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VOLUME XXV

1913

PUBLISHED BY

MR. R. NARAYANASWAMI AIYAR, B.A., B.L.,

Manager, 'The Asram' Mylapore, Madras, S.

1914.

MADRAS:

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Agreement—*Construction—"Share in the event of success of litigation"—Effect of—No present right to possession—A suit in ejectment not maintainable—Point arising on the documents on which plaintiff's title is founded—Not discussed in the Courts below—To be considered nevertheless.*

A certain estate in the Partabghar district was owned by two joint families, the respective heads of which were Bindu Sewak and Rama Pershad.

They had made certain alienations which their descendants wanted to set aside.

Not having funds to carry on litigation, these entered into agreements with one Mahabir Prasad which were to the effect *viz.*, that in the share of each of them, Mahabir Prasad will be a co-sharer of one half share....he will bear the entire expenses in connection with the suit. In case of success he will be entitled to proprietary possession of the share which may be decreed and thereafter, he might at his pleasure keep his share joint or have it partitioned."

Suits were accordingly instituted, with Mahabir Prasad as co-plaintiff. But soon after, the principal plaintiffs in each suit compromised the claim and allowed the suits to be dismissed against them. The question was whether under those circumstances Mahabir Prasad could continue the suits in respect of the share conferred on him by the agreement.

Held reversing the judgment of the court below he could not.

The agreement did not confer on him a then present right to the possession of any share in the property, the subject matter of the suit. That right would arise, if at all, only when success in the litigation had been achieved. Till then Mahabir Prasad was merely a partner or co-owner with his co-plaintiffs in a certain undivided share of the property. There was no present grant or assignment to him of any separate share or fraction of the property by virtue of which he could maintain a suit in ejectment.

This question though raised in the pleadings was not discussed in the appellate Court in India but as the point arose on the very face of the documents on which the plaintiff's case was founded their Lordships felt bound to decide it.

Their Lordships could not grant relief to a litigant which they were of opinion he was not entitled to simply because those concerned for the parties in the cause, abstained from discussing in the Court from which the appeal to his Majesty is taken a vital point plainly appearing on the face of the written proof and plainly raised in the case.

Basant Singh v. *Mahabir Pershad* (P. C.) 301

Agriculture, *meaning of*. See Estates Land Act 578

Aliyasantana Law—*Adoption of sole male—Not belonging to the bali of adopter—Validity of—Customs—Proof of—Bhutalapandia's Kattukattale—Court if bound to take judicial notice of—Evidence Act, S. 57—Inconsistency with necessary consequence of another custom—Not ground for rejecting custom.*

According to Aliyasantana Law and custom, a male may be adopted solely and the adopted need not also belong to the same *bali* or tribe as the adopter.

Aliyasantana Law—(*Contd.*) PAGE.

Bhutalapandia's Kattukattale is not a book, the binding force of which the court is bound to take judicial notice.

Books purporting to contain the laws and customs of any particular community may acquire by being repeatedly proved in Court such a status as to make it unnecessary in any subsequent case for persons of that community to prove anew the authority or the binding force of the books in question. Unless such a state of circumstances is brought about books of this nature stand on the same footing, as any other evidence tending to prove the existence of a body of customs.

Custom must be proved in each particular case and even proof in one or two cases will not dispense with the necessity of its being proved in a subsequent case.

S. 57, Evidence Act does not cast upon the Court the duty to direct of its own accord investigation into the customs set up by the parties.

Assuming that the rules of Aliyasantana law are "rules having the force of law" within the meaning of S. 57, Evidence Act, and the Court is bound to take judicial notice of the binding force of any alleged rule of that law, the Court is not bound to take judicial notice of the further fact that the alleged rule of conduct has been uniformly followed by the parties concerned or by the community to which the parties belong so as to be still binding on them.

The Court cannot decline to accept a custom as valid because it appears to be contrary to what might seem to be the necessary consequence of some other rule of custom by which the parties are bound: *Herbal* v. *Sarbal* (1841 Perry Oriental Cases 110, 123), referred to.

In the case of persons governed by Aliyasantana Law, adoption is but slightly different from the nomination of successor.

Secretary of State for India v. *Santaraja Shetty* (White C.J. & Tyabji J.) 411

Amendment—*Adultery—Alleged adulterer not joined as party—Court has no power to add co-respondent without directing amendment of petition.* See Evidence 594

Apportionment—*Of compensation for land—Ratio of.* See Land Acquisition Act 17

Assignment—*Claim for past mesne profits—Transfer of Property Act S. 6 (e)—Not transferable.*

A claim for past mesne profits is not assignable having regard to S. 6 (e) of the Transfer of Property Act.

Shyam Chund Koondoo v. *The Land Mortgage Bank of India*, I.L.R. 9 C. 695. *Pragilal* v. *Fateh Chand*, I. L. R. 5 A. 207. *Varahaswami* v. *Ramachandra Raju*, 24 M. L. J. 298 followed.

Seetamma v. *Venkatramayya* (Benson and Sundara Aiyar JJ.) .. 410

Bhutalapandiya's *Kattukattale—Court if bound to take judicial notice of.* See Aliyasantana Law 411

Bill of lading—*Cesser of liability clause—Construction—Carriers by sea for hire—Whether common carriers—Law applicable to them—Whether English Common law or the Indian Contract Act—Decision of the Privy Council in an appeal not from an Indian Court, if binding.*

Bill of lading—(*Contd.*) PAGE.

A bill of lading contained the following condition *viz.*, "in all cases and under all circumstances, the liability of the company shall absolutely cease when the goods are free of the ship's tackle and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee." Goods were lost by the sinking of the boats in which they were put after being taken out of the ship and before they were delivered to the consignee. The cause of the sinking was that the boats were overloaded. In an action for damages for the loss of goods, *Held*: that the defendant Company was protected by the cesser of liability clause in the bill of lading and that they were not liable.

Held further: that carriers by sea for hire are common carriers (to whom the Carriers Act, 1865, however, does not apply).

(2) That the English common law relating to carriers by sea applies to them and not the provisions of the Indian Contract Act relating to bailees.

(3) That the clause in the bill of lading absolving the defendants as soon as the goods were free of the ship's tackle protected the defendants from whatever happened afterwards whether it was negligent overloading by or fraudulent dishonesty of, the landing agents.

(4) That the clause excluded liability for unseaworthiness of the boats employed in landing the cargo.

The Chartered Bank of India Australia and China v. *The British India Steam Navigation Company* (1909) A. C. 369 followed.

Sheik Mahomed Rowther v. *B. I. S. N. Co., Ltd.*, I. L. R. 32 M. 95 not followed.

A decision of the Privy Council is binding on the Courts in India though delivered in an appeal not coming from an Indian Court.

Per Sadasiva Aiyar J; There is no implied warranty of seaworthiness for the lighters and boats employed by a ship to land its goods.

Cases relating to the question whether delivery into the owner's boat is equivalent to landing so as to terminate the assurer's liability (on a policy of marine insurance) have no relevancy on the liability of a ship owner who has protected himself from all liability after the goods have left the ship's tackle.

Sparrow v. *Carruthers*, 93 E.R. 1153 s. c. 2 Strange 1236 doubted. *Hurry* v. *Royal Exchange Assurance Co.*, 126 E. R. 1367 referred to.

Kariadan Kumber v. *The British India Steam Navigation Co., Ltd.* (Sadasiva Aiyar and Tyabji JJ.) 162

Burden of Proof—*Ownership in bed of natural stream.* See South Canara 161

Carriers by sea *Whether common carriers—Law applicable to them whether English Common Law or the Indian Contract Act.* See Bill of lading 162

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Central Provinces Government Wards Act, (XVII of 1885) S. 7 cl. 4—*Superintendence of joint family property by Court of Wards Hindu Law—Manager—Powers of.—S. 18—Sanction to mortgage——Nature of—Not to the terms of.*

Central Provinces Government Wards Act—(*Contd.*) PAGE.

Under S. 7 (c) Cl. 4 of Act XVII of 1885 (Central Provinces Government Wards Act), it is competent for the Chief Commissioner to sanction the assumption by the Court of Wards of the Superintendence of joint family property on the application of the managing members of the family.

Maharaj Singh and Dulichand who were brothers were the senior and managing members of an undivided Hindu family consisting of themselves, their children and grand children. Being involved in debts and unable to pay, they applied to the Deputy Commissioner of Hoshangabad stating that they were unable to arrange for the liquidation of the debt or to manage the estate and if the villages should be lost on account of the indebtedness "our children will have no estate left to them" and prayed that "if under S. 7 of Act XVII of 1885 you be pleased to assume the management of our Malguzari villages and to arrange for the discharge of our debt in any way possible, our estate will be saved and our children will thereby be able to maintain themselves."

Held that in making the application Maharaj Singh and Dulichand were acting in their capacity as managing members of the joint family and not merely as two members of the family applying only in their own individual interests and were acting within their powers and authority as the managing members of the family.

It is not necessary under S. 18 of Act XVII of 1885 that the actual mortgage to be made by the Court of Wards should be submitted to the Chief Commissioner for sanction or that the Court of Wards should have sanction for the precise terms of the mortgage provided sanction has been obtained for effecting a mortgage.

The Interest of a member of an undivided Mitakshara family in the family property is not individual property of which the Court of Wards could take charge under the Act.

Gulab Singh v. *Raja Seth Gokaldas* (P. C.) 179

Charitable endowments—*Hindu Law—Widow—Alienation of trusteeship.—Reversioner's right of—Suit for removal.* See Hindu Law .. 373

Charter Act S. 15—*Dismissal of complaint without finding complaint false or unsustainable—Irregular-motives of complaint or result of the proceeding irregular.* See Cr. P. C. S. 203 510

———**S. 15—Cr. Pr. Code S. 144**—*Evasion of—Arbitrary and successive renewal of orders under—Magistrate under—To use his own discretion—District Magistrate's general instructions.*

The object of S. 144 Cr. Pr. Code is to enable Magistrates to make provisional orders for the purpose of tiding over temporary emergencies.

To use the section, by successive and arbitrary renewal of orders thereunder, for the purpose of permanently or for an indefinite period restraining persons from carrying on processions in public streets is an evasion of the code which the High Court has power under S. 15 of the Charter Act to prevent.

A Magistrate acting under S. 144 Cr. P. C. has to use his own discretion and come to a conclusion whether an order under the section is called for and ought not to allow himself to be wholly guided by the District Magistrate's general instructions.

Govinda Chetti v. *Perumal Chetty* (Miller and Sadasiva Aiyar JJ.) .. 370

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"**Child**"—*Meaning of.* See Criminal Procedure Code S. 458 349

Civil Courts—*Jurisdiction of—Remains unless specially conferred on Revenue Courts.* See Estates Land Act 578

Civil Procedure Code—*Suit for possession by usufructuary mortgagee whether plea of redemption proper defence.* See Limitation Act .. 131

———**(Act XIV of 1882) Ss. 2, 311, 312, 588, 594 & 595**—*Orders setting aside sale under Ss. 311 and 312—Orders in appeal against—Appealability of—Irregularities—Gross undervaluation and irregular service—Natural guardian—Competency to act—Court of Wards taking charge of other properties—Court guardian refusing to act on transfer of decree—Opinion as to value—Admissibility of.*

The definition of "decree" in S. 2, C.P.C. is not applicable to S. 595 where S. 594 provides that the expression "decree" includes "also judgment and order". Consequently orders declared final by S. 588 may nevertheless be appealed against to the King in Council under S. 595.

Where, therefore, the High Court reversed the order of the court below setting aside a sale under Ss. 311 and 312,

Held : an appeal lay to His Majesty under that section.

Where it appeared that while the order for proclamation of sale directed that the sale proclamation should be served on each of the 109 mauzas by announcement to the public with beat of drum and that a copy of the proclamation should be fixed at a conspicuous place on each property, the proclamation was in fact read out without beat of drum in one only of the mauzas and the copy of the proclamation was affixed to a tree in that village alone, and it further appeared that the schedule of property attached to the proclamation did not contain a statement of the encumbrances to which the property was liable and it also appeared that the decree holder had fraudulently procured the insertion of Rs. 2,000 as the value of the property when the property was really worth 2 lacs for the purpose of making possible a purchase by him at this low figure (the permission to bid which he obtained from the Court having been subject to the condition that the sale should not take place below the estimated value) and at the sale no bidder was present except the decree holder and the Collector and the property was knocked down to the former for Rs. 2,020, the Government bid being for 2,000, the amount of tax due from the property, notice of none of the proceedings in the attachment having been served at any time on any person representing the infant representative of the judgment-debtor who died pending attachment.

Held : the matters above referred to constituted material irregularities in the publishing and conducting of the sale and the judgment-debtor having sustained substantial injury the sale ought to be set aside.

Held further : Application to set aside the sale made by the natural guardian when the interests of the infant, were not in fact represented by the Court of Wards who had at the time taken charge of the other properties of the minor but had not decided to take charge of this property (which they also ultimately declined to take charge) and the Court Nazir who had acted as guardian *ad litem* in the suit for the minor had refused to act for him when the decree was transferred for execution to another Court which held the sale, was competent and could not be objected to.

C. P. C.—(*Contd.*) PAGE.

Where a letter written in the course of certain negotiations for a compromise contained statements by some official of the Court of Wards that he was not prepared to advise that a sum of Rs. 9,000 should be paid to get rid of the sale unless the estate was wound up with the assistance of the Encumbered Estates Act.

Held, the statement would not be evidence as to the value of the estate unless the writer was called and his source of information disclosed.

Krishna Prasad Singh v. *Moti Chand* (P.C.) 140

———**(Act XIV of 1882) Ss. 441, 443, 456 and 462**—*Representation of minor in a suit—Compromise on his behalf—Guardianship—Restoration to original position—Code of Civil Procedure 1908 S. 98—Duty of the Bench to try point of law referred to try—Practice.*

Where A had represented minors in a suit to pre-empt, without being appointed guardian *ad litem* by the Court as required by S. 443 of the Civil Procedure Code of 1882 and entered into a compromise on their behalf without drawing the attention of the Court directly to the fact that a minor was a party to the compromise as S. 462 of the Civil Procedure Code of 1882 required :—

Held, that the minors were not in law represented in the suit and that the decree was not binding on them, nor was the compromise of any effect against them and that they should be restored to the position previous to the irregularity complained of.

Monohar Lall v. *Jadu Nath Singh*, L.R. 33 I.A. 128 approved.

When two judges had differed on a point of law and the matter was referred to a third Judge who had not confined his opinion to that specific point,

Held, that he ought to have given his opinion on the point referred to alone as required by S. 98 of the Civil Procedure Code (1908).

Partab Singh v. *Bhabuti Singh* (P.C.).. 492

———**S. 462 Act XIV of 1882**—*Manager or father, guardian for the suit—Compromise without leave—Incompetent.*

Where the father or managing member of a joint Hindu family is himself the next friend or guardian *ad litem* of a minor co-parcener his powers as such father or managing member are controlled by the provisions of S. 462 C. P. C. and he cannot do any act in his capacity as father or managing member which he is debarred from doing as next friend or guardian without leave of the Court.

In a suit for partition to which the plaintiff, his father and the defenda[illegible]
(members of a Hindu joint family) were parties, a decree was made making [illegible]nt
defendant liable for Rs. 86,000 to plaintiff's father (as representing pla[illegible] the
branch, though not expressly so stated). Pending appeal against the sa[illegible]ntiff's
by the defendant plaintiff's father acting for himself and for his mino[illegible]id decree
plaintiff) entered into an agreement with the defendant whereby on t[illegible]r son (the
senting to withdraw his appeal he relinquished his claim to the a[illegible]he latter con-
of the Court had not been taken for the said agreement. [illegible]mount. Leave

Held ; that the satisfaction entered up by the father in [illegible]
agreement was not binding on the plaintiff and that [illegible] was [illegible]pursuance of the said
under the decree. [illegible] remitted to his rights

C. P. C.—*(Contd.)* PAGE

That even if he had not expressly purported to act for the minor and had acted in his capacity as father, as he himself was the guardian for the suit he could not bind the minor by any compromise of his without obtaining the leave of the Court.

The question whether if the father or managing member is not himself the guardian or next friend, he would still be subject to the provisions of S. 462 left open.

Ganesh Row v. *Tulja Rama Row* (P. C.) 150

————**(Act XIV of 1882) S. 588**—*Order substituting party—Confirmed on appeal—Finality of.* See Religious Endowments 452

————**(Act V of 1908) S. 2 cl. 11—Order 1 Rule 8**—*Scope of—Similar interest though distinct—Order XXII rules 2 and 3—Representative action—Sole plaintiff—Death of—Continuance or renewal of action by person interested in action—Legal representative—Order XXII—Applicability of.*

On the death of a sole plaintiff in a representative action under order 1 rule 8 the suit can be revived and continued by one of the persons having the same interest in the action.

One S a voter in the Kumbakonam Devasthanam circle brought a suit in his representative character for a declaration that the election of the 7th defendant as a member of the committee was void and for an injunction to restrain him from exercising the functions as member. Pending adjudication he died. The Respondent, another voter was made a party on his application and allowed to continue the suit.

Held :—That though Respondent was not the legal representative of the deceased plaintiff within the meaning of S. 2 cl. (11) C.P.C. yet he was entitled to continue the suit.

Held further :—That if he was entitled to continue the suit mere misdescription of the respondent in the order as legal representative of the deceased plaintiff would not be a ground for setting aside the order.

Order XXII has no application to the continuance of a representative action by persons interested, on the death of a sole plaintiff.

The plaintiff in a representative action is *dominus litis* and not merely trustee of the action, in that he has entire control of the suit so far as the continuance of the suit is concerned. He is not bound to prosecute the suit. He may withdraw the suit or even compromise it.

Nevertheless the interest of the other persons is a vital one and that interest subsists even after the death of the plaintiff so as to enable them to pursue the action.

Sub-Rule 2 of Rule 8 of Order I does not impose any time limit within which the application to be joined as a party must be made.

The Court, however, has a direction whether it should or should not grant an application in the circumstances of a particular case.

O. I, R. 8, is not confined to cases where the interests are concurrent but applies also to cases where the interests are similar though distinct.

Sivagurunatha Chettiar v. *[illegible]nasami Aiyangar* 630

C. P. C.—(*Contd.*) PAGE

———**Ss. 9. 20 and Or. XXXII Rule 5.** See Guardians and Wards Act. 661

———**S. 11—Res judicata—C. P. C. Or. XXII r. 5**—*Decision as to who is legal representative—Not question arising in suit—Matter collateral to suit.*

The question whether a person should be admitted as the legal representative of a deceased plaintiff to continue a suit cannot be regarded as one of the questions arising in the suit itself being only a matter collateral to the suit and any decision arrived at cannot operate as res judicata when a question arises in a subsequent suit as to succession to the deceased in respect of some other property.

Balabai v. *Ganesh,* I.L.R. 27 B. 162, *Pursotham* v. *Janki,* I. L. R. 28 A. 109 followed.

Pakkran v. *Pathumma* (Benson and Sundara Aiyar JJ.) 279

———**S. 24.** See Presidency Towns Insolvency Act 299

———**S. 73**—*Rateable Distribution—Conditions of—Application for execution before receipt of assets and to the Court in receipt of assets—Court of District Munsif—Small Cause side, not same court as Original.*

In order to entitle a party to rateable distribution ;

(i) There must be an application for execution at his instance pending.

(ii) The application must have been made before the receipt of assets.

(iii) The decree of the applicant must either have been passed by the same court which has received the assets or there must have been a transfer of the decree to that Court.

The Court of the District Munsif in the exercise of his Small Cause jurisdiction is not the same Court as his Court in his Ordinary jurisdiction.

Narasiah v. *Obbayya* (Tyabji J.) 601

———**S. 86**—*Foreign Prince or Chief—Suit against.*

A foreign Prince or Chief such as the Raja of Cochin cannot be sued in British Courts even in his private capacity (in this case he was sued as a trustee of a temple in the British territory) except in conformity with the provisions of S. 86 C. P. C.

Narayanan Moothad v. *Dewan of Cochin* (Tyabji J.) 621

———**S. 92**—*Scope of*—See Hindu Law 373

———**S. 115**—*Revision—Formal application not necessary* 507

———**S. 115**—*Religious endowments—Vacancy in Committee—Default by Committee to make election—Declaration of validity by Dt. Court—Judicial order—Power of High Court to interfere in Revision*—See Religious Endowments Act 536

———**S. 141, Or. II r. 2.**—See Decree.. 367

———**S. 151** and **Or. IX**—See Procedure 148

———**Or. II. Rules 1, 2 & 3**—*Splitting causes of action—Suit for declaration of title—Subsequent suit for possession—Cause of action.*

C. P. C.—(*Contd.*) PAGE.

When a suit for declaration of title to some lands was dismissed on the ground that the plaintiffs were entitled to possession and ought to have sued for it also, *Held* : a subsequent suit for possession of the lands on the same title was not barred under Order II Rules 1, 2 and 3 C.P.C.

It is only when the cause of action is the same that Order II rr. 1, 2, and 3 bar the suit.

To determine whether the cause of action is the same one must look to the facts relied on in the plaint in the first suit as constituting the cause of action and if on those facts it was open to the plaintiffs to ask for the reliefs prayed for in the second suit, then only the suit would be barred.

Nannoo Singh Monda v. *Ananda Singh Monda*, I. L. R. 12 C. 291. *Jibunt Nath Khan* v. *Shib Nath Chukerbutty*, I. L. R 8 C. 819. *Mohanlal* v. *B. Laro*, I. L. R. 14 A. 512 followed.

Syed Siliman Sahib v. *Hussain Sahib* (Sankaran Nair and Oldfield JJ.) .. 125

———**Or. II r. 2**—*Purchase of shares of two co-parceners—Separate sale deeds, one after the other—Suit to recover one member's share—Bar to subsequent suit for other member's share.*

Where a person by two separate transactions one after the other acquired the shares of two out of five members of an undivided family —

Held that he had but one cause of action against the family to have his two-fifths share marked out and put in his possession and the suit brought to recover the share acquired from one brother barred a subsequent suit in respect of the other brother's share.

Manonmani Ammal v. *Vythialinga Naicker* (Miller and Tyabji JJ.) .. 481

———**Or. IX r. 5—Or. XLI r. 14**—*Appeal—Failure to take out fresh summons—Dismissal for—Not competent for one year after return of non-service.*

Order 41 r. 14 C.P.C. makes Order 9 applicable to proceedings in appeal and as such an appeal cannot be dismissed for failure to take out fresh summons to the respondent before the expiry of one year from the date of the return of non-service as provided by r. 5 of that order.

Narayanaswamy Naidu Garu v. *Namburi Bhadri Raza* (Sadasiva Aiyar and Tyabji JJ.) 451

———**Or. XXI r. 2.**—*Certificate of satisfaction or adjustment—To be made to the Court whose duty it is to execute the decree—Court of the first instance and not the appellate Court—Relief of possession of immoveable property—Not within rule—Decree for possession on furnishing security—Possession given without security—Void—Compromise in appellate court—Decree not passed in terms of appeal but dismissed as withdrawn—Effect of.*

According to the Old Civil Procedure Code S. 258 and also according to Order 21 r. 2 of the new Civil Procedure Code, the certificate of payment or adjustment should be filed in the Court whose duty it is to execute the decree and as such Court is the Court of the first instance, a compromise petition reciting satisfaction of the decree filed in the appellate Court cannot be regarded as a sufficient compliance with the requirements of the section.

Birod Gosain v. *Jainwati Koer*, 16 C. L. J. 174 dissented from.

C. P. C.—(*Contd.*) PAGE.

Where instead of a decree being passed in terms of a compromise, entered into pending an appeal the court records the petition and dismisses the appeal as withdrawn, the decree of the Lower court against which the appeal has been filed is left intact and can be executed.

Order XXI r. 2 (O.C.S. 258) does not apply to the relief of possession of immoveables given by a decree and therefore, evidence of delivery of possession can be given even after 90 days provided by art. 174 of the Limitation Act.

Where a decree directed that the adult plaintiffs should take possession only on furnishing security for the due protection of minor plaintiff's interests, the latter are entitled to treat possession delivered to the former without such security being furnished as altogether void against them and claim delivery of possession and mesne profits as if there was no such delivery.

A finding of fact by the appellate court in respect of the factum or validity of a compromise alleged to have been entered into pending the appeal is binding on the second appellate court and cannot be interfered with.

Kelu Nair v. *Meenakshi* (Sadasiva Aiyar and Spencer JJ.) 586

————**Or. XXI rr. 2 and 16**—*Security—Death of decree-holder—Eldest son proper person to execute*—See Joint Family 442

————**Or. XXI r. 40**—See Provincial Insolvency Act.

————**Or. XXI r. 90**—*Material misstatement in the sale proclamation—Mistake of both the decree holder and the Judgment debtor as to property sold—Ignorance of statements to which Judgment debtor was bound to object—Ignorance due to conduct of decree holder—Estoppel—Difference between auction purchaser's right before and after confirmation.*

Where both the decree holder and the judgment-debtor proceeded on the footing that what was going to be sold was the rent charge on a certain village and not the village itself, the value of the property and the peishcush due thereon having been fixed on that basis but the other description of the property given in the sale proclamation was such as to take in the entire village,

Held: that if what was sold was the village and not merely the rent charge, there was a misstatement as to material particulars in the sale proclamation and the price fetched at the sale being grossly inadequate, the court could set aside the sale under Order 21 r. 90 C.P.C.

Held: further that as the judgment-debtor was unaware of the statements in the sale proclamation to which he was bound to object, and the ignorance was one for which he was not in the circumstances to blame having been in part induced by the conduct of the decree-holder, he was not estopped from objecting to the sale though he had been served with a copy of the sale proclamation.

Where an act of court is induced by the mistake of parties, it may be set aside.

Huddersfield Banking Company Limited v. *Henry Lister and Son, Limited*, (1895) 2 Ch. 273. *Moore* v. *Peach, the Charging Cross Bank, Garnishee*, (1892) 66 L.T. 198 referred to.

A purchaser at a court-auct[illegible]solute right to have the sale confirmed where there is an irregular[illegible]cation or the conduct of the sale, although he is in no manner [illegible] the irregularity. There is considerable difference between hi[illegible] after the confirmation of sale.

Raja of Kalahasti [illegible] *Venkatagiri* (Benson and Sundara Aiyar JJ.) 198

C. P. C.—(*Contd.*) PAGE.

———**Or. XXXIV rr. 12, 13**—See Mortgage Decree 552

———**O. XLI r. 4.**—*One of the appellants dying—Abatement—Court's power to act under, notwithstanding.* See Vendor and purchaser .. 248

———**2nd Schedule Para 15**—*Decree passed in accordance with award—No appeal, whatever the ground of invalidity—S. 115—Revision—Formal application, not necessary—No interference, unless wrong exercise of jurisdiction clear.*

No appeal lies from a decree passed in accordance with an award, whatever the ground on which the validity of the award is impeached.

The rule laid down in *Suryanarayaniah* v. *Sarabhaiah*, 21 M. L. J., 263 applies *a fortiori* to cases governed by the new Code.

No formal or written application is necessary for the High Court to interfere in revision.

The policy of the legislature is that judgments in accordance with awards should be final and the High Court will not interfere with them in revision unless it is clear that the Lower Courts have exercised jurisdiction wrongly.

Velu Pillai v. *Appasami Goundan*, (1911) 1 M. W. N. 141 distinguished. *Kanakkunaglinga Naik* v. *Nagalinga Naik*, I. L.R. 32 M. 673 referred to.

Batcha Sait v. *Abdul Gunny* (White C. J. and Tyabji J.) 507

Civil Rules of Practice Rule 277—*Pleader—Appearance in proceedings under S. 145 Cr. P. C.—Whether bar to appearing in civil suit arising out of it for opposite party—Power to District Munsif to act on it—Professional conduct—"connected"—Not necessarily civil proceeding.*

Where a pleader who had appeared for the successful party in proceedings under Sec. 145 Cr. Pr. Code appeared for the other side in the suit to establish title to the property forming the subject matter of those proceedings :—

Held :—Rule 277 of the Civil Rules of Practice applied to the case and the pleader was wrong in appearing against his former client without giving him an option to retain his services or obtaining the permission of the Court as required by that rule.

The word "proceeding" in the earlier part of that rule is not restricted to proceedings in Civil Court and is wide enough to include proceedings in a Criminal Court.

Proceedings under S. 145 Cr. Pr. Code and the suit instituted to establish the title of the unsuccessful party are sufficiently connected to attract the operation of the rule.

No rule is necessary to enable a District Munsif (subject to correction by the High Court) to refuse audience to a pleader in a case in which that pleader by his very appearance is guilty of what will be viewed as professional misconduct.

The order of the District Munsif prohibiting a pleader from continuing to appear in a suit does not amount to an inju[illegible]

Apart from any question of the High C[illegible]o frame a rule like rule 277, the lower Courts are entitled to act on [illegible] the view of the High Court on a point of professional conduct.

Little v. *Kingswood Collieries Com*[illegible]., 733 referred to.

Srinivasa Row v. *Pichai Pillai* [illegible] 567

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Coercion—*What is—Whether wrongful attachment of property is*—See Contract Act 104

Co-mortgagees—*Payment to one of two—Valid discharge.* See Mortgagee.

Co-mortgagor—*Discharging encumbrance—Right of.* See Mortgage .. 16

Compensation for land—*Ratio of apportionment—Factors to be considered.* See Land Acquisition Act 17

Compensation for improvement by third person—*Principle of assessment.* See Evidence 176

Compromise in Appellate Court—*Decree not passed in terms of—but appeal dismissed as withdrawn—Effect of.* See Civil Procedure Code .. 492

————*By manager without leave of court—Whether competent.* See C.P.C. S. 462 150

Concurrent findings—See Hindu Law 34

Consideration—*Strangers cannot question*—See Vendors and Purchasers .. 248

Construction—*Gift by widow of portion to next reversioner on his undertaking not to object to alienation of the rest.* See Hindu Law .. 8

Contract Act (Act IX of 1872) Ss. 69, 70—"*Interest,*" *meaning of—Existing interest—Payment not for another—Salvage—Implies pre-existing interest to save—T.P.A. S. 101—Retention of security and not creation, by.*

Plaintiff obtained a mortgage of property under attachment and undertook as a part of the consideration, to pay the amount of the decree. But he failed to do so and the property was sold. The mortgagor then resorted to the defendant and giving him a mortgage, obtained money to make payment under S. 310-A and with that money, he got the sale set aside. In a suit by the plaintiff upon his mortgage, defendant contended that he was entitled to priority relying upon Ss. 69, 70 of the Contract Act, S. 101 of the Transfer of Property Act and the principle of salvage lien.

Held: that the defendant was not entitled to priority.

The interest contemplated by S. 69 I.C.A., is an existing interest which the payment is intended to protect and not an interest which is created by the payment itself.

S. 70 I.C.A., has no application where the person making a payment, makes it for himself and not for the person against whom the claim for re-imbursement is made.

A claim on the ground of salvage necessarily implies an antecedent interest to protect or preserve.

S. 101 T.P.A. enables a person to retain a security and does not create a security where none was before.

Veeraraghava Iyer v. *Lakshmana Iyer* (Miller and Abdur Rahim JJ.) .. 312

————**Act (IX of 1872) Ss. 72, 15**—*Money paid to release property wrongfully attached—Suit against decree-holder—Involuntary payment—"Coercion," what is—C.P.C. (Act XIV of 1882) Ss. 278, 283—Permissive wrong-doer cannot prescribe mode of stopping the wrong—Preliminary Issue—Plea of no cause of action on the allegations in the plaint—Demurrer—Facts persumed to be true.*

Contract Act—(*Contd.*) PAGE

Where property belonging to one person (here cotton mills) is attached in execution of a decree against another and in order to release the property from the attachment, the owner pays the decree-holder, under the English law, he is unquestionably entitled to demand the repayment of that sum as being an involuntary payment produced by coercion and he is equally entitled under S. 72 of the Indian Contract Act,

The word "coercion" in S. 72 I.C.A. is used in its general or ordinary sense as an English word and not in the special sense in which it is used in S. 15.

A person interfered with in his lawful enjoyment of his own property is entitled to rid himself of that unlawful interference by lawful means without thereby affecting his right to hold the wrong-doers liable for that which they have thus caused him to do.

It is not open to the wrong doer to prescribe by which of two alternatives the injured man shall put a stop to the wrong under which he is suffering. His choice of any one alternative does not make it as between him and the wrongdoer a voluntary act or estop him from claiming that it was done under coercion.

There is nothing in the Indian Statute Law which precludes the application of this principle to a person whose property has been wrongfully attached.

The procedure prescribed by S. 278, C.P.C. (*i. e.* preferring a claim) is permissive and the fact that such procedure is open to a person whose property is unlawfully seized under attachment in no way interferes with his right to take any other alternative, *e.g.* payment.

Where the plea is taken that the plaint discloses no cause of action and the court is asked to try that issue first (which is essentially a demurrer) the defendants must be taken to admit for the sake of argument that the allegations in the plaint are true *modo et forma*. In so doing they reserve to themselves the right to show that these allegations are wholly or partially false in the further stages of the action, should the preliminary point be overruled.

Kanhaya Lal v. *National Bank of India Ltd.* (P.C.) 104

Conversion *of Negotiable into non-negotiable instrument—Alteration with the object of enabling a party to sue upon*, See Material alteration .. 572

Co-parcener's interest—*Transfer of, to other co-parceners.* See Transfer of Property Act, S. 55 245

Court of District Munsif—*Small Cause Side, not same Court as original—Application for execution.* See C.P.C. 601

Court of Wards—*Mortgage by if requires the sanction of Chief Commissioner.* See Central Provinces Government Wards Act 177

Criminal Procedure Code S. 106 cl. (3)—*Appellate court—Power of—Not restricted to convictions by Courts specified in cl. (1)*,

The power conferred on the appellate court by S. 106 cl. (3) Cr. P. Code is not restricted to cases where the conviction is by one of the courts specified in Sub-Sec. (1) and can be exercised even where the conviction is by a second or third class Magistrate.

Muthia Chetty v. *Emperor*, I. L. R. 29 M. 190 overruled,

Solai Goundan In re (F.B.) [White C.J., Sankaran Nair and Tyabji JJ.] .. 403

Cr. P. C:—*(Contd.)* PAGE.

——**S. 125**—*District Magistrate—Power under—Incorrectness of the Order—Ground for setting aside.*

Under S. 125 Cr. Pr. Code, the District Magistrate can set aside the order of the subordinate Magistrate as having been passed on insufficient grounds.

Mare Gowd, In re (F.B.) (White C. J., Sankaran Nair J. and Tyabji J) .. 459

——**Ss, 200, 202 and 204**—Object of Chap. XVI. *See* Malicious Prosecution.

—— **S. 203**—*Dismissal of a complaint—Presidency Magistrate—Dismissal without finding complaint false or unsustainable—Irregular—Motives of complaint or result of the proceeding irrelevant—Charter Act S. 15.*

In the absence of a finding that the complaint is false or unsustainable on the evidence likely to be available, passing of an order of dismissal thereon under S. 203 by the Presidency Magistrate constitutes an irregularity with which the High Court has power to deal under S. 15 of the Charter Act.

That the Magistrate considered the probable result of the proceeding undesirable or the motives and the conduct of the complainant discreditable are not relevant considerations in the matter of the disposal of a complaint under S. 201.

The decision under that section must be reached by the exercise of discretion based on judicial considerations.

In the matter of *Ganesh Narayanan*, I. L. R. 14 B. 590 followed.

Gangu Reddi v. *Samarapathy Mudali* (Oldfield J.) 510

—— **S. 438**—*Jurisdiction—Trial and conviction for minor offence—Facts disclosing more serious offence not triable by the Court—Proceedings of the Magistrate not void—Absence of prejudice to accused or inadequacy of sentence—Setting aside of conviction by Appllate Court not called for.*

Where a person was convicted by a Second Class Magistrate and on appeal, the Sub-Divisional Magistrate set aside the conviction and remanded the case for disposal according to law on the sole ground that the facts disclosed amounted to an offence under S. 392 which the 2nd Class Magistrate was not competent to try;

Held :—that the proceedings of the Second Class Magistrate not being void, interference by the Sub-Divisional Magistrate was not called for when it could not be said the accused was prejudiced and the sentence was inadequate in the circumstances of the case.

Queen Empress v. *Gundya*, I. L, R. 13 B. 502. *King Emperor* v. *Ayya*, I. L. R. 24 M. 675 followed.

In re Mohideen Batcha Sahib (Ayling J.) 484

——**S. 438**—*Sessions Trial—Loss of material records—Conviction—Whether void and passed without jurisdiction—Replacing Judgment by memory—Failure to pronounce written judgment before convicting—S. 537 A—Irregularity.*

There is no provision of law which empowers the High Court to quash the conviction and sentence by a Sessions Judge and order a new trial simply because some of the material records of the Sessions trial have been lost,

Cr. P. C.—(*Contd.*) PAGE.

If the convicted prisoner is satisfied that justice has been meted out there is no ground for interference by the High Court.

Semble :—The court has an inherent power in the case of loss or destruction of a judicial record to restore such record and where what is lost is the judgment it is open to the judge to re-write the judgment from memory and from the materials before him and place it on the record.

Sec. 537—A, Cr. Pr. Code cures the omission to pronounce the whole of the written judgment before convicting and sentencing the accused though it might be different if no judgment had been written.

Kamakshamma v. *Emperor* (Sadasiva Aiyar J.) 445

————**S. 476**—*Appeal to Privy Council—Writ of certiorari—Refusal to quash order passed in the exercise of criminal jurisdiction—No appeal.* See Letters Patent Art. 39 565

————**S. 476**—*Judicial proceeding—Execution proceedings—Action taken long after termination.*

Execution proceedings are judical proceedings within the meaning of S. 476. Cr. Pr. Code. *Haracharan Mukherji* v. *King Emperor*, I.L.R., 32 C. 367 dissented from ; and therefore, action taken under the section in respect of an offence under S. 186 I.P.C., brought to the notice of the Court in the course of an execution proceeding long after the termination of that proceeding is illegal. *Ayakannu Pillai* v. *King Emperor*, I.L.R. 32 M. 149.

In the particular case the Munsiff having taken action under S. 476 on the application of the decree-holder for sanction, their Lordships while setting aside proceedings under S. 476 granted sanction to the decree holder to prosecute the accused.

Ponnuswami Pillai v. *Chokkalingam* (Sadasiva Aiyar and Spencer JJ.) .. 593

————**S. 488 cl. (4)**—*Mopla father—Children governed by Marumakkathayam law—Living in Tarwad house—Well to do Tarwad—Refusal to live with father—No ground for disallowing maintenance—" Unable to maintain"—Physical inability and not to want of means.*

A Moplah father is not entitled to the custody of his children who are governed by the Marumakkathayam law.

S. 488 cl. (4) disentitles maintenance only to a wife who refuses to live with her husband without sufficient cause and does not disentitle a child who is living with its lawful guardian.

Inability to maintain referred in that section relates to absence of sufficient maturity of physical and mental development in the child rendering it in consequence unable to earn its living by its own efforts and does not refer to inability through poverty or absence of means. The fact therefore, that the children belong to a well-to-do Tarwad, is not a ground for disallowing maintenance to them when claimed under the section against the father.

Moideen, In re (Sadasiva Aiyar J.) 355

————**S. 488**—" *Child*"—*Meaning of*—" *maintain herself*"—*Prostitution not a profession in the eye of the law—Public policy.*

The word "child" in S.488 Cr. Pr. Code means a person who has not attained the full age, i.e., age of majority.

Cr. P. C.—(*Contd.*) PAGE.

It is against public policy to recognise prostitution as a profession by which a girl might earn her livelihood and 'maintain herself' within the meaning of that section and the law will not treat it as such.

Krishnasami Aiyar v. *Chandravadana* (Sankaran Nair J.) 349

———**S. 537 A**—*Irregularity.* See Criminal Procedure Code S. 438 .. 445

Damages—*Tort and Contract—Principles of assessment—Difference between—Damages resulting directly from wrong only awardable—Mitigation of damage—Basis of the rule—Remoteness—Obstruction to right of way —Loss of crops, unless no other reasonable access, remote—Easements Act S. 33—Damages for interference with evidence of right.*

Alike in actions on Contract and on Tort, the damages which the plaintiff is entitled to must result directly from the wrongful act of the defendant and no claim be made to damages which are only remotely connected with it. This is the basis of the rule that the plaintiff should avoid or diminish the damage as far as he could.

Where the plaintiff sued the defendant for damages for obstruction caused by the latter to his right of way and the court allowed damages for loss of crops on land which was left waste, the other route that was available being hazardous and roundabout.

Held: that unless the plaintiff could show that in consequence of the defendant's wrong it was not reasonably possible for the plaintiff to cultivate, the damage was too remote and the plaintiff could not recover.

But that he was entitled to recover the extra cost he would be put to in consequence of his right of way being obstructed and in addition substantial damages for interference with the evidence of his right.

Baijnathsingh v. *Totai Chowdhry*, 6 C.W.N. 197 followed.

Difference between the applicability of the rule as to mitigation of damages in contract and torts considered.

Karibasavana v. *Veerabhadrappa* (Sundara Aiyar & Sadasiva Aiyar JJ.).. 3

Death of plaintiff—*Non-appearance due thereto—If default.* See Procedure 148

Decree—*Construction—Inadvertent omission of words—Supplying of—C. P. C. S. 141—Execution Proceeding—Applicability to—Order II r. 2—Successive applications for execution of different portions of decree—Maintainability of.*

A decree in a suit for possession of certain immoveable property and mesne profits awarded mesne profits till the date of plaint and subsequent profits "till the date of delivery or for three years whichever is the shorter period".

Held, as it was clear that there was an inadvertent omission of the words "from the date of the decree" after the words "three years", the decree was rightly construed as entitling the plaintiff to mesne profits for three years from the date of the decree.

Notwithstanding the alteration in language in S. 141 C.P.C. that section has not the effect of making the procedure of suits applicable to execution proceedings : *Safdar Ali* v. *Kishun Lal.* 12 C. L. J. 6. followed.

Held accordingly that the rule contained in O. 2, R. 2 C. P. C. did not apply to execution proceedings and the decree holder was not prevented by reason

Decree—(*Contd.*) PAGE.

of his having applied for only three years' mesne profits from the date of the plaint from subsequently applying for the remaining years' profits to which he is found entitled.

Dismissal of a suit for mesne profits after the date of a decree for possession on the preliminary ground that such a suit will not lie cannot preclude a party from seeking to recover the same as covered by the decree in the suit for possession.

There is nothing in the Civil Procedure Code to prevent a decree holder from presenting successive applications for realising different portions of what he is entitled to under his decree.

Balasubramania Chetti v. *Swarnammal* (Benson and Sundara Aiyar JJ.) 367

Dedication—*Graveyard.* See Mahomedan Law 61

Deed—*Construction—Gift—Agreement to pay peishcush after sub-division—Duty of donee to afford facilities for sub-division—Indian Contract Act S. 70—Scope of—"Implied Contract"—"Option to refuse benefit", unnecessary.*

Plaintiff's father made a gift to the defendant, a condition of which was "we (i.e. plaintiff's father) should get the village sub-divided in your (donee's) name, you should pay to the Government the peishcush fixed thereupon according to the said sub-division".

Held: upon the construction of the document that the liability of the donee to pay his portion of the peishcush arose only upon sub-division.

but that he was bound to afford facilities for separate registration by concurring in the application made by the Zamindar for the purpose.

Held: accordingly.

When on the plaintiff's application the Collector fixed the proportion of the peishcush due from the defendant but as the defendant did not intimate his consent thereto, the application was dismissed.

that the defendant was liable to pay the proportionate amount due from the land in his possession from the date on which the Collector fixed the proportion.

and that payments made by the plaintiff in that behalf could be recovered from the defendant under S. 70 I. C. A.

There is nothing in S. 70 I. C. A. which requires the court to deal with the cases coming under it as cases of implied contract.

Yogambal Bai Ammani Ammal v. *Naina Pillai*, I. L. R. 33 M. 15 s. c. 19 M. L. J. 489 puts too narrow a construction on the Section and cannot be followed in so far as it lays down that the defendant must have an option before the benefit is conferred, of accepting or declining it.

The scope and applicability of S. 70 I. C. A. discussed.

Gajapathi Kistna Chendra Deo v. *Srinivasa Charlu* (Miller and Sadasiva Aiyar JJ.) 433

———*Construction—Sale on behalf of temple Committee to defendant's father Sale as agent—No action by or against defendant maintainable.*

Where a sale was made to the defendant's father on behalf of a temple Committee.

Deed—(*Contd.*) PAGE.

Held: The defendant's father being only an agent no action would lie against the defendant or at his instance to enforce the provisions of the sale deed.

Atcheyya v. *Seshagiri Rao* (Sundara Aiyar and Sadasiva Aiyar JJ.) .. 32

Defamation—*Fair comment—Essentials of—Matters of public interest—Newspaper publications—Imputation of offence.*

No suit for defamation will lie against a person for comments made in a newspaper upon matters of public interest unless he has exceeded the bounds of fair comment or has been actuated by malice.

Publications in a newspaper are matters of public interest within the meaning of the rule.

To entitle a writer to the defence of fair comment, three things are essential. First, the comment must not mis-state facts; secondly comments must appear as comments and not as statements of fact; thirdly the comments must be warranted by the facts in the sense that a fair minded man might upon the facts bona fide hold those opinions.

The fact that the conduct imputed to the plaintiff amounts to an offence does not exclude the defence, provided these conditions are fulfilled.

Ramakrishna Pillai v. *Karunakara Menon* (Wallis J.) 476

Delivery—*Meaning of.* See Estates Land Act Ss. 54 and 78 608

Demurrer—*Objection that plaint discloses no cause of action in the nature of—Procedure.* See Contract Act 104

Discharge—*Onus of proof.* See Mortgage.. 329

Discretion—*Reasonable exercise of.* See Limitation Act S. 19.. .. 101

————*Negligence—Ground for not exercising descretion.* See Fraud .. 228

District Municipalities Act S. 168 See Municipality .. ..

Duty of Courts—*Point arising on the documents on which plaintiff's title founded—Not discussed in courts below—To be considered nevertheless.* See Agreement 301

Easements Act S. 7—*Illustration* (*a*)—See Natural right 276

————**S. 33**—See Damages 3

Ejectment.—*Landlord and Tenant—Tenant's claim to hold more land than mentioned in lease—Limitation—Onus—Limitation Act (Act XV of 1877 Sch. II Art. 142.*

Where the suit is for the ejectment of persons who admittedly are at the date of suit in possession of the land from which it is sought to eject them it lies upon the plaintiffs to prove not only a title as against the defendants to the possession but to prove that the plaintiffs have been dispossessed or have discontinued to be in possession within the 12 years immediately preceding the commencement of the suit.

In a suit in ejectment in respect of 7 puras of land, defendants claimed to be in possession under a Mukarari grant from the plaintiffs' predecessors in title under a sanad of 1740 renewed in 1815. They also pleaded limitation. Plaintiffs impugned the genuineness of the sanad but its genuineness was found by the Courts in India and the finding was accepted by the Privy Council. In the sanad the

Ejectment—(*Contd.*) PAGE.

land was stated to be 2 puras in extent. Boundaries which were capable of being ascertained on three sides were also mentioned in the sanad but the fourth (the eastern boundary) was stated to be an ail. The land in dispute was in 1740 and 1850 covered by jungle. Plaintiffs failed to prove that they or the zamindars whom they represented had possession of any portion of the land since the sanad was originally granted and further they failed to shew what was the ail which was the eastern boundary of the lands covered by the sanad if it was not the ail which the defendants contended was the eastern boundary and which if accepted would give the whole of the 7 puras to the defendants.

Held:—Plaintiffs having failed to prove that the lands were not covered by the Sanad (though their Lordships were not prepared to treat the extent given in the sanad as a mere misdescription) and they had been dispossessed or discontinued to be in possession within 12 years before the suit, the suit was properly dismissed.

Dharani Kanta Lahiri v. *Garbar Ali Khan* (P. C.) 95

————*Suit in—No present right to possession—Not maintainable.* See Agreement 301

————*Landlord and tenant.* See Inamdar 33

English and Indian Law—*Evidence—Intention of instrument to operate differently—Admissibility—Difference between.* See Evidence Act S. 92.. 290

Estates Land Act—*Zamindar—House farm lands—Burden of Proof on* See Vendor and Purchaser 248

———— **Ss. 3, cl. 7 (2), 6, 153**—*Passing of the Act in the middle of a term lease—Effect of—Acquisition of occupancy right not prevented—Proviso to S. 153—Operation of.*

Where land in an estate was admittedly not subject to occupancy rights before the passing of the Estates Land Act, but was in possession of tenants under leases of varying duration the operation and the act was passed during a term lease.

Held that the land was not old waste and under S. 5 the tenant acquired occupancy right.

Held also that proviso to S. 153 relates only to non-occupancy rights of the kinds referred in S.6 cl. 3, 4 and 5.

Achappa Raja v. *Krishna Yachendralu* (1913) 24 M.L.J. 402 referred to.

The effect of S. 6 being to confer occupancy rights on all ryots in occupation of ryoti land not being old waste at the time of the passing of the Act. The definition of "old waste" in S. 3 cl. 7 (2) which requires that the land should not be subject to occupancy rights up to a point of time after the passing of the Act cannot prevent acquiring the right under the former section.

Buchi Sarava Garudu v. *Venkata Raju* (Sadasiva Aiyar and Tyabji JJ.) 617

————**S. 42, Cl. 2**, *Landlord—Claim to enhanced rent—For area in excess of that mentioned in lease deed—Maintainable—Applicability of S. 42—When claim to enhanced rent based on contract.*

By a registered deed a tenant agreed that in case the land leased should on measurement be found to be more than the area mentioned therein he would be liable to pay enhanced rent on such excess area from three years prior to the

Estates Land Act—*(Contd.)* PAGE.

date of discovery. *Held* that the landlord could maintain a suit for enhanced rent without any application to the Collector to determine the excess-area under S. 42 of the Estates Land Act.

It is only when the landlord has to base his claim for enhancement on the Estates Land Act that he has to obtain an order from the Collector determining the excess area. *Dintarini Dasi* v. *L. P. D. Broughton* (1896) 3 C. W. N. 225 and *Ramachender Chuckerbutty* v. *Giredher Dutt*, I. L. R. 19 C. 755. followed.

Manager to lessees of Shivagunga Zemindary v. *Chidambaram Chetti* (Miller and Sadasiva Aiyar JJ.) 641

———**Ss. 54 and 78(2)** *"May"—Choice only between modes prescribed in S.54—Offer to tenant and refusal by him—Affixture to house—Insufficient —"Delivery" meaning of.*

Sec. 54, of the Estates Land Act does not permit the landlord to select a mode of tender which is not one of those prescribed by the section itself and to treat the provisions of S. 78 (2) as merely affording him a way of proving that he has made a tender.

The word "may" in the section only indicates that the landlord can choose between the modes prescribed in the section i. e., between private service and service through Collector or other public officer.

Mere offer of patta to the tenant which he does not accept is not delivery.

Held :—Accordingly when the tenant refuses to accept the patta tendered to him the only course open to the landlord is to affix a copy of it on some conspicuous part of the land to which it relates. Affixing of the patta to the house of the tenant is not sufficient compliance with S. 54.

Meaning of "tender" and "delivery" considered.

Zemindar of Sivagiri v. *Michael* (Miller and Spencer JJ.) 608

———**S. 185** See Vendor and Purchaser.. 248

———**Ss. 189, 3, cl. 1. 11, 15 and 16**—*Suit to eject tenant of pasture land and for rent—Jurisdiction—Cognisable by Civil Courts—"Agriculture"—Ryoti land"—"Cultivable"—Ryot"—Meaning of—Cultivation"—"Pasturage fees"—Jurisdiction of Civil Courts—Remains unless specially conferred on Revenue Courts.*

The definition of ryoti land requires that the land should be cultivable, that is, permanently cultivable and therefore land fit usually only for pasturing, though under extraordinary circumstances capable of some cultivation cannot be ryoti land.

The ordinary meaning of "agriculture" is the raising of annual or periodical grain crops. By a special definition, it is made to include horticulture in the Estates Land Act but it does not include pasturing.

A person therefore, who takes up land for pasture does not take it up for agriculture and is not a ryot and the money he pays for the use of the land, is not rent within the meaning of the Act.

Accordingly, where the Raja of Venkatagari sued to eject a person who had taken up waste land in the estate for the purpose of pasture on a certain annual rent and for the recovery of arrears of rent and mesne profits ;

Estates Land Act—*(Contd.)* PAGE.

Held: the suit not being one to eject a ryot or for rent, was not cognisable by Revenue Courts and could only be instituted in Civil Courts.

The pasturage fees referred to in S. 3 cl. (11) can only relate to sums payable by agricultural tenants for the use of communal pasture lands.

In all cases in which jurisdiction is not specially conferred on the Revenue Courts, jurisdiction of the Civil courts remains.

Per *Tyabji* J.:—Cultivation implies some kind of labour on the land generally consisting of a breaking up of the land whereas pasturage has reference to a particular mode of using the land without its being cultivated.

Maharajah of Venkatagiri v. *Ayyappa Reddi* (Sadasiva Aiyar & Tyabji JJ.) 578

Estoppel—*Acceptance of hypothecation by reversioner of portion of property gifted.* See Hindu Law 8

————*against Act of legislature—Validity of.* See Limitation Act IX of 1908 264

————*from Pleading—Agreement against or waiver of plea of—Limitation.* See Limitation Act 264

Evidence—*Legitimacy—Divorce proceedings—Adultery—Alleged adulterer not joined—Court has no power to add co-respondent without directing amendment of petition—Evidence of husband to prove non-access—Evidence Act, Ss. 118 and 120—English Common Law—Child born in wedlock 11 months after marital intercourse ceased—Whether child legitimate—Evidence Act,* S. *112—Evidence relevant under.*

Where in proceedings for divorce on the ground of adultery, the petitioner (husband) did not make any person a party to the proceedings as co-respondent but the Judge on his own initiative made one A a co-respondent: *Held* that the Judge was wrong in adding the party without directing amendment of the petition, so that the allegation against the co-respondent might be stated therein.

Under the English Common Law neither the husband nor the wife could give evidence of non-access during marriage.

In India on the other hand Ss. 118 and 120 of the Evidence Act make them competent witnesses in all civil proceedings and for all purposes.

In this case it was found that there was no marital intercourse between the petitioner and the respondent for 11 months prior to the birth of the child—Held that the child was illegitmate.

Courts can act upon the opinion of experts contained in treatises as regards the question whether the child could or could not be begotten immediately before the date when the marital intercourse between the parties ceased.

Quaere: if evidence as to the relations between the parties or evidence which pointed to immorality on the part of the mother, or evidence of a long interval since the birth of a previous child would be relevant under S. 112 Evidence Act, under which the only question would seem to be whether the child could or could not have been begotton immediately before the marital intercourse which the law presumes, in fact ceased.

John Howe v. *Charlotte Howe* (F.B.) .. 594

Evidence—(*Contd.*) PAGE.

————*recorded by Court not competent to try—Admission of, by consent—Validity of—Rules of evidence—Waiver of the benefit of.*

Facts admitted in evidence being themselves relevant, provisions of law intended to test the credibility of witnesses or to enable the trying judge to make the test himself are not of such an important character that parties cannot waive the benefit of those provisions.

A suit was first instituted in the court of the District Munsif of Peddapur. On appeal, the District Judge of Rajamundry held that the pecuniary value of the suit was beyond the jurisdiction of the District Munsiff and ordered the plaint to be presented to the proper court; the plaint was accordingly presented to the Sub-Court of Cocanada. At the trial, parties agreed that the oral evidence recorded at the former trial might be taken as evidence in the case. The District Judge on appeal held that notwithstanding the parties' consent, the Court could not act upon that evidence as the court that took it had no jurisdiction at all to act in the matter and remanded the case for taking evidence. On appeal, *held* that the Sub Judge did not act illegally in admitting the evidence, with the consent of parties.

Inugunti Prakasa Rayaningaru v. *Venkata Rao* (Benson and Sundara Aiyar JJ.) 360

————*Statement by widow of last male owner (Hindu) as regards husband's relations—Value to be attached to—Improvements—Compensation for—Principal of assessment—Extent of enhancement of value as marketable subject—Amount of expenditure immaterial—Temple—No improvement.*

Where the question was whether the plaintiff was the daughter's son of the last male owner (through his first wife), reliance was placed upon a statement contained in the will of the second wife that he was related to her as her daughter's son and so related to her husband as to be the first in order of capacity to perform funeral ceremonies.

Held the statement being by one who was of all people the most competent person to make a statement with regard to her husband's history, his relationship and his succession, was entitled to great weight.

In awarding compensation for improvements the real question is to what extent the value of the property as a marketable subject, has been enhanced and not the amount of expenditure actually incurred on the property.

It was accordingly held that no allowance could be made for the erection of a temple which admittedly did not add to the selling value of the property.

Kidar Nath v. *Muthu Mal* (P. C.) 176

Evidence Act Ss. 8, 21—*Statement by executant as to circumstances of execution—Long after execution—Inadmissible—Construction—Deeds—Subsequent conduct—Inadmissibility of, to control clear terms of document—Draft—Aliyasantana Law—Gift to wife—Rule as to Putravakasam property—Applicability of.*

Statement by a person as to the circumstances under which he executed a document (sought to be used to prove undue influence) a considerable time after the execution of the document and not accompanying any conduct which is relevant cannot be admitted to prove the facts stated by him.

Evidence Act—(*Contd.*) PAGE.

Except in the case of ancient documents, the construction of a document whose terms are clear cannot be controlled by the subsequent conduct of the parties.

It was accordingly held that where a gift was made to a woman to enjoy the property from gereration to generation, evidence of intention on the part of the donor to make the gift to her children was not admissible.

The ruling in *Kunhach Umma* v. *Kutti Haji Mammi*, I. L. R. 16 M. 201, is not applicable when the gift purports to be made only to the wife and not to the children also.

A draft deed prepared long before the fair was prepared is inadmissible for the purpose of construing the latter.

Narasamma Hegadthi v. *Bila Kesu Pujari* (Benson & Sundara Aiyar JJ.) 637

———(**Act I of 1872**) **S. 19.**—*Admission of liability by agent after termination of agency—Relevancy of, against his surety—Weight according to circumstances—Settlement of accounts between principal and agent admissibility of.*

Under S. 19 of the Evidence Act, admissions of liability by the agent at a time when he has ceased to be such would nevertheless be evidence against his surety provided the liability of the agent for acts done by him as agent has not ceased. The weight to be attached to such admissions however, would vary according to the circumstances of each case.

Held, accordingly, in a suit by the principal against the agent and his surety that the settlement of accounts between the principal and the agent after the termination of the agency was rightly admitted in evidence against the surety.

Parameswara Pattar v. *Sreedevi* (Sundara Aiyar and Sadasiva Aiyar JJ.) 51

———**S. 92**—*Instrument vesting property in présenti—Evidence to show that vesting was intended to be postponed—Admissibility of—English and Indian Law, difference between.*

It is not open to a party to an instrument to show that the instrument was intended to have legal operation not according to its tenor but in a different manner, e. g.. that an instrument which according to its tenor vests the property in the grantee at once was in reality intended to vest it only at a future time or after the death of the executant.

The practice of English courts of Equity of allowing evidence to be given that an instrument was intended to operate in a different manner cannot be followed in India as that is opposed to S. 92 of the Evidence Act.

Mottayappan v. *Palani Goundan* (Benson and Sundara Aiyar JJ.) .. 290

———*Sale—Price—One of the terms—Evidence to show, price higher or lower, inadmissible.*

Provision as to price is one of the terms of a sale and evidence cannot be given to show that the price agreed upon is higher or lower than that stated in the sale deed.

Adityam Aiyar v. *Ramakrishna Aiyar* (Ayling and Tyabji JJ.) .. 602

Fair Comment—*Essentials of.* See Defamation 476

Family arrangement—*Partition acted on by all members.* See Hindu Law 28

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Fraud—*Judgment—Essentials of, for setting aside—Res Judicata, not exception to—Collateral or extraneous fraud—Deliberate perjury, if ground—Truth or falsity of evidence, not collateral—Unfair conduct of suit—Limit for questioning—Discretionary Remedy—Negligence—Ground for not exercising discretion.*

The rule allowing a judgment to be vacated on the ground of fraud is not an exception to the rule of res judicata but is independent and outside the scope of the principle.

The effect of the *Duchess of Kingston's case* is that the correctness of a judgment of a Court of competent jurisdiction cannot be impeached but it may be shown that the value of the judgment assuming it to be correct is destroyed by collateral or extrinsic fraud in the obtaining of it.

The test to be applied is—is the fraud complained of not something that was included in what has been already adjudged by the Court but extraneous to it.

Questions e. g., whether the testimony of a witness is true or false and whether a document produced in evidence is genuine or not are not extraneous or collateral to the judgment.

A party cannot show that the evidence which was insisted upon by his opponent as true was in reality false and characterise such insistence as fraud in the obtaining of the Judgment. Nor could he be permitted to adduce fresh evidence for the purpose, for it was his duty to place all his evidence before the Court at the former trial.

The fraud must be something which would destroy or seriously impair the value of the judgment by showing that by means of an independent collateral wrong, one of the parties was prevented from conducting the litigation fairly or was deprived of the materials which he was entitled to place before the Court.

That one of the parties acted improperly in the conduct of the suit is not a ground for setting aside the Judgment when such conduct falls within the province of adjudication by the court which passed the judgment.

The right of a party to insist on his opponent acting with truth and honesty in the conduct of a suit must in the interests of finality be taken to be exhausted with the adjudication in the case.

Quaere : whether a judgment could be set aside on the ground that the successful party was guilty of deliberate perjury or suborning perjury.

Conflict on the point indicated and the correctness of the decisions that lay down that it could be done, doubted.

Held : however, that it was clear law that in the absence of a finding that the successful party has been guilty of deliberate perjury a judgment could not be set aside.

Held : also the power of the court to set aside a judgment for fraud is a discretionary one and the court will not exercise it in favour of a person who has himself been guilty of negligence or fraud.

In a suit upon accounts, the defendant having failed to appear, the court examined the plaintiff and a decree was passed in his favour. Then the defendant instituted a suit to vacate the judgment on the ground of fraud. The allegation of fraud consisted in the defendant not giving credit, contrary to agreement

Fraud—(*Contd.*) PAGE.

for the full amount due to him on a sale of timber. Defendant said that the arrangement was that the plaintiff should be credited only with what was actually realised by his selling it. The court found that the defendant failed to prove the arrangement set up and as he had sworn in the previous suit to the accuracy of his accounts held that the judgment was vitiated by fraud to the extent of the amount not given credit for.

Held: that the finding did not amount to one of deliberate perjury on the part of the defendant and the judgment could not be set aside.

Held: further, the defendant having failed to appear at the hearing of the former suit, was guilty of negligence and the court ought not to exercise its discretion in his favour.

Chinnaya v. *Ramanna* (Benson and Sundara Aiyar JJ.) 228

Fraudulent Preference—*Test of*, See Presidency Insolvency Act .. 320

Fusion of mortgagor's and motgagee's interest—*No suspension of Limitation period*, See Limitation Act S. 19 131

General clauses Act S. 6.—*Acknowledgment made before Act—If governed by Act passed subsequently*: See Limitation Act. 131

Graveyard—*User—Dedication*, See Mahomedan Law. 61

Guardianship—*Parent's right—Waiver-Delegation—Revocability-Natural right of parent-Welfare of minor not sole test*: See Guardians and Wards Act 661

Guardians and Wards Act (VII of 1890)—*Suit for declaration of guardianship and for custody—Right of suit—Suit in District Court—Transfer to High Court—Letters Patent Cl. 17—Exercise of powers under—Validity of—Infants not resident within jurisdiction of Court—Domicile and residence of father—Test—C.P.C. Ss 9, 20—Order 32 r. 5—Guardianship—Parent's right—Waiver—Delegation—Revocability—Natural right of parent—Welfare of minor not sole test—Jurisdiction—Express abandonment—Immaterial—May be raised before Court of Appeal.*

Plaintiff instituted the suit in the District Court of Chingleput for a declaration that he was entitled to the guardianship and custody of his two minor sons and for the recovery of the boys from the defendant to whom he had made them over for purposes of education constituting her their guardian. The minors were residing in England. By consent, the suit was transferred to the Original Side of the High Court. The minors were declared wards of the Court and plaintiff was appointed guardian. The defendant was also directed to hand over the children to the plaintiff.

Held: The Court had jurisdiction to make the order.

A party is not precluded from raising a question of jurisdiction before the appellate Court though he expressly abandoned it in the lower Court.

The doctrine excluding jurisdiction on the ground of "ineffectiveness" of the decree that might be made has no application when the Court which can give effect to decree and the Court which passed the decree are Courts of the same Sovereign.

The Guardian and Wards Act (VII of 1890) did not take away any common law or equitable jurisdiction vested in the Civil Courts at the time of its coming into force.

Guardians and Wards Act—(*Contd.*) PAGE.

Shamlal v. *Bindo*, I. L. R. 26 A. 594. dissented from.

Sharifa v. *Munikhan*, I. L. R. 25 B. 574. followed.

Held; further that in the circumstances the order was right.

A father surrendering the custody of his child can recover it at any time after the custody has been surrendered unless his doing so would be injurious to the child.

The fact that change of custody might involve the denial of European education to the children is not a ground for not enforcing the father's right to claim back the children but his making charges of grossly indecent character against them knowing the charges to be false might be a ground.

Neither waiver nor delegation will preclude the father from reasserting his parental authority unless the circumstances are such that the Court considers it detrimental to the intersets of the minor that he should be allowed to do so.

The fact that a minor is nearly 18 when a guardian is asked to be appointed and the order will have the effect of extending his minority is only one circumstance among others which the Court has to take into consideration in determining whether a guardian should be appointed.

Equity courts are never guided solely by considerations of the welfare of the minor without regard to the natural rights of the father.

They do not interfere with the rights of the father unless he so conducts himself as to render it essential to the safety and welfare of the children in some serious and important respect either physically intellectually or morally that they should be removed from his custody.

That the father is in narrow circumstances, that he is negligent, injudicious and faulty, that he is a person from whom the discreet, the intelligent and the well-disposed, exercising a private judgment would wish his children to be for their sakes and his own to be removed are not reasons for removing his children from him.

Principles on which the court would act on a writ of *Habeas Corpus* distinguished.

There is no difference in the principles that should govern court's action in the matter of custody of infants in India and in England.

The provision of the Civil Procedure Code, Order 32, r. 5 that no order passed against a minor is valid unless he is represented by a guardian *ad litem*, or the principle of law on which that rule is based has no application when the minor is not a party to the suit or proceeding.

Per Chief Justice. The High Court trying a suit transferred to it in the exercise of its extraordinary original jurisdiction is not precluded from exercising any jurisdiction vested in it as a Court of Original Civil Jurisdiction.

Like the Court of Chancery and the Supreme Court whose powers it has inherited, the High Court can appoint guardians for the person and property of minors provided the residence and domicile of the father are within the jurisdiction of the court though the minors themselves are residing outside the Court's jurisdiction.

In determining whether the court will exercise its jurisdiction and in what manner it will exercise it, many factors have to be taken into consideration amongst others, the question of the residence of the children.

Guardians and Wards Act—(*Contd.*) PAGE.

The words "within the Presidency of Madras" in cl. 17 of the Madras Letters Patent were used for the purpose of territorial limitation and they do not qualify or restrict the powers of the High Court with regard to the guardianship of minors.

Per Oldfield J :—The Chingleput District Court had jurisdiction to try the suit both under S. 20 C. P. C. and under private international law as the defendant was residing within its jurisdiction at the date of the plaint.

The Guardians and Wards Act gives only a concurrent remedy and does not preclude the common law remedy, of suit to which the parties were entitled before the act.

A proceeding instituted in a Court without jurisdiction is not validated by its being transferred to a Court having jurisdiction.

Held : accordingly that if the Chingleput Court had no jurisdiction to make the order, the order could not be justified under the Letters Patent.

The doctrine of "ineffectiveness" is applicable only if the whole relief would be beyond the power of the Court and could have no application where the Court has in its power to enforce the personal obedience of the defendant.

Annie Besant v. *Narayaniah* (White C. J. and Oldfield J.) 661

Hindu Law—*Alienation by father—Immorality—Onus of proving*—See Practice 281

———*Alienation by widow—Suit by reversioner—Cause of action from adoption*. See Limitation Act 219

———*Charitable endowments—Widow—Alienation of trusteeship—Reversioners—Right of—Suit for removal—C. P. C. S. 92—Scope of—No bar to Evidence Act S. 32 cl. (5)—Statement as to one's own adoption—Relevancy of—Length of time—Proof of formalities etc., dispensed with—Proof of enjoyment of rights, as adopted son—Sufficiency of.*

Where a widow alienated the trusteeship of a charity which descended to her from her husband.

Held (1) that the alienation did not by itself determine her estate in the office but that the reversioner could sue for her removal on that ground.

(2) That it was a proper ground for her removal.

(3) That S. 92 C. P. C. would not bar the suit.

The scope of Sec. 92 C. P. C. is to protect the public and it is not aimed at the infringement of individual rights and should not if possible be so construed as to deprive individuals whose rights have been infringed of their remedy.

If a general administration of the trust which includes the removal of a trustee is necessary to provide an efficient remedy for the infringement of the individual right, such general administration may be granted without regard to the provisions of S. 92.

Statement by a deceased person that he is the adopted son of another made before any question is raised as to his adoption is relevant under S. 32, Cl. 5 for the purpose of proving his adoption. That section does not require that the statement should be by a person other than the person whose relationship is in question.

Hindu Law—(*Contd.*) PAGE.

Where adoptions have taken place so long back that actual evidence that all the proper formalities have been observed cannot reasonably be expected, it is quite sufficient to show that the persons in question have always been treated as adopted and have enjoyed the rights of adopted sons.

Venkatarangam Chetty v. *Venkatasubbammah* (Wallis J.) 373

————*Dancing girls forming a joint family—Two of three sisters cannot be said to constitute a branch—Joint acquisition—Character of survivorship*. See Will. 556

————*Gift by widow of portion to next reversioner on his undertaking not to object to alienation of the rest—Construction of—Partial surrender—Validity of—Inheritance—Whole blood and half-blood—Preference, not restricted to special cases mentioned in Mitakshara—Estoppel—Acceptance of hypothecation by actual reversioner of a portion of property gifted.*

Where a Hindu woman conveyed by way of gift a portion of the property which she obtained by inheritance from her son to the next presumptive reversioner on his consenting " to allow her to have possession and enjoyment of the remaining properties with full rights and powers."

Held Per Miller J. :—(1) that the transaction did not amount to a surrender to the reversioner of the whole of the life estate and a re-transfer of a portion to the lady.

(2) That it was a partial surrender to the next reversioner in consideration of his undertaking *not to raise any objection* to her disposal of the other property in case she chose to deal with it and was invalid under the Full Bench ruling in *Marudamuthu Nadan* v. *Srinivasa Pillai*, I. L. R. 21 M. 128.

(3) and that the authority of the said ruling has not been affected by the decision of the Privy Council in *Bajrangi Singh* v. *Manokarnika Baksh Singh*, I. L. R. 30 A. 1.

Per Sadasiva Aiyar J.—The law as to the effect of reversioner's consent to widow's alienations has been developing though not logically and the effect of the decision of the Privy Council in *Bajrangi Singh* v. *Manokarnika Baksh Singh* is to put partial alienations on the same footing as alienations of the entire inheritance.

Held: accordingly, that the alienation in favour of the reversioner was valid and binding against the actual reversioners.

Per curiam: As between collaterals and their descendants of the same degree those related through whole blood are to be preferred to those related through half blood. The preference based on the distinction between whole blood and half blood is not restricted to the special cases referred to in the Mitakshara; *Subba Singh* v. *Sarapur Kumar*, I. L. R. 19 A. 215, *Sham Singh* v. *Krishna Sahai*, 6 C. L. J. 190 followed. *Vithal Row* v. *Rama Rao*, I. L. R. 24 B. 317 not followed.

One R was the last male owner. His grandfather was S who was also the great grandfather of the plaintiff, the 1st and 3rd defendants. Plaintiff, 1st defendant and R were descendants through his sons by one wife, the 3rd defendant through the son of another wife.

Held: The plaintiff and 1st defendant excluded the 3rd defendant from inheritance.

Hindu Law—(*Contd.*) PAGE.

Held further *Per Miller* J. That the plaintiff was not estopped from contesting the gift by reason of his having accepted a hypothecation of a portion of the land to which the gift applied.

Arthanari Goundan v. *Ramasami Goundan* (Miller & Sadasiva Aiyar JJ.) 8

————*Impartible Estate-Regulation XXV of Madras Regulations of 1802—Sanad confers descendible estate-Impartibility of estate from its nature or family custom is a question of fact—Concurrent findings of fact—Practice.*

Where a Zemindari was subject of a Sanad in common form under Regulation XXV of the Madras Regulations of 1802 and was not proved to be impartible and descendible to a single heir either by special family custom or from its very nature, but was on the other hand, concurrently found by the Courts in India, not to be a Raj.

Held, that it was partible and descendible according to the ordinary rule of inheritance of the Hindu Law, for the Regulation XXV of 1802 did not affect the title to any land, nor could a sanad alter the ordinary rule of succession which it would under ordinary circumstances only confirm. The Judicial Committee refused to disturb the concurrent finding of fact of the Courts below as to the nature of the estate before the grant of the Sanads it was not shown to be not justified by the evidence.

Collector of Trichinopoly v. *Lekkamani*, L. R. 1 I. A. 306 ; *Kachi Kaligana* v. *Kachiyava*, L. R. 32 I. A. 261 ; *Raja Venkata Narasimha Appa Row* v. *Raja Narayya Appa Row*, L. R. 7 I. A. 38 ; *Baboo Ganesh Dutt Singh* v. *Maharaja Moheshur Singh*, 6 M. I. A. 164 ; *Srimantu Raja Yarlagadda Mallikarjuna* v. *Srimantu Raja Yarlagadda Durga*, L. R. 17 I. A. 134 ; *Allen* v. *Quebec Warehouse Co.*, 12 A. C. 101, referred to and approved.

Raja Venkata Narasimha Appa Row v. *Raja Parthasarathi Appa Row* (P. C.) 386

————*Inheritance—Leprosy—Sanious or ulcerous and agonising type alone a ground of exclusion—Incurable nature of leprosy—Insufficiency of, as a test—Unfitness for social intercourse, test.*

Both the texts and the decided cases fully establish that it is only the agonising sanious or ulcerous type of leprosy that forms a ground of exclusion from inheritance under the Hindu Law.

It is not safe to make incurableness the test as that is a matter of opinion and too indefinite to be used for legal purposes.

Unfitness arising, from the virulent and disgusting nature of the disease is the only satisfactory test.

Quaere, whether leprosy as a ground of exclusion is not obsolete.

Where a person was suffering from the anæsthetic form of leprosy which was in a medium stage when succession opened.

Held, that he was not disqualified from inheriting.

Kayarohana Pathan v. *Subbaraya Thevan* (Benson & Sundara Aiyar JJ.) 251

————*Joint-family—Partition—Right by survivorship—Entries in Revenue records and acts indicating separation—Presumption of jointness rebutted.*

Where it appeared that on the death of the father specified areas forming parts of what was admittedly family land was registered separately in the names

Hindu Law—(*Contd.*) PAGE.

of the sons and three of them also separately mortgaged the lands standing in their names as if they were their exclusive property,

where it was also admitted that some other village belonging to the family was partitioned;

where it further appeared that the brothers were in separate possession of their respective sir lands.

Held that the entries in the revenue records, though themselves inconclusive, taken along with the other circumstances which were consistent only with the hypothesis of division sufficiently rebutted the presumption of jointness of the family.

Net Ram Singh v. *Musammat Tursa Kunwar* (P. C.) 489

——*Joint family property—Partition—Oudh Estates Act of 1869 Ss. 2, 3, 8, 10 and 22—Succession in Taluqdari tenure and in acquisitions therefrom—Concurrent findings—Impartible estate.*

Where a family had been in possession of a Taluq of 26 villages until 1856 when the British occupied the kingdom of Oudh, the representative thereof did not enter an appearance until July 1859 *i. e.*, after Lord Canning's Proclamation of March 1858, but on 5th October 1859 an order was passed sanctioning the Summary settlement with him of nine villages, of which the Kabuliat was signed on the 13th of that month while in the course of the Regular Settlement he recovered six more villages, (thus being in possession of fifteen villages before the Act I of 1859, his name appearing in the List of Taluqdars,) and subsequently acquired other properties :

Held in a suit for partition, that the properties consisting of 15 villages, that is to say, those settled with the representative of the family in 1859 together with those recovered during the Regular Settlement, constituted an "Estate" within the meaning of the Act I of 1869 and were in consequence impartible, although the formal documents were not executed on or before the 10th of October 1859 as acquired by Section 3 of the Act I of 1869.

Held further that the incorporation of any acquisition by an owner into "the ancestral estate for the purposes of his succession" depended upon the owner's intentions, in the absence of which as conveniently held by the Lower Court the ordinary rule of succession of the Hindu Law applied.

Parbati Kumari Debi v. *Jagadis Chunder Dhabal* (1901) L. R. 29 I. A. 82 referred to and approved.

Janki Pershad Singh v. *Dwarka Pershad Singh*(P. C.) 34

——*Joint family—Self acquisition—One account of income of self-acquisition and ancestral property—By conduct conversion into joint family property—Will—Invalidity of, without consent—Legatee, a maintenance holder—Non-interferance with—No inference of consent.*

Where the head and managing member of a joint Hindu family had kept one account of the income of his ancestral and self-acquired property (obtained as a reward for services rendered to the Government in the Indian mutiny) and used to treat the income or both kinds of property as one amalgamated fund, making no distinction between them and applying them for the purposes of the whole family and there was nothing to indicate that he wished to treat the property acquired by him as his separate property.

Hindu Law—(*Contd.*) PAGE.

Held, that the property acquired became by the conduct of the acquirer property of the joint family and could not be disposed of by him by will without the consent of the other members of the family.

Their Lordships refused to draw from the fact that the property in suit was not dealt with on the partition between the other members of the family, the inference that the will was made with their consent as it was probably owing to their reluctance to interfere during the life time of the legatee (who was to take a life estate) with what undoubtedly were the wishes of their ancestor, and as the legatee also was a lady entitled to maintenance.

Indar Sahai v. *Shaiam Bahadur* (P. C.) 57

————*Joint family—Will by father—Power to partition by—Construction—Family arrangement—Consent of sons—Each son representing his branch—Division in status effected by—Clause, giving father power to cancel—Effect of—Contractual condition or mere threat.*

There were three brothers, Rao Karan Singh, Kunwar Sheodan Singh (plaintiffs) and Rao Sultan Singh (whose widow and sons were defendants in the case.)

The father of the brothers was Rao Balwant Singh. In 1895, he was in advanced years and indifferent health and determined to free himself from the labours of business and devote the remainder of his life to pilgrimages. Accordingly, he drew up and executed a document (which he called a will) setting out a division of the family property among the members of the family reserving nothing for himself. Though styled a will, the document was intended really as a record of family arrangement then and there made and carried into effect partitioning the family estate among those interested.

In pursuance of the arrangement, the parties severally applied for mutation of names in respect of the villages and mutatior was effected.

On the death of Rao Sultan Singh, there was a similar mutation of names in favour of his son.

There was also evidence of separate enjoyment.

The division was unequal in that the eldest son (Rao Sultan Singh) was given a larger share than the others.

Held, that although the father had no right to make a partition by will among the members of the family except with their consent, the evidence established consent of the sons to the arrangement and their acceptance was binding not only on themselves but also on their sons, as each of them was representing his branch in the transaction.

Held accordingly that the parties were divided in status from the date of the will and the suit for partition brought as if they were not divided was unsustainable.

Reliance was placed on a clause in the will to show that the partition was not intended to take effect *in presenti*. It was "if I at any time come back from pilgrimages and find mismanagement or character of anyone bad then I shall have power to cancel this will which shall be enforced from the date of its execution."

Held, that the highest effect that could be given to the clause was that it evidenced a contractual condition which the sons accepted in order to obtain partition but that it did not prevent the partition operating *in presenti*; that it was merely put in as a threat to keep the sons in good behaviour and could not have been enforced specifically or even at all.

Brijraj Singh v. *Sheodan Singh* (P. C.) 188

Hindu Law—(*Contd.*) PAGE.

———*Manager—Sale by mother—During minority of sons—Suit to set aside more than three years after the elder attained. majority—Limitation, Bar of.* See Limitation Act 405

———*Mitakshara School—Alienation by father of ancestral property—Impeachment of partition by sons—Limitation Act of 1877—Sec. 7—Dhusars of Gudgaon settled in Central Provinces—Direction to bring a suit for partition.*

Where a childless Hindu A had adopted B and the widow of A's brother on A's death adopted C and subsequently B partitioned the ancestral property during the minority of his sons, with C, in a suit brought by B's son on attaining majority impeaching partition :—

Held, that "although a partition made by a Hindu father may under some circumstances bind his minor sons, yet if on the partition a share is given to an absolute stranger the partition may be impeached as a disposition of property made without consideration, unless it can be supported as a *bona fide* compromise of a disputed claim.

Balkishan Das and others v. *Ram Narain Sahu and others*, L. R. 26 I. A. 139=30 C. 738 distinguished.

Held also that in as much as C was joined as defendant with B (father) C had a right to say that he stood in the shoes of B (father) and claim partition of ancestral property with B's sons.

Held also (in effect) that Dhusars of Gudgaon settled in Central Provinces were governed by the Hindu Law of the Mitakshara School.

Held further that within three years after coming of age a son could impeach his father's alienations under S. 7 of the Indian Limitation Act 1877.

Kedarnath v. *Jainarayan Ramrachpal* (P. C.) 512

———*Mortgage by father—General charge of immorality—Not sufficient to prove immoral purpose of debts—Proof of connection between immorality and debts necessary.*

A general charge of immorality against the father is not sufficient to prove that the debts for which he executed a mortgage of joint family property were incurred for immoral purposes and in the absence of evidence to connect the debts with his immorality, the sons will be held bound by the mortgage.

Sri Narain v. *Lala Raghubans Rai* (P. C.) 27

———*Mortgage of immoveable property by manager for purchase of lands—Not binding.*

The manager of a joint Hindu family has no power to mortgage immoveable properties for the purpose of purchasing more lands for the family.

Subramania Nadan v. *Ramasami Nadan* (Ayling & Sadasiva Aiyar JJ.).. 563

———*Partition—Agreement between some members—Acted upon by all the members—Division in interest—Reunion, a question of fact.*

In 1871, for the purpose of giving the share of one of the members of a joint Hindu family an agreement was executed by 3 members of the family ; subsequently in 1873 another agreement was executed between the same three persons which after declaring that the executants along with two others (one of whom was a minor) were sharers in the villages therein mentioned and each was in

Hindu Law—(*Contd.*) PAGE.

possession of a definite share, went on to say that each share "shall be considered to be the property of that very person who is in possession thereof." This agreement was acted upon by all the members including the persons who were not parties thereto up to the time when dispute arose.

Held having regard to the agreement of 1873, all the members were divided in interest and the share of one of the executants went to his widow.

Appovier v. *Rama Subba Aiyan* (11 M. I. A. 75), *Balakishen Das* v. *Ramnarain Sahu* (30 C. 738), *Parbati* v. *Naunihal Singh* (31 A. 412) followed.

Reunion is a question of fact to be established by evidence.

Kunwar Raghubir Singh v. *Moti Kunwar* (P. C.) 28

———*Policy of Life Insurance—Premia paid out of family property—Effect of—Partition—Expenses of Upanayanam of brothers and sisters—If to be provided for—Paternal Estate—No difference between father's self acquisition and ancestral estate—Maintenance of step-mother—Charge on both son's and step son's shares—Order 41 rr. 22, 33—Provision for maintenance disallowed by Lower Court against step-son—Allowed on memo of objections by son—Marriage of male only Niyama Vidhi or Parisankhya Vidhi—Father not bound to marry sons.*

A Hindu father took out a policy of insurance on his life. The policy stated that it was taken for the benefit of his wife and two sons. Of these, the wife and one of the sons subsequently died. Plaintiff was the son by his second wife. The premia were paid out of the family property.

Held : the amount of the policy was family property and the plaintiff was entitled to share in it.

[But Cf. *Balamba* v. *Krishnayya* 25 M. L. J. 65 F.B.]

A minor co-parcener living separately for no fault of the manager is not entitled to claim mesne profits.

There is no difference in principle between a minor co-parcener and a major co-pracener in this respect.

Even where there has been exclusion and the excluded co-parcener sues for past profits the manager is entitled to have credit for all sums properly expended by him.

Maintenance of the widows of the father is a charge not only on the shares of their own children but also on those of their step-children.

Where the lower appellate Court refused to make provision for the maintenance of the plaintiff's mother on the ground that it was to come out exclusively from the share of the plaintiff but the plaintiff's mother failed to appeal against it. *Held*:—Nevertheless that it was open to the plaintiff (respondent) as a party affected by the lower court's order, to urge by memorandam of objections that her maintenance should be provided for out of the shares of both himself and the 1st defendant (his step-brother).

Per Sundara Aiyar J.—Provision ought to be made at partition not only for the Upanayanams of brothers and marriages of sisters but also for the marriages of brothers who have not been married and such provision ought to be made whether the property to be divided is merely self-acquired property of the father or ancestral property.

Hindu Law—(*Contd.*) PAGE.

Per Sadasiva Aiyar J. Marriage of males is not one of the ceremonies for which provision is to be made at the partition.

The expression "paternal estate" in Hindu Law books does not mean the father's self-acquisition alone but merely means the estate which the son can inherit or obtain through his relation as such son to his father. Liability to provide for the marriages of daughters and Upanayanam of sons attaches to all such property without distinction.

Marriage of sons not being a Samskaram which the father is bound to perform, a deduction from the paternal estate for the purpose of providing for it need not be made before partition.

The doctrine "property by birth" and its history discussed.

Marriage is only a Vikalpa Vidhi and it is not a Nitya or Apurva Vidhi. It is either a Niyama Vidhi or is only a Parisankhya Vidhi.

Srinivasa Iyengar v. *Thiruvengadathaiyangar* (Sundara Aiyar und Sadasiva Aiyar JJ.) 644

————*Will—Devise of ancestral property—Birth of son after will—Death of son, leaving father absolute owner—Validity of the devise—Construction—"Support the widow after her death perform funeral ceremonies and then take full possession"—Meaning of.*

At the time, a will was executed, the testator had no sons and was competent to dispose of the property the subject of devise which was ancestral. Subsequently a son was born to the testator but the son dying, the testator became again, at the date of his death absolute owner of the property.

Held: the fact that the testator ceased to have power of testamentary disposition over the property for sometime by the birth of the son did not have the effect of making the will totally inoperative and the will passed the property to the legatee.

Shib Savitri Prasad v. *The Collector of Meerut*, I.L.R. 29 A. 82 followed.

Held further: a provision in the will that "the legatee should support the widow during her life, after her death he should perform her funeral rights and then take full possession of all the properties" did not confer any right of possession on the widow but only made the property during her lifetime subject to her right of maintenance.

Bodi v. *Venkatasami Naidu* (Benson and Sundara Aiyar JJ.).. .. 363

Immorality—*Charge of, not sufficient to prove immoral purpose of debts—Proof of connection between immorality and debts necessary.* See Hindu law 27

Impartible Estate—See Hindu law—Oudh Estates Act. 34

————*Regulation XXV of Madras regulations—Sannad confers descendible estate.* See Hindu Law 386

Inadmissible evidence—*Hearsay—Contradictory statements—Circumstantial evidence—Violation of principles of natural justice—Substantial injustice—Practice.*

Where "by some disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done," the Judicial Committee is bound to advise His Majesty that the conviction should not be allowed to stand.

Inadmissible evidence—(*Contd.*) PAGE.

Dillet's Case, 12 A. C. 459 approved.

However strong and convincing the evidence of an adequated motive may be, that evidence can never counteract the harm done by the reception of inadmissible evidence or the injustice its use may lead to nor by itself supply the want of all reliable evidence, direct or circumstantial of the commission of the crime with which an accused person may be charged.

Where an accused person after he is arrested makes a confession implicating the other accused and the confession is sought to be used against them it is incumbent on the prosecution to disclose the name of the officer who made the arrest and produce him or any other witness who could speak to the circumstances in which the confession is made so as to enable the defence by cross-examining the witness to ascertain what inducements were offered to the accused to make it and what generally were the circumstances that attended the confession.

Vaithinatha Pillai v. *King Emperor* (P. C.) 518

Inamdar—*Landlord and tenant—Ejectment—Occupancy right—Question of fact,—25 years' possession, good evidence of—Presumption, Kudivaram not in Inamdar.*

In a suit in ejectment by an inamdar against a ryot in occupation.

Held : (1) The question whether the defendant had occupancy right was a question of fact.

(2) 25 years' possession would not by itself confer occupancy right but was good evidence of it.

(3) The land being inam the presumption was that the Kudivaram was not vested in the plaintiff.

Ramabrahmam v. *Lakshmanna* (Benson and Sundara Aiyar JJ.) .. 33

Indian Contract Act S. 70.—*Scope of*—See Deed 435

————**S. 235.**—See Limitation Act (XV of 1877) 256

Indian Evidence Act S. 17, 19, 21—See Mortgage 329

————**S. 32 Cl, 5.**—*Statement as to one's own adoption.—Relevancy of*—See Hindu Law. 373

————**S. 57**—See Aliya Santana Law 411

Indian Succession Act Ss. 91, 106 and 202—See Will 556

Inherent power of Court—*to rectify order inadvertently made*—See Procedure 148

Inheritance—*Leprosy—Sanious or ulcerous and agonising type alone ground of exclusion*—See Hindu Law 251

————*Whole blood and half blood—Preference—Not restricted to special cases mentioned in Mitakshara*—See Hindu Law 8

Instalment bond—*Failure to accept instalments—Default waiver—Limitation*—See Limitation Act (IX of 1908) 364

Interest—*pendente lite omission to provide interest after suit—Court's direction*—See Limitation Act S. 19 101

Insurance—*Insurance for the benefit of children—Married Woman's Property Act (III of 1874) Ss, 2, 6,—Whether applicable to Hindu male assured—Rights of daughter of the insured as against insurance company or creditor of the assured—Doctrine of advancement—Strangers to contract—Right to sue.*

Where a Hindu male effects a policy of insurance which expresses on the face of it to be for the benefit of his wife or of his wife and children or any of them and dies leaving a daughter.

Held by the Full Bench that S. 6 of Act III of 1874 (Married Women's Property Act) creates a trust in favour of the daughter and the amount of the policy is not available for the creditors.

Oriental Government Security Life Assurance Ltd. v. *Venteddu Ammiraju* (35 M. 162) not followed.

Per *Chief Justice* and *Sankaran Nair* J.:—S. 2 of Act III of 1874 (Married Women's Property Act) has not the effect of making S. 6 inapplicable to a policy of insurance effected by a Hindu male. S. 2 applies only to Ss. 4, 5, 7, 8 and 9 and not to S. 6.

A policy for the benefit of one or more children to the exclusion of the wife does not on that ground cease to come within S. 6. The words "a trust for the benefit of his wife or of his wife and children or any of them" in S. 6 mean "a trust for the benefit of his wife or of his children or of his wife and children or any of them."

Per *Chief Justice.*—S. 6 dispenses with the necessity for a separate deed of trust. It does not affect the law of contract or the law of trusts as regards the persons entitled to enforce the contract under the policy. When by virtue of the section a trust is created, the person entitled to enforce the right of the beneficiary is the trustee, if a trustee has been appointed and if no special trustee is appointed the official trustee to whom the money is payable under the 2nd paragraph of the section. The beneficiary himself (or herself) would not be entitled to maintain the action.

The presumption of advancement by way of gift that might arise if the policy was taken out by a father in favour of his daughter cannot arise where the policy purports to be for the benefit of his wife and children. It cannot be held that though there is no gift to the wife, under the doctrine of advancement, there is a gift to such of the children as may be daughters.

In cases contemplated by S. 6, apart from the Act, the beneficiaries have no cause of action. *Khwaje Muhammad Khan* v. *Hussan Begum* (32 A. 410) distinguished.

Where the Insurance Company contracts to pay not to the parties for whose benefit the policy purports to have been taken out but to the executors, administrators or assigns of the assured.

Held per *Chief Justice* that the case does not come within S. 6.

Per *Sankaran Nair* J.—The amount not being payable to the beneficiaries there was no scope for the application of the doctrine of advancement by way of gift.

Per *Tyabji J.*—A daughter of the assured is not a married woman within the meaning of S. 2 of the Act, even if she is married. Her rights under the insurance policy are affected by S. 6 and the operation of S. 6 is not affected by S. 2.

Insurance—(*Contd.*) PAGE.

Married Woman in S. 2 refers only to the woman married to the assured.

On the rights of the widow or on the construction of the policy in question his Lordship would express no opinion.

Balamba v. *Krishnayya* (F.B.) (White C.J., Sankaran Nair & Tyabji JJ.) 65

Issue—*Frame of—Party accepting burden—Can't question in appeal—No duty in Court to hear defendant's case when plaintiff makes no case.*— See Practice 281

Joint family—*Decree for partition—Death of decree holder—Eldest son after him proper person to execute—Civil Procedure Code Or. 21 r. 16—Security not necessary—O. 28 r 2—Payment in kind—Applicability.*

Where in a suit for partition the decree-holder dies leaving several sons, the eldest son as the managing member of his branch of the family is prima facie the person entitled to take out execution and not the junior members.

Ordinarily no security need be taken from the managing member where execution is allowed in his favour on behalf of himself and his brothers.

A payment to the managing member of a family towards the amount due under the decree is valid.

Dorasami Sastriar v. *Venkatrama Iyer*, 21 M. L. J. 1088 followed.

Or. XXI r. 2 C.P.C. requiring the certifying of payment applies only to monies payable under a decree and not to payments in kind.

Krishna Hande v. *Padmanabha Hande* 442

Joint lease—*Agricultural lands—Partition among lessors—Forfeiture—Each can enforce his rights separately as regards his share.* See Landlord and tenant .. ..

Judgment—*Essentials for setting aside.* See Fraud .. ..

Judicial Proceeding—*Execution proceedings, are.* See Criminal Procedure Code 476

Jurisdiction of Court—*Infants not Resident within—Domicile of father—Sole test.* See Guardians and Wards Act 661

Jurisdiction of Civil Courts—*remains unless specially conferred on revenue courts.* See Estates Land Act.. 189

———**Question of**—*Express abandonment immaterial—May be raised before Court of appeal.* See Guardians and Wards Act 661

———*Suit to eject tenant of pasture land and for rent—Cognizable by Civil Courts.* See Estates Land Act 57

Kudivaram—*Presumption—Not in Inamdar.* See Inamdar 31

Land Acquisition Act—*Nature of proceedings under Part III—New enquiry and not appeal—Party at whose instance reference made, not adducing evidence—Effect of—Not precluded from asking for modification—Zamindar and ryot—Muchilika—Construction—Provision for separate cist for fruit trees—No cist levied and user with tenants—Award of entire value to tenant upheld—Ratio of apportionment of compensation for land—No fixed ratio of three-fifths and two-fifths—Factors to be considered.*

Limitation Act—(*Contd.*) PAGE.

———Art 120, 125—*Hindu Law—Alienation by widow—Suit by reversioner who became so by subsequent adoption—Cause of action accrues from adoption—Presumptive reversioner—Attestation—Presumption of consent—Consent and ratification, effect same.*

Suit for a declaration that two alienations dated 1881 and 1889 respectively made by a Hindu widow were invalid against the minor plaintiff. The widow died in 1899 and the next reversioners were her daughters defendants 1 and 2. Plaintiff was the adopted son of the 1st defendant, having been adopted in 1903. The suit was brought in 1907.

Held, that as the suit was after the death of the widow and as the plaintiff was not "a person entitled to possession if the female died on the date of the institution of the suit," art. 125 did not apply.

That art. 120 applied.

That the cause of action accrued to the plaintiff from the date of his adoption and not from the date of the alienation when he was not in existence and could not sue.

Per *Sadasiva Aiyar* J.:—When an adult male of full mental capacity, admittedly having a tangible interest in the property affected by a deed, attests the deed, the presumption is that his attestation is taken as a proof of his consent to and knowledge of the correctness of the recitals in the deed and it lies upon the person who asserts the contrary to prove it.

Per *Sankaran Nair* J.:—The effect to be given to attestation by a witness will depend upon the facts of each case.

Consent to an alienation by the next reversioner and ratification of past alienations stand on the same footing.

Held, accordingly, that as the sale deed of 1881 and a sale deed in 1894 of a portion of the property comprised in the sale deed of 1889 which had been resold to the widow in 1893, had been attested by the nearest male reversioner and the female reversioners had acquiesced in the transactions, the alienation of 1881 and the alienation of 1889 (to the extent of the property comprised in the deed of 1894) were binding against the plaintiff.

Narayana Aiyar v. *Rama Aiyar* (Sankaran Nair and Sadasiva Aiyar JJ.) 219

———**S. 4—Art. 74, 75, 80**—*Instalment bond—Failure to accept instalments—Default—Waiver—Limitation—Estoppel from pleading—Agreement against or waiver of plea of limitation—Validity of—Estoppel against act of Legislature.*

On the 12th of December 1904, there was an agreement between the plaintiff and the defendants under which the plaintiff released his interest in a certain business for an amount which had been fixed by arbitrators. On the same day—for consideration specified in the release, defendants executed a pronote for Rs. 30,000 payable by monthly instalments of Rs. 1,000, the whole amount to be recoverable in case of three successive defaults. Defendants paid 16 instalments up to April 1906. In May and June also, defendants sent cheques to the plaintiff who declined them and finally told them in July that he was not going to accept any more instalments and was repudiating the whole transaction. In August 1906, he instituted a suit to set aside the release on the ground that it had been obtained by fraud. His suit was dismissed and the judgment was confirmed on appeal on 19-1-1910. In the appellate Court application was made on his behalf

Limitation Act—(*Contd.*) PAGE.

that a decree might be made for the amount of the pronote. The defendants in answer did not deny their liability but stated that they were always ready and willing to pay it and contended that a decree should not be passed in that suit for the amount and the appellate Court refused to pass the decree. On 25-1-1910 plaintiff made a demand for the balance of instalments on the note and immediately after instituted this suit. Defendants pleaded that the whole amount became payable in July 1906 by three successive defaults on their part and the suit was barred. The learned original side Judge held that the defendants who for the purpose of resisting the application had admitted the liability were estopped (though not under S. 115 Evidence Act) on general principles from pleading that long before their admission the claim had become barred.

Held on appeal,

That the defendants were not estopped and that having regard to S. 4 of the Limitation Act no estoppel could even be pleaded.

That as on the facts there was no default by the defendants, art. 75 of the Limitation Act did not apply.

Per Chief Justice, under the circumstances, plaintiff could also properly be said to have waived the default of the defendants, if any.

Per Oldfield J. There can be no waiver of the benefit of a provision for immediate payment where there is no default in payment.

Per *curiam*: That article 74 (Per *Oldfield* J. or art. 80) applied and the claim for instalments falling due more than 3 years from the date of suit was barred.

In India, parties cannot waive or even contract out of the law of Limitation. *Khetrondhun* v. *Mohin Chandra Das* (17 C. W. N. 518) followed.

Difference between Indian and English law pointed out.

There can be no estoppel against an Act of the Legislature.

Jagadbhandu Saha v. *Radha Krishna Pal* (I. L. R. 36 C. 920) *Abdul Aziz* v. *Kanthu Mullick* (I. L. R. 36 C. 512) followed.

Where the debtors are ready and willing to pay, mere absence of completed payment does not amount to default within the meaning of Art. 75 of the 1st schedule.

Sitharama Chetty v. *Krishnasami Chetty* (White C.J., & Oldfield J.) .. 264

————**S. 12**—*Stamp papers, called and copy ready both on Saturday—Papers supplied and copy taken delivery of on Monday—Exclusion of Sundays—"Time requisite for obtaining copies.*

On an application for a copy of an order (sought to be appealed against) stamp papers were called for on a Saturday and supplied on the ensuing Monday. Similarly the copy was posted as ready on a Saturday and taken delivery of on the ensuing Monday. *Held* that the party was entitled to have both the Sundays excluded as time requisite for the obtaining of copies under S. 12 of the Limitation Act.

Ramasami Chetty v. *Ramanathan Chetty* (Benson and Sundara Aiyar JJ.) 354

————**Sec. 18, art. 62, 120**—*Hindu Law—Mortgage—Amount collected by a member of family before partition—Claim for share of—Representation that amount had not been collected—Fraud—Interest—Right in actions for money received to the use of the plaintiff to interest—For period when plaintiff is fradulently kept in ignorance—Remission by one of the payees—Not binding on others.*

Limitation Act—(*Contd.*) PAGE.

A suit to recover the share of the plaintiffs in the mortgage amount due to the family collected by one of the members before the partition and not brought into account at the family partition is governed by art. 62 and not by art. 120.

Representation that the amount had not been collected while as a matter of fact it had been, is fraud within the meaning of S. 18 of the Limitation Act.

Though ordinarily plaintiff in an action for money received to his use is not entitled to interest, yet where he has been fraudulently kept out of the knowledge of his rights, he is entitled to interest for the period during which he has been so kept in ignorance. *Johnson* v. *Rex* ((1904) A. C. 317) followed.

Remission by one of the payees of a debt is not binding on the others.

Lakshmi Narasimha v. *Lakshmamma* (Sadasiva Aiyar and Tyabji JJ.) .. 531

————**S. 19**—*Partnership—Acknowledgment by a partner—Trading Partnership—Necessary or usual in—Not binding, in the absence of express authority—Conflict—Correctness of rule doubted.*

According to the course of decisions in Madras, acknowledgment by one partner is not sufficient to save the bar of limitation against his co-partners though the acknowledgment is an act necessary for or usually done in the course of partnership business, in the absence of proof that he had express authority to do so.

The correctness of the decisions doubted and the conflict between Bombay and Allahabad and Madras pointed out.

Goodwin v. *Parton* (41 L. T. 91 affirmed in 42 L. T. 568), *Watson* v. *Woodman* (L. R. 20 Eq. 730) referred to.

It is the almost invariable practice of trade creditors here to insist upon a written acknowledgment in their books being made by the debtors as a condition of giving credit and engaging in further transactions and that whether the debtor is carrying on business singly or in partnership of which the Court, on account of the practice constantly coming within its cognisance, may well take judicial notice.

K. R. V. Firm v. *Sitharama Swami* (Wallis J.) 501

————**S. 19**—*Acknowledgment—Plea of accord and satisfaction by agreement—Effect of.* See Practice .. ..

————**Art. 12**—*Revenue Sale*—See Mutt .. .. ..

————**Art. 39**—*Illegal attachment of land with crops—Trespass—Suit for value of crop—Applicability of—Trespass under colour of legal process—Effect of.*

Defendants illegally procured attachment of plaintiff's land with crops thereon. The attachment on land was subsequently removed but not that on the crop. While under attachment, part of the crop was lost by theft, part owing to negligence and failure to harvest in proper time and the rest was sold by court and the proceeds were paid to the defendants. Under the law prevailing at the time of attachment, standing crops were immoveable property. In a suit to recover the estimated value of the crop.

Held that the illegal attachment of the land with crops thereon amounted to trespass of immoveable property and the suit being in substance one for damages

Limitation Act—(*Contd.*) PAGE.

consequent on such trespass, art. 39 of the Limitation Act applied to the case, the starting point being the date of attachment.

Art. 39 does not become inapplicable because the trespass is effected under colour of legal process. *Jadunath Dandupat* v. *Harikar* (36 C. 141) followed.

Vnkataramarayanim v. *Basavayya* (F. B.) 447

————**Art. 142**—See Ejectment 95

————**Art. 161 C. P. C. Or. XX r. 7**—*High Court—Original side—Decree of—The date of judgment and not the date of signature by—Registrar—Starting point of limitation for appeal.*

Decree of the High Court on the Original side also, like decrees of other Courts, bear the date of the judgment.

Consequently limitation for appeal should be calculated from that date and not from the date on which the decree is signed by the Registrar.

Ramey v. *Broughton* (I. L. R. 10 C. 652) followed.

Rahimtulla Saib v *The Official Assignee of Madras* (Sadasiva Aiyar J.) .. 560

————**art. 176**—*Previous suit dismissed for default*—See Procedure .. 148

Limitation Amendment Act 1900—See Municipality .. ..

Madras Estates Land Act (Act I of 1908) S. 3 cl. 11—*Rent—Definition—Actual use for agricultural purposes, not essential—Right to use—Test.*

The definition of rent in S. 3 cl. (11). Estates Land Act does not require that the ryot in possession should actually use the land for agricultural purposes. Irrespective of the use to which the ryot puts the lands, he is liable so long as his right to use it for agricultural purposes subsists and what he is so bound to pay is rent.

Appalaswami v. *Rajah of Vizianagaram* (Benson and Sundara Aiyar JJ.) 50

Madras Heriditary Village Offices Act (Act III of 1895) Sec. 5—*Applicability of—Inams in proprietary estate within Sub. cl. 4, S. 3.*

S. 5 of Act III of 1895 is applicable to emoluments of hereditary offices in a proprietary estate of the classes mentioned in sub-clause 4 of S. 3. *Mutyala Bapayya* v. *Kosuri Muramullu* (1912 M. W. N. 7) approved. *Veerabhadran Achari* v. *Suppiah Achari* (I. L. R. 33 M. 488) overruled.

Kandappa Achary v. *Vengama Naidu.* (F.B) 42

Madras Regulation XXV of 1802—*Sannad granted in common estate if impartible*—See Hindu Law 386

Madras Rent Recovery Act (Act VIII of 1865)—*Patta and muchilika, exchange of—Between Zamindar and ryot—Fresh exchange between farmer and ryot, for the same fasli—Not essential.*

The provisions of Act VIII of 1865 (Madras Rent Recovery Act) do not require the exchange of a second muchilika and a second patta between the ryot and the farmer of the land under the Zamindar when for the same fasli, a patta and muchilika have already been exchanged between the ryot and the Zamindar.

China Jagayya v. *Narasimham* (Miller and Sadasiva Aiyar JJ.) .. 15

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Mahomedan family following Hindu Religion.—*Ancestral property—mortgage by males—Liability of females*—See Mortgage .. 55

Mahomedan Law—*Wakf—Graveyard—User—Dedication—Punjab Land Revenue Act (XVII of 1885) Sec. 44.*

Suit for declaration that a piece of waste land was *wakf* and consequently inalienable. From time immemorial, it was being used by the Mahomedan community for burying their dead. There was no evidence as to when or how it was originally set apart as a burial ground. A probable origin was that a lady revered as a saint having been buried there in the 12th century, Mahomedans began to bury their dead in the waste land about the tomb. In 1858 at a public meeting called by public authorities a resolution was passed that the particular place was to be an open graveyard. The resolution was sanctioned by the Government and in 1867 burial in other than recognised places one of which was land in dispute was prohibited.

In the *Record of Rights* the place was described as graveyard in the possession of Mahomedans but the defendant was described as owner.

Held :—*Agreeing with the Chief Court that* the land in suit was a graveyard set apart for the Mahomedan community and *that* by *user*, if not by *dedication*, the land was walkf :

That by force of S. 44 of the Punjab Land Revenue Act the entry in the Record of Rights was conclusive.

That the defendant was properly described in the Record of Rights as owner as he was the trustee and custodian of the shrine of the saint buried there.

Hassan Baksh v. *Ilahi Baksh* (P.C.) 61

Maintenance—*Marumakkathayam law—Children governed by—Living in Tarwad house—Well-to-do Tarwad refusal to live with father—no ground for disallowing maintenance*:—See Cr. P. C., S. 488. .. ..

————*Step mother—Charge on both sons and step-sons shares.*—See Hindu Law .. ..

Malicious prosecution—Cr. P.C. Ss. 200, 202, 204—Chapter XVI, *object of—Separation of unfounded from substantial cases—Notice of inquiry under S. 202—Not contemplated by Cr. P. C.—No prosecution—Commencement of Prosecution—Issue of process—Meaning of—Warrant or summons after entertainment of complaint.*

Where on a complaint by the defendant accusing plaintiff of defamation the Magistrate issued a notice to plaintiff and held an inquiry under S. 202 Cr. P. C. and after hearing counsel for both parties dismissed the complaint.

Held : that on these facts there was no prosecution and a suit for damages for malicious prosecution was unsustainable.

Prosecution of the accused under the Criminal Procedure Code commences with the issue of process after the complaint has been entertained by the Magistrate and prior proceedings constitute at most only an attempt to prosecute the accused.

Notice that a preliminary inquiry would be held in respect of a complaint is a mere intimation that the Magistrate intends to take action and does not amount to an issue of process to the accused.

Malicious prosecution—(*Contd.*) PAGE.

Proceeding against the accused commence ordinarily with a summons or warrant, and a hearing of the accused before such summons or warrant is not authorised by the Code and could not be attributed to the defendant so as to render him responsible for any damage caused thereby to the plaintiff.

The object of the procedure prescribed by Chapter XVI Cr. P. C. is the separation of unfounded from substantial cases at the outest and to prevent innocent persons from being brought into Police Courts and subjected to the annoyance of frivolous charges and this object would be frustrated by a preliminary hearing of the accused.

Golapjan v. *Bholanath Khettry* (1910) I. L. R. 37 C. 358, *De Rozario* v. *Gulabchund Anandjee* (1911) I. L. R. 38 C. 880 followed.

Sheik Meeran Saib v, *Ratnavelu Mudaly* (Bakewell J.) 1

Marriage—*Whether a necessary samskaram—Father's duty to perform marriage of sons*—See Hindu Law .. ..

Married Woman's Property Act—See Insurance 65

Matadipathi—*Position and Powers of—Corporation sole*—See Mutt ..

Material alteration—*Conversion of negotiable into non-negotiable instrument—Alteration with the object of enabling a party to sue upon it—Change of circumsatances—Institution of suit in Court where suit should have been brought on document in original condition—Effect of—Negotiable Instruments Act (XXVI of 1881) S. 87.*

Defendants' father, a resident of Mysore executed in Mysore two instruments in favour of plaintiff, also a resident of that place. The parties having subsequently come to reside in Madras a suit was instituted upon those documents on the original side of the High Court. At the time the documents were let in evidence, they were found torn and mutilated, the effect of the mutilation being that the words "or order" disappeared from the documents. The alterations were made with the obvious purpose of enabling the plaintiff to sue upon the documents in Mysore which she could not have done in their original condition as they were insufficiently stamped. *Wallis J.* dismissed the suit holding that the documents were materially altered and therefore the defendants were not liable on them. On appeal, it was contended that a suit could have been brought upon the documents even in their original condition in Madras and therefore the alteration was not a material alteration.

Held, overruling the contention, that the alteration was material and the documents could not be sued upon.

An alteration which has the effect of converting a negotiable instrument into a non-negotiable one is a material alteration.

An alteration made with the purpose of enabling a party to sue upon the document in the Court in which it was expected at the time the alteration was made that the suit would have to be brought does not cease to be material because in the events that subsequently happened, the party came to be entitled to institute the suit in another Court where a suit could have been maintained upon the document even its original condition.

The rule and the policy of the rule with regard to material alteration of documents stated and discussed.

Gourchandra Das v. *Prasanna Kumarchandra* (1906) I. L. R. 33 C. 812 followed.

Lakshmammal v. *Narasimharaghava Aiyangar* (White C.J. & Oldfield J.) 572

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Minor co-parceners—*Partition—Consent of adults representing each branch—sufficient*—See Hindu law .. ..

Mitigation of damages—*Rule as to applicability in Contracts and Torts and difference between*—See Damages .. ..

Mortgage decree—Order 34 rr. 12, 13—*Proceeds of sale—Order of appropriation—Costs, interest and principal—Presumption that Court did its duty—Right of third party interested to insist on appropriation according to law.*

Though the rule contained in O. 34 r. 13 in terms applies only to cases covered by r. 12, the principle of the rule applies to all sales held in execution of mortgage decrees and the order in which payment is to be made out of the sale proceeds, is, costs first, interest next and lastly the principal.

The benefit of the rule can be taken advantage of also by a person who along with the mortgagor has been made liable for the costs of the mortgagee.

Where the Court made an order directing payment out to the mortgagee without indicating the order in which appropriation should take place.

Held :—The duty of applying the proceeds being in the Court, the Court must be presnmed to have done its duty in the matter and followed the rule of law applicable to the case.

Sabapathi Pillai v. *Chokalinga Pillai* (Benson and Sundara Aiyar JJ.) .. 552

Mortgage—*Payments to be made by mortgagee annually—Duty to give credit at the time of redemption—Limitation—Continuing liability during the mortgage.*

So long as the relationship of mortgagor and mortgagee continues, the obligation of the mortgagee to make all payments provided in the mortgage deed subsists and at the time of redemption, the mortgagor is entitled to insist on credit being given for all arrears in respect of them.

The fact that the payments were to be mnde at the end of every year and more than six years have elapsed from the due dates does not take away this right.

Parasurama Pattar v. *Venkatachalam Pattar* (Benson & Sundara Aiyar JJ.) 561

————*Mahomedan family following Hindu religion—Ancestral property—Mortgage by males—Management by males—Other transactions by males—Representation by, of females—Inference of—No misleading by females—No liability.*

The male members of a Mahomedan family executed a mortgage of ancestral property to the plaintiff. The family was one which in matters of worship had adopted the Hindu religion. There was no evidence however of any custom in the family varying the Mahomedan law of inheritance. Plaintiff took the mortgage under the impression that the Hindu law of descent prevailed in the family and that the female members had no interest in the property. He made no inquiry of the female members or of their husbands. They were *pardanashin* ladies and naturally had left the management in the hands of the males. The mortgage was given for the benefit, and protection of the whole property. Because the females had not actively interfered with the property and it also appeared that in other transactions the male members had dealt with the family property without the active concurrence of the females, the High Court

Mortgage—(*Contd.*) PAGE.

held that the male members 'represented' the females in the transaction and the mortgage could be enforced against them. *Held*, on appeal.

That the decision of the High Court was against all principle and authority and that in the absence of any proof that the ladies had misled the plaintiff either by word or conduct their shares could not be held liable.

Azima Bibi v. *Munshi Shamalanand* (P.C.) 55

————*Payment to one of two co-mortgagees—Valid discharge—Production of mortgage deed by mortgagor—Onus of proof of discharge—Shifting of—Admission in written statement of co-mortgagee—Relevancy of—Evidence Act Ss. 17, 19, 21,—Pleadings—Object of—Finding on issue—Practice.*

Payment to one of two co-mortgagees is a valid discharge of the mortgage debt; *Mannava Annapurnamma* v. *Akkaya* (1913) 24 M.L.J. 333 (F.B.) followed.

Plaintiff's assignor and the 10th defendant were co-mortgagees under the suit bond. Plaintiff sued to recover half of the amount due alleging that they were each entitled to a half and the 10th defendant had collected her half. Defendants 2 and 7, subsequent alienees of the property from the 1st defendant, mortgagor, pleaded that the 1st defendant had paid off the mortgage to the 10th defendant and produced the mortgage bond bearing an endorsement of discharge purporting to be made by the 10th defendant. 10th defendant supported defendants 2 and 7 and further pleaded that the whole money belonged to her. Plaintiff did not admit the genuineness of the endorsement. Defendants produced no evidence to prove discharge.

Held : the production of the mortgage deed by defendants 2 and 7 raised the presumption that the debt has been discharged and it lay on the plaintiff to rebut the presumption.

Held by Sadasiva Aiyar J : The admission by the 10th defendant in her written statement was evidence under S. 19 of the Evidence Act of the discharge and the fact that her statement was not marked as an Exhibit did not matter as the statement had been relied on in Lower Courts.

Where no other evidence is adduced in a case except written admissions in pleadings, it is advisable that such record should be marked as Exhibits and then referred to as evidence in the judgment of the Court.

Per Tyabji J. The statement of the 10th defendant was not an admission within the meaning of S. 19 and even if it was, as it was not relevant under S. 21 or any of the succeeding sections, was not admissible in evidence against the plaintiff.

Statements contained in pleadings do not prove themselves and some proof must be given of them before they can be considered part of the evidence in the case.

S. 58 of the Evidence Act cannot be relied upon as making it unnecessary to prove statements.

The object of pleadings is to bring the parties to an issue. They can and must be looked at only for one purpose *i.e.*, to be informed of the allegations and contentions of the parties. They cannot be taken as proof of those allegations and contentions.

An admission in a pleading is a different thing from such an admission as is contemplated in the 17th and the succeeding sections of the Evidence Act,

Mortgage—(*Contd.*) PAGE.

By an admission in pleadings is generally understood a concession made by one of the parties that a fact alleged in the pleading of the opposite party need not be proved. It narrows down the question before the Court.

Per curiam : There must be a specific finding on each issue in the form of a categorical reply to the question involved.

Appavu Chettiar v. *Nanjappa Goundan* (Sadasiva Aiyar and Tyabji JJ.) 329

———*Transferee of decree—Subsequently purchasing a share of redemption—Effect of—Right to recover proportionate share of decree amount —Co-mortgagor discharging encumbrance, right of—Difference between.*

Where one of two mortgagors discharges an encumbrance binding on both, the mortgagor doing so could not recover from his co-mortgagor more than the proportionate share of the amount actually paid by him.

The case is different where the transferee of a mortgage decree subsequently becoming the purchaser of a share of the equity of redemption sues the other sharers. His rights as decree-holder which had became complete before his purchase of the equity of redemption could not be affected or curtailed by it and he is entitled to recover the proportionate share of the decree amount and not merely of the amount paid by him for the transfer of the decree.

Suryanarayana v. *Sriramulu* (Benson and Sundara Aiyar JJ.) .. 16

———*Usufructuary mortgage and lease—Construction of—Lease on favourable terms—Not simple mortgage, notwithstanding—Evidence admissibility of—Evidence Act, S. 82—Negotiations and preliminary Conversations—Unregistered agreement, varying mode of application of rents provided in registered mortgage—Admissibility of—Registration Act (III of 1877) S. 48—Diminution of security by adverse title—Knowledge of circumstances, effect of—Transfer of Property Act.*

Where a mortgage provided that the mortgagee should take the profits in lieu of interest but the High Court iufluenced by negotiations and conversations alleged to have taken place before the mortgage was executed and by the circumstance that by a deed practically contemporaneous with the mortgage the property was leased back to the mortgagor for the period of this mortgage on very favourable terms at a rent which worked out at 6 per cent. per annum on the sum secured came to the conclusion that the security was intended to be a simple mortgage carrying interest at the rate of 6 per cent.

Held :—That it was no more permissible in India than it is in England to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations.

That the mortgage and the lease were part of one and the same transaction but that there was no inconsistency between them, and

That the mortgagee was entitled to the whole profits while the property was in his possession after the mortgagor gave up his lease.

An unregistered document varying the mode in which rents and profits of the property are dealt with in a registered deed of mortgage is under the Indian Registration Act, inadmissible in evidence.

Mortgage—(*Contd.*) PAGE.

Where part of the property expressed to be mortgaged was withdrawn from the security in consequence of a successful claim by the mortgagor's sister but it appeared that when he took his security, the mortgagee was aware of the circumstance of the property and the possession of the mortgagor's family;

Held that the Transfer of Property Act S. 65 cl. (*a*) on which reliance was placed (whatever the construction on that section may be) could have no application when the mortgage was executed before the date of the Act, though there was further charge later in date and the mortgagee was not entitled to damages for the diminution of his security.

Saiyed Abdullah Khan v. Saiyed Basharat Husain (P. C.) 91

Municipality—*Street—Adverse possession—Loss of title, effect of—Limitation Amendment Act, 1900—District Municipalities Act S. 168—Right to demolish structures erected.*

Power to remove encroachments conferred by S. 168 of the District Municipalities Act is confined to streets vested in the Municipality.

Where a portion of the street vested in a Municipality becomes lost to it by adverse possession, it ceases to be a portion of the street and the Municipality can no longer direct the removal of any structure upon it; *Basaveswara Swami* v. *Bellary Municipal Council* (23 M. L. J. 479) distinguished.

Twelve years' adverse possession before the Limitation Amendment Act, 1900 is sufficient to confer a title against the Municipality.

Chairman, Municipal Council Srirangam v. Subba Pandithar (Sadasiva Aiyar and Tyabji JJ.) 297

Mutt—*Permanent lease by the holder—Not operating to the detriment of the up-keep of the mutt—Not void, but good for the life time of the grantor—Voidable by successor—Ratification good for life of ratifier—Prescription against—Matadhipathi—Position and powers of—Corporation sole—Revenue sale—Notice absence of—Sale only irregular and not without jurisdiction—Limitation—Revenue Recovery Act (Act II of 1864) S. 59—Limitation Act (Act XI of 1877) art. 12.*

There is no justification for the view that each Matadhipathi has an independent life estate and as such is not bound by any prescription by which his predecessor might have lost title to the property.

A permanent lease by a Matadhipathi which does not operate to the detriment of the upkeep of the Mutt is after the manner of widow's alienations good for the life time of the grantor and may be ratified by his successor so as to validate it for his life.

Where, therefore, a Matadhipathi granted a permanent lease in 1872 leaving enough for the up-keep of the mutt and on his death in 1890, his successor elected to ratify the lease by accepting rent.

Held that a suit brought by a succeeding trustee within 12 years of the latter's death was not barred.

Abhiram Goswami v. *Shyamacharan Nandi* (36 C. 1003) and *Narsaya Upada* v. *Venkataramana Bhatta* (23 M. L. J. 261) followed.

Quaere: Whether the suit would not have been barred if the lease operated to the detriment of the upkeep of the mutt.

Mutt—(*Contd.*) PAGE

Nature of the Matadhipathi's interest in Mutt properties and his powers discussed. *Vidyapurna Tirtha Swami* v. *Vidhyanidhi Tirtha Swami* (27 M. 435) referred to.

Per Sadasiva Aiyar J :—Comparison of the Matadhipathi's position to that a corporation sole is misleading.

Where the lessees in occupation having failed to pay the local cesses payable by the Mutt the property was sold by the Government without issuing notice to the Mutt.

Held that the sale was only irregular and not one made without jurisdiction and as the time prescribed for setting aside the sale (whether under S. 59 of Act II of 1864 or under Art. 12 of the second schedule to the Limitation Act) had elapsed, the purchaser's title was complete and a suit for possession of the land is not maintainable at the instance of the mutt (though within 12 years of the sale).

Muthusami Iyer v. *Sree Methanithi Swamiyar* (Miller & Sadasiva Aiyar JJ.) 393

Natural guardian—*Competency to Act—When guardian ad litem refuses to Act*—See C. P. C. Act XIV of 1882 140

Natural right—*Owner of upper and lower lands—Right to let water flow on the lower land—Injunction—Easements Act, S. 7 illustration (a)—Conflict of natural rights.*

The right of the owner of an upper land to let his water run naturally into the adjacent lower land is a natural right and an interference with the exercise of such right entitles him to an injunction against the person interfering.

Whether in any case the owner of the upper land has exceeded his rights must be determined upon the facts of each case.

Mahamahopadhyaya Rangachariar v. *The Municipal Council of Kumbakonam* (29 M. 539) distinguished, *Sangana Reddiar* v. *Perumal Reddiar* (1910 M. W. N. 545) not followed. *Smith* v. *Kenrick* (7 C. B. 566) and *Subramania Iyar* v. *Ramachandra Row* (1 M. 335) followed.

The owner of the upper land is not entitled to do anything that will throw on the lower land, water which would not have naturally gone there.

Smith v. *Anderson* (47 Am. Rep. 148) followed.

Plaintiffs and defendants were neighbouring land owners engaged in agriculture, plaintiffs owning the upper land and defendants the lower. The defendants erected a bund which prevented the water that fell on plaintiffs' land from flowing on to their land. The Judge dismissed the plaintiffs' suits following the decision in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam* (29 M. 539). *Held* reversing the judgment that plaintiffs were entitled to an injunction restraining the defendant.

Quaere : Where is to prevail where there is a conflict between the right to build and the right to let water flow.

Sankarappa Naicker v. *Rani Nachiar* (Sankaran Nair and Oldfield JJ.) .. 276

Negotiable Instruments Act S. 28—*Agent—Signing the note in his own name—English Law and Indian Law—No difference—Promissory note—Construction—Practice—Plaint seeking to make party liable as agent—Additional issue as to liability as maker—Competent for the trial judge to raise.*

Negotiable Instruments Act—(*Contd.*) PAGE.

A pro-note was in these terms:—Promissory note executed to you both (1) Gopalaiyar and (2) Nagasamier * * *....by R. P. Koneti Naidu Garu * * * agent holding power of attorney from the Zemindar Dorai Rajah * * * and residing in Vellikurichi Village. * * *

Amount due to you * * * up to date upon settlement of accounts of dealings which was standing against the name of Rani Chakkani Ammal on cloths &c., having been purchased ere this for the Vellikurichi palace is Rs......On demand, I promise to pay......(Signed) R. P. Koneti Nayudu."

Held, on the construction of the note, that there was nothing therein to indicate that the executant signed as Agent or that he did not intend to incur personal responsibility that therefore he was personally liable.

Per Chief Justice and Oldfield J.—The law as to the liability of the agent signing his name to a pro-note is the same in England and in India. The Legislature intended in both enactments (English Bills of Exchange Act S. 26 and Indian Negotiable Instruments Act S. 28) to reproduce the Common law though the language used for the purpose of carrying out the intention is different.

In this case, the plaint sought to make the appellant liable only in the alternative i. e., if it was found that his representation as to agency was erroneous. At the hearing, on the application of the plaintiff the Munsif raised an additional issue as to the liability of the appellant as a maker of the note and gave a decree on that footing.

Held that under the circumstances, it was competent for the Munsif to raise the additional issue.

Koneti Naicker v. *Gopala Aiyar* (F. B.) 425

————**S. 87**.—See Material Alteration 572

Non-access—*Evidence of husband to prove, Evidence Act Ss. 118 and 120* —See Evidence 594

Occupancy right, *acquisition of—term lease—Act passed in the middle of the term—Effect of—Acquisition not prevented*—See Estates Land Act.

————*Question of fact.* See Inamdar 33

Onus—*Ejectment—Landlord and Tenant*—See Ejectment 95

————**of proof**—*Hindu law alienation by father—Immorality*—See Practice 281

Oudh Estates Act Ss. 2, 3, 8, 10 and 12—See Hindu law .. 34

Parties—*Suit by person not trustee—Substitution of trustee—Effect of—Validation of suit from commencement—Suit against ceased trustee—Validly appointed or not—Limitation—No bar of*—See Religious Endowments 452

Partition—*Expenses of upanayanum of brothers—Marriage of brothers and sisters—If to be provided for*—See Hindu Law.. 644

Partnership—*Acknowledgment by a partner—Trading partnership—Necessary or usual in—Not binding unless expressly authorised*—See Limitation Act, IX of 08, S. 19 501

————*Hindu joint family, a partner—Partition, effect of—Dissolution, natural incident of—Presumption of dissolution from ceasing of annual accounts and making of final account—Limitation Act, art. 106.*

Partnership—(*Contd.*) PAGE.

Where a Hindu joint family is partner in a business, a dissolution of the partnership is a natural incident of the division of the joint family interests. By the division, different personae arise in law and with these it is open to the stranger partner to say whether he should be allied in partnership or not.

When in a partnership annual accounts cease to be rendered and a final account showing division of both capital and revenue is made out the presumption is that there is a dissolution as at the definite date of the year in the account thus closed.

In a suit for winding up of a partnership in which the plaintiffs alleged their family had a share, it appeared that in 1891 there was a division in respect of some other family property and that in respect of the partnership also in that year a final account was taken and there was no further rendering of yearly accounts as was previously the case, or any interposition of the family in the partnership business. It also appeared that some time in 1901 the dispute between the plaintiffs and the defendant was arranged by a letter signed by the plaintiffs in which there was reference to a verbal arrangement by which they agreed to divide properties acquired with the partnership funds equally. Defendant's case was that there was a dissolution and a settlement of accounts in 1891 and that the plaintiff's claim was barred.

Held, that the dissolution of the partnership in 1891 was made out and the suit having been instituted more than 3 years from that date, was barred by limitation under art. 106 of the Limitation Act.

Joopoody Sarayya v. *Lakshmanaswamy* [P. C.] 128

Paternal Estate—*No difference between father's-self acquisiton and ancestral estate*—See Hindu Law 644

Patta and Muchilika—*Exchange of between Zemindar and ryot—Fresh exchange between Farmer and ryot—Not essential*— See Madras Rent Recovery Act 15

Pedigree—*Proof of—Statement of deceased relative—Value to be attached to*. See Evidence 176

Pensions Act (XXIII of 1871) S. 6—*Certificate of Collector to sue—Cancellation by Board of Revenue—Leave to sue to establish annual payment from the Jaghir—Construction—Rules issued by Government—Board's Standing order—Ultra vires—Presumption of regularity of official acts—Application of.*

The Board of Revenue has no power to revoke a certificate issued by the Collector under Section 6 of the Pensions Act.

Gotghandi v. *Bhikambhat* (1899) I. L. R. 23 B. 676 followed.

Where a certificate was in these terms viz., "R is authorised to file a suit to establish the annual payment due to him from the net income of the Jaghir"

Held that the certificate authorised the plaintiff to institute a suit to declare his share in the profits but that it did not authorise a suit for the recovery of arrears or for accounts.

Per *Sadasiva Aiyar* J.—S. 14 relates to the framing of rules or bye-laws in connection with mere formalities of procedure and does not give the Government power to control the discretion of the Collector under S. 10 to issue a certificate.

Pensions Act—(*Contd.*) PAGE.

Held, accordingly, that the rules issued by the Government and printed at p. 125 of the Board's Standing Orders are *ultra vires* of the Government.

Held also that the said rules cannot be considered as framed by the Board with the consent of the Government.

In the absence of a statement in the rules themselves to that effect and in the absence of any words in the section that the rules should be issued by the Government after they consent to the rules framed by the Board there is no scope for inferring by the application of the presumption that all official acts have been done in accordance with law that the rules were issued by the Board with the consent of the Government under S. 15 of the Act.

Subba Row v. *Rama Row* (Miller and Sadasiva Aiyar JJ.) .. 155

Permanent Lease—*By the holder of mutt not operating to the detriment of the upkeep of the mutt—Not void—Good for the life time—Voidable by successor.* See Mutt 393

Pleader—*Professional conduct—Appearance in proceedings under S. 145 Cr. P. C.—Whether bar to appearance in civil suit arising out of it, for opposite party.* See Civil Rules of Practice, Rule 277 567

Pleading—*Conversion of suit in ejectment into one for redemption by defendant.* See Limitation Act S. 19 101

———*Object of—Finding on issue—Practice.* See Mortgage 329

Practice—*Adultery—Alleged adulterer not joined—Court has no power to add co-respondent without directing amendment of petition.* See Evidence... 594

———*Appellate Side Rule 1, Original Side Rule 335—Applicability of—Single Judge in Admission Court—Admission of original side appeal—Competency of—Notice to respondent. Notice by appellant's Vakil validity of—Notice under court's seal &c., necessity for—Order without notice Nullity or only irregular—Inaction, effect of—Hindu Law—Alienation by father—Immorality—Onus of proving—Frame of issue—Party accepting burden—Can't question in appeal—No duty in Court to hear defendant's case when plaintiff makes no case.*

Under Rule 1 of the Appellate Side Rules of Practice a Single Judge sitting in admission has power to excuse delay in the presentation of an appeal whether the appeal is from the original side of the High Court or from a Mofussil Court.

It is not incompetent to the judge disposing of the application to direct notice to the respondent before he finally disposes of the matter and an order made after such notice is binding unless it is brought up on appeal or by notice of motion before the Appellate Court.

The irregularity in the service of notice is waived by the party having notice appearing and contesting on the merits.

Per Chief Justice: Rule 335, Original Side Rules applies only to applications made after an appeal has been admitted and does not apply to an application to excuse delay in filing the appeal and notice by the appellant's vakil over his signature given to the respondent is sufficient notice under the law.

Practice—(*Contd.*) PAGE.

A party who has had notice of a proceeding but fails to attend on the ground that the notice is irregular is bound by the order unless he appeals against it or somehow gets it vacated.

A judge who makes an order under S. 5 of the Limitation Act excusing delay in the presentation of an appeal is not adjudicating on the appeal, *Hussain Begam* v. *The Collector of Muzzufurnagar* [1889) I. L. R. (11 A.176] followed.

Per Oldfield J:—There is no rule which provides for the bringing of a party before the court at the beginning of any proceeding or for his being informed of such proceeding otherwise than by a communication bearing the signature of the court or its officer and the court seal. A party is not bound by a notice which does not fulfil these requirements and an order passed in the absence of such notice is a nullity against him and need not be avoided by him.

An adjudication originally a nullity against a person only nominally a party to it cannot be validated against him by his mere inaction unaccompanied by positive conduct which raises an estoppel; *Baswantappa* v. *Ranu* (1884) I. L. R. 9 B. 86].

Semble:—Where an antecedent debt is established, the onus is on the son who seeks to impeach the alienation by the father (purporting to be for the discharge of the debts to show that the debt is tainted by immorality and as such the alienation is not binding against him.

Where on the form of the issues, a party accepts the onus and the finding is against him, it is not open to him in appeal to turn round and say that the onus was wrongly thrown on him.

Where the plaintiff fails to prove his case, the judge is not bound to hear the defendant's case; it is open to him to say there is no case for the defendants to answer and dismiss the plaintiff's suit.

Rathna Gramany v. *Veerabudra Aiyar* (White C. J. and Oldfield J.) ... 281

——*Judge's finding different from plaintiff's and defendant's cases—remand for trial on altered footing.* See Will 556

——*Plaint seeking to make party liable as agent—Additional issue as to liability as maker—Competent for the trial Judge to raise.* See Negotiable Instruments Act 425

——*Procedure—Revenue Courts—Estates Land Act—Suit one of several co-sharers—Making others defendants on their refusal to join—Maintainability.*

The general rule of procedure viz., that a person entitled to sue who refuses to join as a co-plaintiff may be impleaded as a defendant applies also to Revenue Courts.

Pramada Nath Roy v. *Ramani Kanta* (1907) I. L. R. 35 C. 331 (P. C.) followed.

In this case the suit by one of two co-sharers for rent making the other co-sharer a defendant was dismissed on the ground that the both of them should have been plaintiffs. *Held*, reversing the judgment, that the suit was maintainable.

S. 3 cl (5) of the Estates Land Act does not apply when two persons are admitted to be entitled as co-sharers, and there is no dispute that either of them alone is the landlord.

Mangalasami Thevar v. *Satayappa Porandan* [Sankaran Nair and Bakewell, JJ.] 351

Practice—(*Contd.*) PAGE.

———*Leave to amend on terms—Liberty to raise defenses as if plaint presented then—Plaintiff bound in the absence of slip—Limitation Act (Act IX of 1908) S.19—Acknowledgment—Plea of accord and satisfaction by agreement at earlier date—Effect of—Denial of liability coupled with the plea of set off and acknowledgment with plea of set off—Difference between.*

In 1909, plaintiffs sued the defendants for a sum of money. He sued defendants 1 to 3 as the legal representatives of a deceased partner, defendants 4 to 6 as the representatives of another partner and defendant no. 7 in his own capacity as partner. In February 1912, plaintiffs applied for leave to amend the plaint by altering the claim against defendants 1 to 3 into one against them in their personal capacity as partners. The Court gave leave on terms reserving liberty to the defendants to raise defences as if the plaint was field in 1912.

Held that the plaintiff was bound by the order and all the defendants could plead limitation as if the suit was filed in 1912.

Held also that in the absence of anything in the nature of a slip, the order could not be varied or cancelled on appeal.

Defendants stated in 1909 in their written statement that there was an agreement in 1907 that the plaintiffs' firm should receive from the defendants 25 p. c. of their dues in full satisfaction of their claims and that they were ever ready and willing to pay the same but that the plaintiffs made default. They also stated that the plaintiffs' firm had taken possession of certain goods belonging to them, that they were liable to give credit out of the value of those goods to the extent of 25 per cent. of the claim and that in any event the defendants' liability should be exonerated to the extent of the value of the goods.

Held that these statements were neither of them acknowledgments of liability in 1909 within the meaning of S. 19 of the Limitation Act so as to save limitation whether as regards the whole as regards the 25 per cent.

The plea of accord and satisfaction of the debt by reason of an agreement at an earlier date could not operate as an acknowledgment of a specific liability at the date the plea was put in.

An acknowledgment of liability coupled with a claim to a set off is a good acknowledgment under S. 19, Limitation Act but a denial of liability with a claim by way of set off in the alternative is not.

Sheik Meera Sahib and Co., v. *Sheik Naina* (White C. J. & Oldfield J.) .. 259

———*Privy Council—New point in appeal.* See Limitation Act.

Provincial Insolvency Act (Act III of 1907) S. 11—"*Unable to pay*" —*Meaning of—Assets exceeding liabilities—Abuse of process—Right to apply for adjudication—Difference between creditor's application and debtor's—C. P. C. Order 21 r. 40.*

An undivided member of a Hindu family applied to be declared an insolvent, alleging that his assets were much larger than his debts but that as his brother would not give him his share and a suit had to be filed, he was unable to pay his debts. The District Judge dismissed the petition.

Held, on appeal, that on the allegations in the petition the appellant could not be declared an insolvent.

A debtor is not entitled to an adjudication when his petition itself shows that his assets greatly exceed his liabilities.

Provincial Insolvency Act—(*Contd.*) PAGE.

What is meant by the expression "unable to pay his debts" in Sec. 11 is that the debtor has less realisable assets than the amount of his indebtedness.

A person cannot be regarded as unable to pay his debts merely because his assets are of such a nature that he cannot get hold of them easily for discharging his debts.

Acts of Bankruptcy are of three kinds, *viz.*, those which arise from dealings by a debtor with his property, those which consist of personal acts or defaults committed by him and those which arise from the condition of affairs showing him to be an insolvent. The essence of the first two classes of acts lies in the intention to avoid or evade the payment of debts. Neither of them affords ground for an application by the debtor.

If a debtor declares himself unable to pay his debts, that is an act which would justify a creditor in seeking to get an order of adjudication against him. It would not entitle the debtor to apply.

Ordinarily a debtor is entitled to apply only when his liabilities exceed his assets. But when he makes a statement to that effect, the court will accept it and will not decide by anticipation whether it is or it is not so. Even where he values his assets higher than his liabilities, the Court will not refuse to adjudicate him an insolvent when he says he is unable to pay his debts, if it appears from the petition or the evidence before the court that the assets are of a doubtful value or would take a long time to realise and in consequence have no appreciable present value.

The use of Bankruptcy laws by a debtor for his own convenience to get the property administered through Court is an abuse of the process of the Court and will not be tolerated.

The mere fact of arrest in execution of a decree does not entitle a debtor to an adjudication if he is not otherwise entitled to apply.

Where the Judgment debtor cannot get in his assets readily and is on that account unable to escape arrest, the proper procedure is to apply to the Court under Order 21, r. 40 C. P. C. under which the Court has a discretion to postpone arrest.

The object and policy of the Bankruptcy laws discussed.

Ponnusami Chetti v. *Narasimma Chetti* (Benson & Sundara Aiyar JJ.) 545

Presidency Insolvency Act S. 36—Object of—Cannot declare alienations voidable—S. 55—Title voidable from accrual of trustee's title—Proceedings under S. 55—To be determined in the ordinary way.

Property transferred by the insolvent 4 months before the order of adjudication (though under circumstances which might render the transfer voidable under S. 55 of the Presidency Insolvency Act) is not "property belonging to the debtor" within the meaning of S. 36 cl. (5). It is therefore not open to the court under that section on the examination of the transferee to declare the transaction bad under S. 55 and direct the delivery of the property to the Official Assignee.

The object of S. 36 is to enable the Official Assignee or any creditor who has proved his debt to obtain information with reference to the property belonging to the insolvent on which proceedings might be taken for the purpose of impeaching transactions which are voidable under the sections of the Act relating to voluntary transfers fraudulent preferences, and cognate matters.

In S. 55 of the Act, "void" means only voidable and the transaction is avoided not from its date but only from the accrual of the trustee's title.

In the case of *Re Brall: Exparte P. Norton* (1893) Q. B. 381 referred to.

Proceedings under S. 55 must be determined in the ordinary way i. e., by notice of motion supported by evidence which the other side has an opportunity of answering.

Abdul Khadar Sahib v. *The Official Assignee of Madras.* (White C. J. Oldfield J) 308

Presidency Insolvency Act S. 56—" Fraudulent preference"—Test of—Pressure, not sufficient—" Substantial, effectual or dominant motive "—Pressure notwithstanding, if payment would not have been made but for desire to prefer—Report of the Official Assignee—Evidence when—Only when Assignee authorised or empowered to report—Rule 116, Presidency Insolvency Act—Ultra vires.

The question for the court under S. 56 of the Presidency Insolvency Act when a payment to a creditor is impeached on the ground of undue preference is what was the substantial effectual or dominant view with which the debtor made the payment.

To protect the creditor, it is not sufficient that there was some pressure by him or previous to the payment. Even if the payment would never have been made but for such pressure it is fraudulent preference if it is also a fact that the payment would not have been made but for the desire to prefer him.

In re Bell [(1892) 10 Mor. 15 at 18] followed.

Semble Sec. 104 apart, the report of the Official Assignee is prima facie evidence of the matters reported only when the matter is one with regard to which the Official Assignee is directed or empowered by the provisions of the Act to make a report. In criminal proceedings, the report is not evidence though the Official Assignee is authorised by S. 104 to make a report for the purposes of prosecution.

Rule 116 if it is to be construed as making the report for any purpose evidence of the facts stated therein, is *ultra vires.*

Putting the report at its highest it is only evidence of the facts stated therein.

Abdul Khader Sahib v. *The Official Assignee of Madras.* (White C. J. & Oldfield J) 320

S. 90—C. P. C. (Act V of 1908) S. 24—Insolvency petition—Transfer from the High Court to District Court—Incompetent—District Court not " competent to try "—Inconvenience—Matter for legislature.

An insolvency petition presented under the Presidency Towns Insolvency Act and pending before the High Court cannot validly be transferred to a District Court to be disposed of by it, the District Court not being a court " competent to try " such application within the meaning of S. 24 C. P. C.

That sometimes " collusive " arrests are made within the High Court's jurisdiction to bring a case within the Presidency Insolvency act where it would have been more convenient to have the estate administered in the place where it is situate is a matter for the legislature to deal with and cannot justify a transfer of the insolvency application when made.

Provincial Insolvency Act—(*Contd.*) PAGE.

Srinivasa Aiyangar v. *The Official Assignee of Madras.* (White C. J. & Oldfield J) 299

Act (III of 1909) Ss. 103, 104—Offences under S. 103—Triable only by the Insolvency Court—Not cognisable by the Presidency Magistrate.

The Presidency Magistrate has no jurisdiction to try offences under S. 103 of the Presidency Towns Insolvency Act. They are the creatures of the Act and can only be tried by the Insolvency Court which is constituted into a special tribunal for the purpose with a special procedure of its own.

Lakshmi Narasayya v. *Narasimha Chari* (Sankaran Nair & Ayling JJ.) .. 577

Procedure—Inherent power of Court—Mistake of Court inadvertently made—Power to rectify—C. P. C. S. 151—"Abuse of process"—C. P. C. order 9—Inapplicability of, to deceased person—Dismissal for default—Principle of punishment—Death of plaintiff unknown—Power to restore suit on application by representative.

Rules and orders dealing with the case of the non-appearance of a suitor are inapplicable to the situation which arises when the suitor is dead. The principle of forfeiture of right in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default and can have no application to a dead person who cannot be said to commit default by not appearing.

When a suit was called on for hearing plaintiff was not present and the suit was accordingly dismissed for default. At the time the plaintiff was dead, a fact not known to the Court. Subsequently within six months of the death (the period limited by art. 176 of the Limitation Act, V of 1908), application was made by the plaintiff's son under O. 22, r. 9 to have his name substituted in place of his deceased father. The Court granted the application and directed the suit to proceed.

Held.—In view of the death of the plaintiff subsequently made known to the Court, the order of dismissal for default was wrong and to prevent an abuse of the process of the Court had ample power both under S. 151 C. P C. and under its inherent powers to set the matter right.

Quite apart from S. 151 C. P. C. Courts have inherent power to rectify mistakes inadvertently committed by them.

Bakhsh Singh v. *Habib Shah* (P. C.) 148

Presumption—Regularity of Official Acts.

See Pensions Act 155

Presumptive reversioner—Attestation by—Presumption of consent—Consent and ratification-effect.

See Limitation Act 219

Privy Council Practice—Concurrent findings of fact—Estate whether Raj.

See Hindu Law. .. 386

Privy Council, decision of, in an appeal not from an Indian Court, if binding.

See Bill of lading .. ..

Practice New Case on appeal.

See Limitation Act.

————Right of appeal against order setting aside sales under Ss. 311 and 312 C. P. C.

See C. P. C. Act XIV of 1882.

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Principal and Agent—S. 235 I. C. A.—Breach of implied warranty of authority damages, suit for.

See Limitation Act.

Prosecution—Commencement of with the issue of Process.

See Malicious Prosecution. 1

Prostitution, not a profession in the eye of the law.

See Cr. P. C. S. 488 349

Raj—*Estate whether—Question of fact or law.* See Hindu law 386

Rateable distribution—*Condition of*—See C. P. C. (Act V of 1908) S. 73 .. ..

Religious Endowment—*Temple—Trustee—Costs of litigation—Unsuccessful—Right to be reimbursed—Conditions of—Unsuccessful action by person believing himself to be trustee—Right to be paid—Limitation Act—Ss. 20, 22—Parties--Suit by person not trustee—Substitution of trustee—Effect of—Validation of Suit from commencement—Suit against ceased trustee, validly appointed or not—Limitation, no bar of—Civil Procedure Code S. 388—Order substituting party—Confirmed on appeal—Finality of.*

Where a suit was brought on behalf of a Devasthanam by a person who was not or had ceased to be trustee but non objection the proper trustee was substituted in his place.

Held that the substitution cured all defects in the suit with effect from the date of the institution of the suit.

Held also that such substitution did not involve the addition of a new party within the meaning of S. 22 of the Limitation Act, *Peary Mohun Mukerjee* v. *Narendranath Mukerjee*, [(1905) I. L. R. 32 C. 582,] confirmed on appeal in *Peary Mohun Mukerjee* v. *Narendra Nath* [(1909) I. L. R. 37 C. 229] followed.

Having regard to S. 588 C. P. C. the correctness of an order directing the substitution of a party confirmed on appeal cannot be impeached in Second appeal.

Sec. 10, Limitation Act applies to suits on behalf of the Devasthanam against a ceased trustee whether his right to the office was legally valid or not, *Sethu* v. *Subbamma*, (1887) I. L. R. 11 M. 274 and *Moosabbai* v. *Yakotabhai* [(1904) I. L. R. 29 B. 280] followed.

A trustee is entitled to be reimbursed out of the trust estate moneys which he spends on litigation which he *bonafide* believes to be in the interests of the trust including suits to defend or establish his own right as trustee, provided he has not been guilty of gross negligence or misconduct in instituting or conducting the suit.

An action brought against a person in unlawful possession of the office of trustee after having been validly dismissed by the committee is an action in the interest or the Devasthanam and the trustee who incurs the expenses of the action is entitled to be reimbursed in respect of the same.

The fact that the suit (which was brought under legal advice and under the immediate superintendence of a member or the committee well versed in litigation) failed ultimately on account of some technical defect would not deprive the trustee of the costs incurred in the suit.

Religious Endowment—(*Contd.*) PAGE

There is no authority for the position that a person believing himself to be trustee of a Devasthanam while really not entitled to the office has a claim against the Devasthanam for expenses incurred in bringing an unsuccessful suit against the trustee when the Court which decided the suit has not in its decree provided for his costs to come out of the trust funds.

Subramania Aiyar v. *Subba Naidu* (Benson and Sadasiva Aiyar JJ.) .. 452

————**XX of 1863, S. 10**—*Schemes of—Vacancy in Committee—Default by Committee to make election within 3 months—Procedure—Election by Committee—Declaration of validity by District Court—Effect of—Not tantamount to appointment by—Judicial order—C. P. C. S. 115—Power of High Court to interfere in revision.*

An order of the District Court under S. 18 of the Religious Endowments Act declaring an election held by the Temple Committee valid, is a judicial order and can be revised under S. 115 C.P.C. *Minakshi* v. *Subrahmanya*, 11 M. 26 distinguished, *Gopala Iyer* v. *Arunachellum*, 26 M. 85 followed.

Cases of orders by District Judge as *persona designata* and as Court distinguished.

Orders passed under Ss. 9, 14, 16 and 18 are also judicial orders similarly revisable.

The scheme of S. 10 of the Act is this, *viz.*, that in the first instance, vacancy is to be filled up by election ; if however there is default on the part of the Committee and no election takes place within the prescribed period, the appointment is to be made by the Court if it thinks fit or if it does not think fit to do so, it may order the remaining members of the Committee to make the appointment.

When the remaining members of the Committee make the appointment under direction of the Court, they do so as nominees of the Court and are not required to hold an election.

The rules framed under the Act do not make provision for the holding of an election after the expiry of three months.

An application was made to the District Judge of Tanjore under S. 10 of the Religious Endowments Act with reference to a vacancy in a Temple Committee. At the time more than three months had expired since the vacancy. The District Judge passed the following order. "It is the duty of the Committee to fill up the vacancy by election * * I therefore order that the vacancy be filled up by the remaining members of the committee." In the election that was held the 2nd respondent was returned as the successful candidate. On objection being preferred against the election, the District Judge held that the election was good.

Held : in the circumstances the order of the District Judge accepting the validity of the election was not tantamount to an appointment by the District Judge or an appointment by the Committee under the direction of the Court as required by S. 10 and as the course laid down in S. 10 had not been followed, the election was invalid.

Ramanuja Aiyangar v. *Anantaratnam Aiyar*, 6 M. L. J. dissented from. *Vasudeva Aiyar* v. *The Devasthanam Committee of Negapatam* (White C. J. and Oldfield J.) 536

Rent—*Definition—Right to use—test—Actual use for agricultural purposes not essential.* See Madras Estates Land Act 50

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Representation—*Male members left by females to manage estate—If representing females* See Mahomedan law 55

Res judicata—*Basis of Judgment in favour of a party—Application for execution—Decision that land is cultivable—Whether res judicata in restitution proceedings in respect of subsequent year's profits—Inconsistent position—Rule against—Improvements—The holder of a decree reversed, effected by—Cannot claim.*

Respondent got a decree against appellant for possession and for mesne profits. On appeal the decree was reversed. In the meanwhile respondent had obtained possession in execution as well as mesne profits. On the reversal of the decree appellant obtained re-delivery of the properties and repayment of the amount he had paid as mesne profits. The present application was for mesne profits during the period the respondent was in possession. The case for the appellant was that the lands were cultivable, and that the mesne profits should be assessed on that basis while the respondent's case was that they were uncultivable contrary to what he had set up in the previous proceedings. On the previous occasion appellant having failed to produce any evidence to his allegations, the Court had accepted respondent's contentions and assessed mesne profits on the basis that the lands were cultivable. It was contended for the appellant that either the decision in the previous proceedings operated as res judicata or that the respondent was estopped from taking up a position inconsistent with what he then took.

Held that the previous decision did not operate as res judicata and also that the respondent was not estopped.

The basis of the rule of res judicata is that the parties had the opportunity of fighting out their present quarrel on a previous occasion. The doctrine is not based on the intrinsic effect to be attached to an adjudication by the Court alone but on a rule of public policy that a question which has once been fought out should not be reagitated between them again.

It necessarily involves that the case of both parties is the same on both occasions.

A party *against whom* a judgment has been rendered is not permitted to show that it is erroneous whether as plaintiff or as defendant in a subsequent proceedings, but not a party in whose favour it is rendered ; the latter may be prevented from doing so where to permit will contravene the principle of not allowing a person to derive an inequitable benefit by adopting inconsistent positions : but the principle of res judicata has no application to such a case except where the subject matter of the two proceedings and not merely a point at issue is the same.

The rule against a party being allowed to take up inconsistent positions applies only where a party seeks to defeat his opponent by successive inconsistent positions as in *Ekhabar Sheik* v. *Hara Bewah*, 13 C.L.J 1 or when having obtained a benefit by adopting one position he afterwards tries to assume a different and contradictory position while retaining the advantage already obtained by his former position.

A party who alleges but fails to establish a certain state of facts is not estopped in a subsequent suit between the same parties and concerning the the same subject matter from alleging a different and inconsistent state of fact.

Res judicata—(*Contd.*) PAGE.

A party who is put into possession of properties under a decree of Court which is subsequently reversed is not entitled to be paid the value of improvements effected by him while in possession; *Mathumsa Rowthen* v. *Apsa bin* 21 M. L. J. 969 distinguished.

Velusami Naicker v. *Bommachi Naicker* (Benson and Sundara Aiyar JJ.) 324

Res judicata between co-defendants—*Test—Conditions under which defendant could appeal when suit dismissed—C. P. C. (Act V of 1908) S. 11—Competency of the original Court to try subsequent suit—Principles discussed—Combination of causes of action and institution of suit in higher tribunal—Effect of resjudicata not taken away—Negligence of guardian ad litem—Answer to plea of res judicata against minor.*

When a plaintiff cannot get at his right without the court trying and deciding a case between co-defendants, such decision will operate as res judicata in a subsequent suit between the co-defendants.

Cottingham v. *Earl of Shrewsbury.* 3 Hare 627 followed.

If a defendant is aggrieved by such adjudication he has a right of appeal notwithstanding the dismissal of the suit against him.

Krishna Chandra Coldar v. *Mahesh Chandra Saha,* 9 C. W. N. 584. followed.

For the purpose of determining whether or not the adjudication is appealable it is open to the parties to go behind the decree and see what really the adjudication was.

In a suit by a creditor of the present plaintiff and his father to declare that an alienation by the plaintiff's father in favour of the present plaintiff and the present defendant was in fraud of creditors, in the alternative for a declaration that the plaintiff's ½ share in the property was liable for the debt, the present defendant pleaded that the alienation was not in fraud of creditors and that the property belonged to herself exclusively and not the plaintiff also (who was made a co-defendant in the suit). The court held that the alienation was not in fraud of creditors. It also held on the alternative claim that the property belonged exclusively to the present defendant.

Held that that decision operated as res judicata as between the present plaintiff and defendant.

A party cannot deprive an adjudication of the force of res judicata by combining the claim litigated upon with other claims and bringing the action in a higher tribunal.

Negligence of the *guardian ad litem* is valid answer to the plea of res judicata against a minor party; *Lalla Sheo Churn Lal* v. *Ramnandan Dobey,* 27 C. 8 followed.

Ranganatham Chetty v. *Lakshmiammal.* (White C .J. and Oldfield J.) .. 379

————*Mortgage, suit upon—Decision that debt should be realised from one party only if another property insufficient—Bar to a suit for contribution by owner of latter against former.*

The decision in a suit by a mortgagee that the mortgage amount should be realised by the sale of property in the possession of one of the defendants and that the property in the possession of the other defendants should be proceeded against only in the event it becomes insufficient, bars a suit for contribution by the former against the latter.

Ramana Gounden v. *Ramalinga Mudaliar* (Sankaran Nair and Tyabji JJ.) 24

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Restoration of suit—*Dissmissed as for default of deceased plaintiff—Limitation Act art.)* 176—See Procedure .. .. ..

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South Canara—*Ownership in bed of natural stream—Burden of proof—Ownership of land on both sides of the stream, dealing with bed as property and slight diversion—Insufficiency of.*

In South Canara, the burden lies upon the person who alleges that the bed of a natural stream that passes through his land is his property to prove that it is so.

The circumstances relied upon, *viz.*, that the plaintiff happened to have lands on both sides of the stream, that he had dealt with the bed of the stream as his property in documents to which the Government was not a party and that at a point in the stream outside his lands, there had been a slight diversion were held to be insufficient to establish his ownership.

Krishna Bhatta v. *Secretary of State for India* (Benson and Sundara Aiyar JJ.) 161

Stamp Act—*Sec.* 2 (17) —*Mortgage*—"*specific property*"—"*Amount profits*"—"*Machinery, stock in trade*"—"*Declaration of trust*" *as security*—"*Letter of hypothecation.*"

An instrument recited that O in order that certain creditors of the firm of which her husband was the sole proprietor (whose executrix she was) may be repaid their debts, has entered into an agreement with the Bank of Madras by which the Bank has agreed to advance to O a certain amount on a promissory note to be executed by one B in favour of the firm and to be endorsed by the latter to the Bank upon the said O executing a declaration of trust of the machinery, plant etc., connected with the business. In consideration of the advance to be made by the Bank O declared that she held the machinery, plant etc., on trust for and on behalf of the Bank. After a provision as regards interest, full power was given to the trustee to use and employ the trust property and to replace sold portions etc. The substituted goods were to be included in the security. Finally there was a declaration that the trustee stood possessed of the net profits realised after payment of all expenses including a sum not exceeding Rs. 20,000 to be retained by the trustee, annually in trust to pay and apply the same in payment of sums advanced by the Bank.

It was argued that the document was only a declaration of trust in respect of net profits and as they were not "specified property" the document could not to construed as a mortgage.

Held that as there was an express declaration of trust in respect of the machinery etc., (whatever the extent of the beneficiary interest of the bank therein) and the document was a mortgage.

Stamp Act—*(contd.)* PAGE.

Held also :—that a formal declaration of trust could not be treated as a letter of hypothecation within the exemption in Art. 40.

Reference under the Stamp Act S. 46, (1887) I. L.R. 11 M. 216, referred to *Board of Revenue* v. *Orr* (F. B.) 613

———**Art. 5.**—*Loan to be granted on terms—Declaration that borrower would not encumber "Memorandum of agreement" test of—Mere offer, not though accepted, if acceptance not in writing.*

Under the Stamp Act both in England and in India, a written proposal or a written offer does not become subject to stamp duty by reason merely of a subsequent acceptance which is not in writing. In order to make a document liable to stamp duty as "an agreement or Memorandum of agreement." it must be evidence of an agreement ; the mere fact that it may be of assistance in proving a contract does not render it chargeable with stamp duty.

Carlill v. *The Carbolic Smoke Ball Company* (1892) L. R. Q. B. 484 *Chaplin v. Clarke*, (4 Ex. Reports 403, *Clay v. Crofts* [(1881) 20 L. J. (C. L.)] followed.

Where, according to the course of business in a bank, before money is advanced on pronotes, the would be borrower has to sign a declaration in the confidential register of the bank that he will not member his property until the bank debt is discharged.

Held : in the absence of anything to indicate the existence of completed agreement imposing an obligation on the bank to make the advance the declaration did not amount to an agreement or memorandum of agreement within the meaning of Art. 5 of the stamp Act and did not require to be stamped.

Quaere. If the entries would not require to be stamped if it appeared on the face of the entries that the signing of the declaration, the making of the note, the advance of the money were parts of one and the same transaction.

The Board of Revenue v. *The South Indian Bank Ltd.* (F. B.) .. 119

Statutes—*Retrospective operation of—Estates Land Act S. 17— Rent Recovery Act S. 7—Rule enacted a rule of procedure—Suit for rent for faslis prior to Estates Land Act—Maintainability of without tender of patta after passing of the Act.*

The rule enacted in S. 7 of the Rent Recovery Act (Act VIII of 1867) is merely a rule of procedure and does not affect the right of the land-holder to levy rent.

Held, therefore, that suits for rent instituted after the passing of the Estates Land Act are not liable to be dismissed on the ground of non-tender of patta though in respect of faslis prior to the passing of the said Act.

There is no distinction between cases where the change in the processual law imposes a new and further restriction on the prosecution of a substantial claim in the Court and where it takes away a restriction on such prosecution imposed by the older processual law.

G. Lee Morris v. *Sambamurthi Aiyar*, (1871) 6 M. H. C. R. 122, dissented from.

Retrospective operation of statutes explained and discussed.

Muthia Chettiar v. *Ramasami Chettiar* (Sundara Aiyar and Sadasiva Aiyar JJ.) 205

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Sundays—*Exclusion of—Stamp papers called and copy ready both on Saturday—Papers supplied and copy taken delivery on Monday—Time requisite for obtaining copies.* See Limitation Act (IX of 08) S. 12.

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Surrender—*Partial, validity of.* See Hindu Law 8

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Temple Trustee—*Costs of litigation—Unsuccessful—Right to be reimbursed conditions of—Unsuccessful action by person believing himself to be trustee right to be paid.* See Religious Endowments.

Tenant-in-common—*Never in possession—Purchaser from—Joint possession with other tenants-in-common—Not entitled to.*

Sadasiva Aiyar J. (*Tyabji* J. dubitante).

The purchaser of a portion of the common land from some of the tenants-in-common (who had never actual possession) suing for exclusive possession on the footing that the others had no right therein on failure to prove his right to exclusive possession will not be entitled to a decree for joint possession.

Watson & Co. v. *Ramachandra Dutt,* (1890) I. L. R. 18 C. 10 followed.

Narani Bhai Vagibai v. *Ramchod Premchand* (1901) I. L. R. 26 Bom. 141 distinguished

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Transfer from High Court to District Court. .. *District Court not competent to try—Insolvency petition—Incompetent.* See Presidency Towns Insolvency Act S. 90.

Transferer of decree—*Subsequently purchasing a share of redemption—Effect of.* See mortgage 16

Transfer of Property Act S. 43—*Alienation of service Inam lands—Applicability to.* 299

S. 43 of the Transfer of Property Act cannot be invoked in favour of alienee of service Inam land whose alienation is wholly void under the law.

Ramaswami Naick v. *Ramaswami Chetty* (1906) I. L. R. 30 M. 255

Narahari Sahu v. *Korithan Naidu,* (1911) 24 M. L. J. 462 followed.

Angannayya v. *Narasanna* (1907) 18 M. L. J. 247 dissented from.

Ramayya v. *Dhara Satchi* (Sadasiva Aiyar and Spencer JJ.) 635

———**S. 55**—*Vendor's lien—Contract to the contrary—Agreement to execute mortgage for purchase money—Effect of—Hindu law—Co-parcener's interest—Transfer of, to other co-parceners—Sale.*

Where a transaction between members of a Hindu joint family by which one co-parcener transfers his interest to the other of others, takes the form of a sale and is accepted as such by the other co-parcener, or co-parceners there is no reason why effect should not be given to it as a sale with all the incidents attaching thereto.

Under the Hindu law as it obtains in the Presidency of Madras, the interest of an individual co-parcener is property and can properly form the subject of a sale.

Will—(*Contd.*)

Their Lordships while expressing no surprise, looking to the state of the pleadings and particularly to the unqualified nature of the demand made in the plaint, that the High Court had simply dismissed the suit to prevent future litigation made a decree in favour of the plaintiff conditional upon his paying within a time to be fixed by the court what is found due on the mortgages in default directing the suit to stand dismissed.

Richard Ross Skinner v. *Kunwar Nannihal Singh* (P. C) .. *11*

———*Devise of ancestral property—Birth of son after will—death of son. leaving father owner validity of the demise.* See Hindu Law.

———*Document described as, by father—Construction—Family arrangement.* See Hindu Law.

———*Of deceased relative—Statement in—Pedigree—Proof of.* See Evidence.

———*Legacy—Disclaimer—Effect of—Indian Succession Act Ss. 91, 106 and 292—Legatee's right—Inchoate will—Executor's consent—S. 187.. Bars pleading of right as jus tertii—Practice—Judges finding different from plaintiff's and defendant's cases—Remand for trial on altered footing—Hindu Law—Dancing girls—Two of three sisters, not branch—Joint acquisition—Character of—Survivorship.*

In the Indian law, as under the English, disclaimer by the legatee prevents the legacy vesting in him.

The vesting contemplated by S. 19, Indian Succession Act is not such a complete vesting as to render the legacy incapable of being divested by a mere disclaimer.

The right of legatee is only an inchoate right till the executor's assent is given.

S. 187, Succession Act bars not only the legatee or some person claiming under him but also a stranger who pleads the right conferred by the will as a *jus tertii* for the purpose of defence.

The fact that plaintiffs admitted the existence of the will and its contents does not prevent to operation of the section when that admission is coupled with a denial of the validity of the will. The fact that their denial was based on one ground which has been held to be mistaken cannot alter the scope of the admission or disable them from taking ...

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INSURANCE POLICIES FOR THE BENEFIT OF WIFE AND CHILDREN.

The decision of the Full Bench in *Pokkunuri Balamba* v. *Kakareparti Krishnayya*[1] raises questions of some importance in Hindu Law. The questions that arose in this case were whether a life insurance policy effected by a Hindu husband and expressed to be for the benefit of his wife and children would come within the purview of S. 6 of the Married Women's Property Act III of 1874 or if not coming within such purview form part of the estate of wife and children and not of the husband (the assured in the case) under the Hindu Law. There was an earlier case (*The Oriental Government Security Life Assurance Ltd.* v. *Vanteddu Ammiraju*[2]) decided by *Benson* and *Sundara Aiyar* JJ. where their Lordships held that the Married Women's Property Act III of 1874 did not apply to Hindus and that apart from the Act there was no trust created in favor of wife and children. In that case not merely the policy was for the benefit of wife and children but the company also undertook to pay the amount to the trustee and in default of such trustee to the beneficiaries. The Full Bench in the recent case hold that S. 6 is applicable. The learned Chief Justice admits that by reason of S. 2 of the Act Ss. 4, 5, 7 and 8

under that head considers the applicability of S. 6 of the Married Women's Property Act and holds that it applies to the case before him being one in which the daughter of the assured claims an interest in the policy effected by him for the benefit of his wife and children. While he holds that S. 6 of the Act affects the rights and liabilities of the daughter though married who, it has been observed by the learned judge is not a married woman within the meaning of S. 2 he declines to deal with the question whether she acquires any interest and if so what interest under the policy.

In considering the question whether S. 6 of the Act applies we have only to consider the reasons assigned by the learned Chief Justice. His opinion seems to be first that unlike S. 10 of the English Statute of 1870 or S. 11 of the English Act of 1882 the Indian Act splits the subject matter contained in that section into two Ss. 5 and 6. S. 5 is concerned with an insurance effected by a married woman while S. 6 concerns itself with an insurance effected by a married man and that such splitting is consistent with an intention to make S. 6 applicable and S. 5 inapplicable to Hindus; secondly that S. 2 of the Indian Act only excludes its operation as regards 'married women', that such exclusion cannot operate as regards children, that the words 'married women' do not occur in S. 6 and that although the section is in the interests of wife and children its primary object is to enable a man to make provision for his wife and children by insuring his life for their benefit without executing a separate deed of trust. The learned Chief Justice observes: "The section enables a Hindu male to do something which but for the section he would not be able to do." With all deference, however, this is merely begging the question.

We are afraid the learned judges have not taken any note of the consequences which would follow upon the construction

heading does not apply to Hindus notwithstanding that the words "married woman do not occur in the section." The section speaks of the mutual relations of husband and wife and when we speak of the husband the wife, a married woman within the meaning of S. 2 is also necessarily referred to. S. 6 also speaks of husband and wife but it does not stop there; it speaks of children also. If the section had not dealt with children the learned judges would apparently have felt no difficulty in holding that the section does not apply to Hindus. Can the mere fact that the children are incidentally referred to in S. 6 make any difference? The primary object of the Act is to deal with married women and the mere fact that the issue of a marriage is also dealt with cannot affect the construction properly to be placed upon it. There is no reason to suppose that the Legislature by a side-wind intended to deal with persons who are governed by their own personal laws. If the section is intended to be for the benefit of wife and children as is admitted by the learned judges we must take it that by reason of S. 6 no rule of Hindu Law is affected by the operation of S. 2. We take it that the exemption to married woman necessarily takes with it the husband who is the married man. If the intention of the Legislature is to affect the rules of Hindu Law and the primary object of the Legislature is to enable a person to make provision for his wife and children and to modify the law relating to Insurance we fail to see why the section should be restricted to a married man. Again if the construction placed by the learned judges on S. 6 is correct it would follow that a policy of insurance effected by a husband who is a member of a joint Hindu family and expressed on the face of it to be for the benefit of his wife and children or any of them as the case may be will create a trust for the benefit of his wife or of his wife and children or any of them as the case may be notwithstanding the fact that the premiums may have been paid by the husband out of the joint family moneys or partly out of it or out of his own savings. That is interfering with the Hindu Law of joint family and to impute such an intention is really absurd especially when it is remembered that the Legislature in the Trusts Act II of 1882 was careful to state expressly that nothing contained in that Act affected the mutual relations of the members of an undivided family as determined by any customary or personal law. Again if the construction placed by the learned judges be correct and that therefore in the case of a Hindu a trust is created by S. 6 in favor of his wife or of his wife and children or any of them as the case may be a trust in favour of unborn children may be validly created although according to the

law as now administered that will be contrary to the Hindu Law as laid down in the *Tagore case* [1] Again, children may be males or females, if a female she may be married or unmarried. If a policy is effected by a Hindu father and the policy is effected to be for the benefit of his wife and the married daughter will S. 2 apply ? A married daughter is a married woman within the meaning of S. 2 and the wife also being a married woman will come within its operation. The Chief Justice and Mr. Justice *Sankaran Nair* do not seem to consider this question; but Mr. Justice *Tyabji* seems to think that a married daughter will not be a married woman. He says the expression "married woman" cannot refer to any one other than the woman married to the assured. Where he gets this we can hardly see. We therefore think that the best way to construe S. 6 is that the Legislature had no intention to affect the rules of Hindu Law and that the section therefore has no application to the Hindus.

It does not follow, however, that no trust has been created under the Trusts Act or under the general Hindu Law and it has therefore to be considered what is the nature of a policy effected by a Hindu for the benefit of his wife or of his children or of his wife and children or any of them. Before we discuss this question we have to state that although Mr. Justice *Sankaran Nair* refers to this question the question in the form in which we have raised has not been referred to the Full Bench and so the Full Bench has not dealt with it. Before proceeding to consider the question under the Indian Law it is well to consider the relationship of husband and wife under English Law. The relationship of husband and wife is so entirely different under English Law that it is unsafe to rely upon English decisions. According to English law husband and wife are one person and the property held by the wife at the time of her marriage as well as property acquired during coverture became the husband's property. Gifts by the husband to wife were also void at law ; See Halsbury's Laws of England Vol. XV Title 'Gifts' para 73 note (g) p. 399. Equity had to intervene and create separate property for the woman by its peculiar doctrine of trusts so that a gift by a husband to his wife is sometimes supported in equity as a declaration of trust. No such doctrine was at any time required under the Hindu Law notwithstanding the Hindu Law admits the theory that husband and wife are one person. The Hindu Law recognises the wife to hold property independently of her husband. A gift cannot therefore be void but can be given effect to without

1. (1872) 9 Beng. L. R. 377.

invoking to aid any doctrine of trust. In England statutes had to be passed for recognizing separate property in a married woman so that but for those provisions the wife can hold no separate property. It is otherwise however under the Hindu Law. Hence the fact that without S. 10 of the English Statute of 1870 or without S. 11 of the English Statute of 1882 no trust or gift can be recognised under the English Law has no force whatever in considering the matter under the Hindu Law. In *Cleaner* v. *Mutual Reserve Fund Life Association*[1] there is an observation of *Lord Esher* M. R. "that apart from the statute (Married Women's Property Act) no interest would have passed to the wife by reason of her being named merely in the policy" so that apart from the statute such a policy would not create any trust in favour of the wife. The above observation is relied upon by the learned judges in *Oriental Government Security Life Assurance Ltd.* v. *Vanteddu Ammiraju*[2] as applicable to a case arising under the Hindu Law. With all deference we should protest against this method of applying the English Law.

Where the insurance is made for the benefit of wife and children and the policy expressly declares that it is for the benefit of the wife and children of the insured the property in the same belongs to the wife and children under the Hindu Law and under any system of law which does not hold that the wife can have no property apart from the husband. No special words are necessary to create a trust under the Hindu Law. Under the Hindu Law no writing is necessary to create a trust or transfer of property. Illustration (*a*) to S. 6 of the Trusts Act shews that words such as the one pointed out will form a valid trust. But if the transaction amounts to a trust the question arises whether the provisions of Ss. 5 and 6 of the Trust Acts will apply. The Trusts Act applies to private trusts and S. 1 enacts that "nothing herein contained affects the rules of Mahomedan law as to *waqf* or the mutual relations of the members of an undivided family as determined by any customary or personal law or applies to public or private religious or charitable endowments * * *." According to this section the provisions of the Trusts Act do not affect the mutual relations of the *members of an undivided family* as determined by any customary or personal law. A father and son constitute a joint Hindu family and in such a case wives and other females will be members of the family under the Hindu Law. The Trusts Act does not say that the mutual relationship of the *co-parceners* is not affected so that we take

1. (1892) 1 Q. B. 147.

2. (1911) I. L. R. 35 M. 162 at 166.

it that the rules of Hindu Joint Family are not affected by the Trusts Act. A Hindu husband and wife without any issue and without the husband's brothers or other co-parceners can hardly be said to be the members of an undivided family although there is a potientiality of a joint family arising by birth of children. The Trusts Act only says that the mutual relations of the members of an undivided family are not affected by it. It is a question whether this has the effect of saving all the provisions of the Hindu Law of Joint Family so that it has to be considered whether a transaction between two members of a joint family amounting to a trust is to be governed by the Hindu Law or by the Trust Act.

S. 5 of the Trust Act enacts "no trust in relation to immoveable property is valid unless declared by a nontestamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee. No trust in relation to moveable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee." Insurance amount or the right created under the Insurance policy is not a right created in immoveable property. The question is whether the right created is moveable property within themeaning of the 2nd paragraph of the section. There is no definition of the words "moveable property and immoveable property" in the Trusts Act. So far as one can gather the provisions of Ch. II presuppose some existing physical property and it is therefore a question whether choses in action or rights to recover moneys under insurance policies can be said to be properties within the meaning S. 5. However it may be said that in the absence of a definition in the Trusts Act we shall have to look to the provisions of the General Clauses Act. In 1882 the General Clauses Act applicable was Act I of 1868. S. 2 cl. 2 of that Act enacted (after defining immoveable property under clause 5) that unless there be something repugnant to the subject or context moveable property shall mean property of every description except immoveable property so that it may be taken that under S. 5 of the Trusts Act rights of action conferred by Insurance policies are moveable property and that a trust in relation thereto can only be effected either by a non-testamentary instrument signed by the author of the trust or by the trustee in writing registered or by the will of the author of the trust or unless the ownership of the property is transferred to the trustee. It has been held by the Bombay High Court in *Madanji Devchand* v. *Tribhowan Virchand*[1] following the obser-

1, (1911) 13 Bom. L. R. 1121.

vations of Lord Romilly in *Bridge* v. *Bridge*[1] that there is a class of cases which although amounting to trusts do not fall within S. 5. This class of cases is described as follows: "If the stock stood in the names of trustees, and the beneficial owner of it executed, in favor of a volunteer, an assignment of such stock, and if notice of that assignment were given to the trustees, who acknowledged the validity of it and acted upon it, they would thereupon, through the act of the beneficial owner, become the trustees for the volunteer, and equity would enforce the due performance of that trust in his favour." The learned judges of the Bombay High Court go on to explain that "the cases referred to in the above passage are not confined to cases of written assignments by the beneficial owner, for example, in *M' Fadden* v. *Jenkyns*[2] a verbal message to a debtor desiring him to hold the debt in trust for another, when the trust was accepted by the debtor and communicated to *cestui que trust* was held to create a trust binding upon the personal representatives of the creditor." So that whereas in this case the Insurance Company for the amount insured by the husband agree to hold the amount payable under the policy for the benefit of the wife and children there is at least a complete trust within the meaning of the above decision enforceable as against the husband or as against the Insurance Company if they have agreed to pay to the wife and children under the policy. Under such circumstances the handing over of the policy to the wife and children is a sufficient communication to the *cestui que trust* so as to entitle him to take advantage of the transaction. Again it has been held by *Chandavarkar* J. in *Bai Mahakure* v. *Bai Mangla*[3] that where a husband deposits money in his wife's name in his shop he constitutes himself a trustee and that S. 5 only applies where the trustee is some other than the author of the trust that where the person constituting the trust holds himself as trustee there is no transfer and that therefore there is no registration necessary under S. 5. In the case of moveable property if the ownership of the property is transferred to the trustee no writing and therefore no registration is necessary. Thus the provisions of the Trusts Act do not prevent Courts from giving effect to the transactions of the nature noticed in the Madras case under discussion.

A further question arises as to the nature of the transaction *viz.*, whether it amounts to a gift or a trust. In either case the intention to create a benefit is necessary. It

1. (1852) 16 Beav. 315, 322. 2. (1842) 1 Ph. 153,
3. (1911) I. L. R. 35 B. 403.

may be a mere benami transaction. In *Narayana* v. *Krishna*[1] a husband purchased Government Promissory notes in the name of his wife and the High Court held that the presumption was that he ntended the notes to become her property. This case has been followed in *Narasimha Ammal* v. *Srinivasa Raghava Aiyengar*[2] and in *Diwan Ran Bijai Bahadur Singh* v. *Indar Pal Singh*[3] and it has been now definitely settled by the Judicial Committee that when property stands in the name of a female member of a joint Hindu family there is no presumption that such property is the common property of the family. As observed by the learned judge *Sankaran Nair* J. " in the Madras Presidency at any rate, there is an increasing disposition to make provision for the benefit of a person's wife, children including daughters as against his joint family, to whom his property would survive at his death, or as against the male heirs." It is more common in this Presidency and we may add that this is so especially in the case of those new kinds of property which have become familiar to us by our contact with the West, *i.e.*, Government Promissory Notes, Shares in Companies, Insurance Policies etc. In the case of a Mahomedan husband and wife a similar intention was given effect to in *Ebrahim Bhai Rahim Bhai* v. *Ful Bai.*[4] Assuming that there was an intention to give the benefit the question is whether it is a transaction of gift or trust. Whether it is a gift or trust the right of ownership is conferred upon wife and children and they become entitled to the property. The question whether a particular transaction is a gift or a trust is a difficult one. Different judges have taken different views of the same transaction. In *Bhai Mahakore* v. *Bai Mangla*[5] *Chandavarkar* J. held the transaction to be a trust while the other judge *Heaton* J. held there was no trust and held that a right was conferred upon the wife for the money so deposited. Whether a transaction falls under a particular head depends upon the particular circumstances and a discussion of these will be too long for being included in this article.

NOTES OF INDIAN CASES.

Moosa Goolam Ariff *v.* Ebrahim Goolam Ariff.—I. L. R. 40 C. 1.—The Judicial Committee held in this case following the judgment of Lord Cairns in *Peet's case*[6] and of Lord Chelmsford in *Oakes* v. *Turquand*[7] that a certificate of registration (or incor-

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1. (1884) I. L. R. 8 M. 214.
2. (1909) I. L. R. 33 M. 112.
3. (1899) I. L. R. 26 C. 871, 872.
4. (1902) I. L. R. 26 B. 577.
5. (1911) I. L. R. 35 B. 403.
6. (1867) L. R. 2 Ch. 674.
7. (1867) L. R. 2 E. & I. Ap. 325.

poration) by the Registrar of joint stock companies is conclusive for all purposes and courts cannot go behind it to consider any alleged defect in the formation or constitution of a company. . Their Lordships also point out that the language of S. 6 of the Indian Act apart from any English decisions plainly indicates that the statutory condition that the memorandum of association must be signed by seven persons is as much a condition of registration as any other requisition to be found in the Act which is preliminary to registration and apparently essential.

Kumed Bewa *v.* **Prasanna Kumar Roy.**—I. L. R. 40 C. 45.—The decision in this case that the omission to issue a notice under S. 248 of the old Code (O. XXI, r. 22) does not render a sale subsequently held void, can hardly be questioned though one cannot agree with all the reasoning adopted by the learned judges. If the case had come under the new Code, clause 2 of O. XXI r. 22 shows that the court is not bound to issue notice in all cases. We doubt whether the case is not one falling within the scope of O. XXI r. 90. Anyhow the object of issuing a notice is we take it to be; to see whether the decree debt is not discharged, or to give the judgment debtor time to discharge the debt. If execution is ordered without the issue of such notice we doubt whether the order directing execution can be set aside for want of notice if the judgment debtor does not offer to pay when he admits the decree debt has not been discharged. Anyhow after an order of attachment has been made if a judgment debtor has not chosen to pay or discharge his debt the order cannot be set aside for want of notice prior to attachment.

Sita Ahir *v.* **Emperor.**—I. L. R. 40 C. 168.—We think that the learned judges acted rightly in setting aside the conviction in this case on the ground that no charge was framed but we have doubts as to the construction placed by the learned judges upon Ss. 535 and 537 (*a*) Cr. P. C. We are afraid that the construction placed by the learned judges on S. 535 *viz.*, that it applied to a case where the offence being a petty one and the evidence being fairly taken, the Court framed no charge at all and not to a case where the Court has framed a charge, is far from satisfactory; but of course when the charge is of one offence and the person is acquitted of that offence and convicted of a totally different offence the conclusion of the learned judges that a failure of justice has been occasioned can hardly be gainsaid.

Prasanna Kumar Mookerjee *v.* Srikantha Rout.—I. L. R. 40 C. 173.—The learned Judges in this case held that in the case of a ghatwal the holder for the time being does not claim through the preceding holder and that therefore adverse possession under art. 144 affecting the predecessor cannot affect the present holder. Reliance is placed upon S. 2 of the Limitation Act and the decision of the Judicial Committee in *Ramachunder Singh* v. *Madho Kumari*[1]. The Privy council case referred to does not, however, support the contention. In that case there was no adverse possession against the predecessor and adverse possession was expressly stated to have commenced only at a time when the present holder entered office. The Privy Council held that under art. 144 possession became adverse from that date and starting from that date there was no adverse possession. The question therefore has to be considered upon general principles and that is whether a person who is the holder for the time being can represent the estate for purposes of limitation. If the estate is not one for life the Privy Council has held in *Gnana Sambanda* v. *Velu Pandaram*[2] that possession adverse against the holder for the time being will be adverse to the successors also. That principle will have no application when according to law there is a series of successive life estates and possession can become adverse *prima facie* against the holder for the time being only and not against others unless there is a general principle of law that the life estate holder represents his successors also for purposes of limitation, etc. The Limitation Act however does not contain any such general principle On the contrary article 140 of the Limitation Act seems to show that the successor will have 12 years to recover possession of immoveable property from the time the estate falls into possession. The position of mutt holder seems to fall under this category. See *Vidyapurna* v. *Vidya Nidhi*[3]. Apparently this case is authority for the view that the position of ghatwals is similar.

Raj Krishna Dey *v.* Bipin Behari Dey.—I. L. R. 40 C. 251.—We have been repeatedly pointing out the inconsistency of the reasoning adopted by the judges of the Calcutta and Allahabad High Courts in laying down the principle applicable in a case of default of nomination by the holder or the last trustee. In this case the learned judges following *Sital Das* v. *Pratap Chunder*[4] lay down three principles. The first two seem to

1. (1885) I. L. R. 12 C. 484 : L. R. 12 I. A. 188.
2. (1899) I. L. R. 22 M. 271.
3. (1904) I. L. R. 27 M, 435.
4. (1909) 11 C. L. J. 2.

be unquestionable. The third principle laid down is this: "Where a *Shebait* appointed by the founder fails to nominate a successor in accordance with the condition or usage of the endowment, the management reverts to the representatives of the founder, even though the endowment has assumed a public character." If the correct principle is that the right of management reverts to the representatives of the founder it is difficult to reconcile it with what is said by the learned judges immediately below. The learned judges say: "In the case before us, therefore, upon the death of the original *Shebait* it became incumbent upon the representatives of the founders to make an appointment to the office of Shebait." If the right of management reverts to the founder's representative why should they make an appointment because the right of appointment is a distinct thing from the right of management itself. It is also difficult to appreciate the principle enunciated in this case that where a right of appointment is vested in a number of persons all of them must be unanimous in making the appointment and that an appointment by the majority is invalid. If according to the instrument of the founder a unanimous resolution is required that is a different question but here is a case of no instrument of foundation. The principle applicable to a public trust is that a majority may appoint. We fail to see why the above principle should not hold good in the case of the exercise of a right of appoint nent.

Bhima Rout v Dasarathi Dass.—I. L. R. 40 C. 323.—We are surprised at the conclusion arrived at by the learned judges in this case. Even taking the view that the members of a new committee would not be proper parties their decision that S. 14 does not apply to a suit to remove a trustee under S. 3 is untenable, unsound and opposed to all the authorities. The learned judges say: "The Legislature could not have intended, that where there is a Committee which controls the trustee, manager or superintendent, a suit may be instituted not merely against the Committee, but independently of the Committee against the trustee, manager, or superintendent for his removal. The intention of the Legislature must have been to regulate and control the management of the endowment through the Committee. If the members of the Committee tolerated an unsuitable person as trustee, manager or superintendent, such conduct on their part would amount to neglect of duty and would make them amenable to the jurisdiction of the Court. In the present case, therefore, the suit could not have been instituted against the second defendant

alone." See however *Sital Das* v. *Pratap Chunder* [1], *Agri Sherma Embrandari* v. *Vishnu*[2], *Ponnambala Mudaliar* v. *Varaguna Rama. Pandia Chinnathambiar*[3], *Shanmugam Pillai* v. *Sankaremurti*[4]. In fact in many of the cases the contention was that that section refers to institutions falling under S. 3 and not to institutions falling under S. 4 so that there was no doubt felt as to the applicability of the former section to such cases. The learned judges do not refer to any of these cases nor to the language of S. 14 but to some supposed policy of the Legislature. The fact that the delinquent trustee would be amenable to the jurisdiction of the committee and the fact that the Committee itself would be guilty of breach of trust for neglecting to remove such delinquent trustee would not affect the jurisdiction of the Court to remove such delinquent trustee which jurisdiction the Court undoubtedly possessed before Act XX of 1863.

Subbayyar v. Moniem Subramania Aiyar. — I. L. R. 36 M. 8.—The learned judges in this case referred to some American authority for the position that when a grant of property is made on the consideration or condition that the grantee should maintain the grantor, the failure of the grantee to fulfil the condition entitles the grantor to avoid the grant, but they refused to follow the same as according to the learned judges the American decisions laid down a special equity which should not be imported into this country. The learned judges have not been referred to any Indian authority and in fact they say there is no Indian case. The principle laid down in the American decisions is to be found in the Hindu Law Texts and there are also earlier decisions upholding that principle. A passage in Narada dealing with the resumption of gifts supports this principle. As instances of invalid gifts he refers to a gift in expectation of a reward i.e., in respect of some service to be performed by the donee. Narada Ch. IV § 10 Sacred Books of the East Vol. XXXIII p. 130. See also Manu Ch VIII § 212, and various other texts to the same effect. The commentators and Digest writers equally recognise it. Colebrook's Digest vol. I, Macnaughten's Precedents case No. 15 at pp. 222, 223 and case No. 29 at p. 237 fully support this principle. We regret that the texts and authorities of Hindu Law have not been brought to the notice of the learned Judges. There is no special equity laid down in American Courts as peculiar to that country

1. (1909) 11 C. L. J. 2.
2. (1865) 3 M. H. C. 198.
3. (1872) 7 M. H. C. 117.
4. (1899) 10 M. L. J. 109.

although there may be no English cases exactly on the lines of the American authorities.

Sri Maharajah of Vizianagaram *v.* Veeranna, I. L. R. 36 M. 18.—We can hardly understand the headnote in this case. The objection taken was that the suit was of a small cause nature and that no second appeal lay. The appellant replied that the suit fell under Article 13 whch exempted or excepted certain suits from being cognizable by Small Cause Courts. The objection prevailed and the suit was held to be of a small cause nature. The learned judge held that a suit by the *Za*mindar to recover from the Inamdar the land cess was a suit of a small cause nature and did not fall under article 13. Apparently that is what was meant by the reporter in the head note.

Danakoti Ammal *v.* Balasundara Mudaliar, I. L. R. 36 M. 19. We think the learned Judges applied the correct principle in this case. Where a person has only a qualified authority and the validity of his or her acts depends upon the consent given by a third person such consent must have been given and obtained bonâ fide. Innumerable cases have established this principle. In the case of a widow making an adoption with the consent of the sapinda the validity of the transaction itself will depend upon the consent being bonafide. It is different in a case where the adoption is made by a full owner whose act does not depend upon the consent of a third person. In the case in I. L. R. 29 M. 160 apart from the distinction drawn by the learned Judges already referred to, it was the person who gave the child in adoption that received the money. That, however, is an immateiral circumstance so far as the question of adoption is concerned. It is by the act of receiving that a status is created and we have to look at it from the stand point of the person who makes the adoption. Of course if under the law the person giving in adoption is under any disability that is a different question. It is not necessary to consider whether the explanation of the learned Judges of the decision in I. L. R. 30 M. 450 is correct and whether it is really distinguishable from the case reported in 11 M. L. J. 20 or not.

R. P. Chelamanna *v.* R. P. Rama Rao. I. L. R. 36 M. 46. —We regret that the decision in this case can hardly be regarded

as an authority on the decision of the questions of law raised in this case or as settling the law in question. There is an obvious fallacy in the reasoning of the learned Judges and we are surprised at the learned Judges falling into this fallacy especially when they are dissenting from a previous Judgment of this court which also dealt with this question *viz., Natesa Chetti* v. *Vengu Nachiar*[1]. It may be remembered that in the previous case one of the learned Judges argued as counsel for the position now taken in the case under notice but it was, after an elaborate argument, overruled. That being so, one would have expected the learned Judges to have threshed out the question in all its aspects. We are bound to say with regard to the present judgment that it is by no means convincing nor can it be said to be a well-considered one. The learned Judges in dissenting from the previous case rely upon S. 49 of the Registration Act. We are afraid that it is begging the whole question. The learned Judges admit that one of the consequences created by the section is taken away. Apparently we take it that the learned judges intend to mean that that consequence is taken away by the other section. That apparently is the trend of their remarks as to the effect of the decisions of the Judicial Committee. That is how the learned Judges think that the remarks of the Judicial Committee can be supported. It needs hardly be stated that the the Judicial Committee say nothing of that sort and we cannot understand how their language can be plainer when they say in *Bindesri Naik* v. *Ganga Saharan Sahu*[2]. "They are satisfied that the provisions of S. 17 of the Act do not apply to proper Judical proceedings whether consisting of pleadings filed by the parties or of orders made by the Court." That being so S. 49 can have effect only in cases where a document falls under S. 17. The section begins by stating that no document required by S. 17 shall have the consequences stated in the section if the requirements of S. 17 have not been complied with. The Judicial Committee holding that decrees and orders of the Court do not come under S. 17 the consequences of S. 49 cannot follow if those pleadings and decrees and orders are not registered. That being so the learned Judges in I. L. R. 33 M. 102 are perfectly justified in their Judgment. It is not necessary to consider whether the term pleadings should be restricted in any way in order that such pleadings may be taken out of the category of S 17 or out of the effect of the consequences stated in S. 49. That is a comprehensive question which cannot be answered within the limits of a note. It

1. (1909) I.L.R. 33 M. 102. 2. (1897) I.L.R. 20 A. 171 at 180 (P.C.)

may be noticed that the learned Judges are inaccurate in stating that. the decision of the Allahabad High Court. (I. L. R. 28 A. 71) has not been followed in later cases. The two cases cited by. the learned Judges with regard to this view really do not support them. In the case in I.L. R.31 A. 13 there were only mutation proceedings before the Revenue authorities and the Allahabad High Court in that case held that the rule laid down in the decisions of the Judicial Committee did not apply. In the case in I. L. R. 32 A. 206 the decision in I. L. R. 28 A. was not referred to at all. Assuming therefore that a document is taken out of S. 17 of the Registration Act by reason of its falling within the principle laid down by the Judicial Committee as to which there is some conflict of opinion we must say that such a document cannot have the effect of drawing the consequences imposed under S. 49 by reason of that section. We hope to refer to this matter later on.

Devaraju v. Mahomed Jaffer Saheb, I. L. R. 36 M. 53 Although the Reporter's headnote in this case seems to take the decision as laying down a general proposition on the question of estoppel the learned Judges in this case lay it down only as applicable to the particular circumstances of the case. A person who is a *defacto* Dharmakarta sued a tenant on the basis of a rent deed executed by him for six years. During the period the rightful Dharmakarta had sued him and the defendant for possession and got a decree which declared him and not the person getting the rent deed as a rightful Dharmakarta. Here there was no question of estoppel under S. 116. It was only a question of estoppel by *res judicata* but apparently the point argued before the learned Judges was only an estoppel under S. 116. The person adjudged to be the rightful Dharmakarta had not executed the decree for possession but had accepted certain money payments from the person in wrongful possession in discharge of his claim for mesne profits. The present suit was by the person in whose favour the rent deed was executed against the tenant for recovery of rent. There is no plea of discharge to the rightful Dharmakarta; at any rate such a discharge was found against. Under the circumstances the learned Judges held that the tenant is liable for the rent.

SUMMARY OF ENGLISH CASES.

Hickman & Co.,: v. Roberts [1913] A. C. 229 (E.). and Bristol Corporation v. John Aird & Co.,: [1913] A. C. 241 (E.).

Building contract—Arbitration clause—Arbitrator siding with or influenced by one of the parties or necessary witness of matters in issue—Unfitness to arbitrate—Other party not bound by arbitration clause—Right of suit, even before final issue of certificate.

An engineer or architect paid by a building owner but appointed as arbitrator or referee to decide various matters of difference that may arise until the completion of the building contract, between him and the building contractor must, being an arbitrator, preserve that judicial independence which is required of him so as to do even justice between the parties. If he either sides with or is in a position to be influenced by the building owner or so conducts himself or becomes placed under circumstances that he is obliged to be at once a witness and a judge of facts in issue between the parties he is no longer fit to arbitrate; and the strict rule of law that parties must abide by the terms of their contract to refer to arbitration will not be applicable in such a case which if applied will certainly work to the manifest injustice of the contractor, who is under such circumstances entitled to be relieved of the necessity to submit to arbitration and bring his case to the adjudication of the ordinary tribunals of the land. The contractor is then entitled to file a suit for what is due to him under the contract even without the final certificate of the engineer improperly withheld, which is neither a condition precedent to the institution of the action nor conclusive as to the amount due to the contractor.

Rickards v. Lothian [1913] A. C. 263. (J. C.)

Action for Negligence—Immediate cause, the mischievous act of a third party—Taking of reasonable precautions—Damage by overflow of stored water.

The rule of liability enunciated by *Rylands* v. *Fletcher*[1] will not be applicable to a case where stored water which was safely guarded against leakage is made to escape by an unforeseen mischievous act of a third party over whom the defendant had no

1. (1868) L. R. 3 H. L. 330.

control and whom the defendant did not instigate or where the storage of the water which was safely kept was for ordinary or natural purposes connected with the use of the land.

Kilmer v. British Columbia Orchard Lands Limited.,
[1913] A. C. 319. (J. C.)

Liquidated damages or penalty—Contract to buy land by payment in instalments on specified dates—Forfeiture clause in respect of paid instalments in case of non-payment of any one instalment—Time agreed to be essence of contract—Unenforceability of the forfeiture clause.

In cases of contracts to buy lands by payment of the price in instalments or on specified dates though time may have been agreed to be of the essence of the contract, a clause of forfeiture of the whole agreement and of all the amounts till then paid, in case of failure to pay any one instalment on due date is certainly a penalty and will be relieved against by Courts of Equity.

In re Dagenham (Thames) Dock Co., Exparte Hulse[1] followed.

Per curiam. The penalty, if enforced according to the letter of the agreement becomes more and more severe as the agreement approaches completion and the money liable to confiscation becomes larger.

In re **General Motor Car Co., Limited:** [1913] 1 Ch. 377. (C.A.)

Companies Act. S. 120—"Compromise or arrangement"—A sale to a new company to be formed.

A sale of the assets and undertaking of a company to a new company to be formed for the purpose with a provision for the creditors being taken over by the new company but no provision for preserving the rights of the dissentients cannot be said to be a compromise or arrangement within the meaning of S. 120 of the Companies Clauses Consolidation Act.

The judgment of *Neville* J. reversed.

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1. (1873) L. R. 8 Ch. 1022.

In re **Woodward : Kenway** *v.* **Kidd** [1913] 1 Ch. 392.

Evidence—Registers of births and kept by Society of Friends—Admissibility of, at Common Law—Non-parochial Registers Act, 1840—Entries, how provable—Not by extracts from digest.

Registers of births, marriages &c., kept by the Society of Friends prior to July 1, 1837 when the Births and Deaths Registration Act came into force were not evidence at common law. Under the non-parochial Registration Act, 1840 these registers when deposited at the Somerset House became statutory evidence but entries therein were provable only by the registers themselves or by a certificate under seal of the general Register office. So long as the registers are in existence extracts from a digested copy of these registers are inadmissible.

In re **Birkbeck Permanent Benefit Building Society** [1913] 1 Ch. 400.

Pension—Voluntary—Not claimable on winding up—Ultra-vires business—Clerks connected therewith—Contract not enforceable.

A clerk under a building society was asked to retire and out of consideration for his past services, the board allowed him a pension. The society after a time was ordered to be wound up. The clerk claimed the capitalised value of his pension but his claim was rejected on the ground that it was only a voluntary allowance. Another clerk who was doing banking work of the society was similarly being given pension. The banking branch of the business being considered ultra vires, it was held that the claim of the clerk connected with that branch of business was inadmissible irrespective of the fact whether his allowance was voluntary or under a contract.

In re **Fane: Fane** *v.* **Fane** [1913] 1 Ch. 404.

Devise—To the uses of another settlement at the death of the testator's wife—Good if as a fact, rule as to perpetuities not infringed—Analogy to powers.

A testator gave his estate to his wife for life and on her death to such uses as should at the time of the death of his wife be subsisting and capable of taking effect concerning another estate.

Justice Eve held that the limitation over was bad as taking the limitations as regards the other estate it was possible that the rule against perpetuities might have been offended though the disposition did not as a fact offend the rule. The court of appeal held that the rule applicable to the case is the rule analogous to that applicable to powers and the limitation over is good, if as a matter of fact it does not offend the rule, though in other events it might offended.

Thornhill *v.* **Weeks**: [1913] 1 Ch. 438.

Declaration—Cause of action for—District Council—Assertion of right.

An action for declaration and injunction will lie against the District Council whose duty it is to protect public right of way who threaten and intend to exercise that right by their servants and agents. Where parties claim to have a right to do a thing, even though they say they have no present intention of doing it, they are proper parties to a bill for a declaration of right and for an injunction. If the defendant claims and insists on the right to do a thing, although he has not already done *modo et forma* as alleged he would be a proper party to the suit and an injunction may be granted against him. Where a person claims a right that is a ground for making him a party to an action for injunction.

The King *v.* **Edwards**: [1913] I. K. B. 287.

Criminal Law—Indictment—Larceny—Joinder of several charges against different defendants bad.

The joinder in one trial of a count of larceny against one defendant with a count for another larceny against the same person and another jointly is bad in law.

Reversion Fund and Insurance Co., Limited *v.* **Maison Cosway Ltd.,**: [1913] I, K. B. 364. (C. A.)

Principal and agent—Borrowing money by managing director on behalf of Company—No authority to borrow—Liabilities of Company discharged by money borrowed—Knowledge of lender of absence of authority to borrow—Right to recover—Equity.

The Manager of the defendant company had no authority to borrow except in so far as he might be authorised to do by the company. He borrowed money from the plaintiff company on behalf of the defendant company without authority and applied the

same in discharging existing liabilities of the company. The plaintiff company was aware of the absence of authority of the Managing Director at the time money was advanced. *Held*: By *Buckley* L. J. and *Kennedy* L. J. *Vanghan William* L.J. dissenting that the plaintiff company was entitled to recover the amount advanced notwithstanding the knowledge of the absence of authority to borrow on the part of the manager.

Latham *vs.* **Johnson & Nephew Ltd.,**: [1913] I. K. B. 398.

Negligence—owner of unfenced waste land—Leave and License to enter for public—Children—Allurement, invitation or trap—Dangerous objects—Injury—Liability.

In this case the plainfiff is an infant aged about two. The defendant is the owner of an unfenced waste land adjoining a path leading to the house in which the infant's parents lived. The land did not adjoin any high way. The public adults and infants alike were allowed to pass and repass over it and to run about and play on it. The defendant had stored a heap of paving stones. The plaintiff strayed alone into the land and was there found sitting on a large stone with another on her hand three fingers of which were badly injured. In an action for negligence the jury found that children played on the land with the knowledge and implied permission of the defendants and that there was no invitation to plaintiff to go upon the land and that the defendant ought to have known that children might be injured by the stones and that they did not take reasonable care. On this finding judgment was given in favour of the plaintiff aud damages awarded. On appeal held that the defendants were not liable as there was no invitation trap or allurement or any dangerous object on the land.

Roberts *v.* **Gray** : [1913] I. K. B. 520 (C. A.)

Infant—Contract for necessaries—Benefit—Consideration—Received—Executory contract—Damages—Liability.

A contract by an infant for necessaries is binding on him and cannot be repudiated on the ground that it is executory.

In this case a contract was entered into between an experienced billiard player and an infant of great promise to go on a tour as a professional billiard player and the contract was held to be for necessaries and for his benefit. After it had been in operation for a some time the infant repudiated the contract. Held

that the whole contract was binding on him and that he could not repudiate any part of it.

Orient Company Ltd., v. Brekke and Howlid : [1913] I. K. B. 531.

Sale of goods—I. F. E. Contract—Delivery—Safe arrival of goods at port of destination—Goods not insured—Obligation of buyer to accept.

Under a C.I.F. Contract an essential condition of delivery is that a policy of insurance of the goods shipped must be included among the shipping documents tendered to the buyer. It is not sufficient if the goods have arrived at their destination and the buyer is not bound to accept and pay for the same.

In this case under a C. I. F. contract goods were shipped by plaintiffs. They sent to defendants a bill of lading and an invoice only and as no insurance was effected there was no policy to be given. The goods arrived safely but the defendants refused to accept. *Held* in an action for the price of goods that the defendants were not bound to pay.

Clydesdale Bank Ltd., v. Schroder & Co.,: [1913] II K. B. p. I.

Money paid under compulsion of law—Legal process in a foreign country—Action to recover.

The plaintiffs were mortgagees of a ship and on the ship's arrival at a foreign port took possession as mortgagees. The defendants were entitled to a lien on the ship and freight by virtue of a document in connection with some advances. The defendants instituted legal proceedings in the foreign court for the detention of the ship. The plaintiff paid the money due to them under protest and brought a suit in England to recover the money. *Held* they were not entitled to recover on the ground that the money paid under legal process cannot be recovered back.

Morpeth Rural District Council v. Bullock Hall Colliery Company Limited. [1913] II. K. B. 7. (C. A.)

Practice—Interrogatories—Highway—Extraordinary traffic—Damages—Action to recover extraordinary expenses—Particulars of average expenses of neighbouring highways—Particulars of—Highway damaged.

Plaintiff, the highway authority for the district concerned, sued the defendants who owned a colliery in the neighbourhood to recover the expenses incurred by them in repairing the highway which they alleged was damaged by extraordinary traffic. The plaintiffs were ordered to give the best particulars of the average expense for the past five years of similar highways in the neighbourhood regarding the cost of labour, materials and establishment charges. But the court refused to order the plaintiff to deliver particulars of the average expense for 5 years of the highway concerned as they were particulars of matters of defence.

The King *v.* Palmer: [1913] II. K. B. 29. (C. A.)

Homicide—Murder or man slaughter provocation—accused and deceased only engaged to be married—Confession of immorality.

A confession of immorality by a woman who was not the wife of the prisoner but engaged to be married to him will not if he kills her be such provocatien as will entitle the jury to find a verdict of manslaughter instead of murder.

King and Duneen *In re*: [1913] II. K. B. 32.

Arbitration—Particular question submitted to arbitration—Award—Error in point of law—Setting aside.

If a specific question is submitted to an arbitrator for his decision and he does decide it, the fact that the decision is erroneous on a point of law does not make the award bad in law.

JOTTINGS AND CUTTINGS.

The Attorney-General.— The demonstration of confidence and esteem offered to Sir Rufus Isaacs by the City Liberal Club this week was not confined to members of his political party, and the legal profession generally will welcome the significant utterance of the Chairman (Earl Beauchamp), who, after referring to the Attorney-General's great achievements as a statesman as well as an advocate, said: ' We look forward to the time when his brilliant abilities and the high integrity of his character will have placed him in a position where he will have even greater authority and influence. The claim which Sir Rufus Isaacs himself made that there is no act which he has committed, nothing which he has done, which could lead to the forfeiting of any part of the esteem and confidence of

his political friends will certainly be recognised by all his fellows at the Bar, irrespective of party, for there is nothing in the political developments of the inquiry which has elicited these emphatic statements that can affect his professional advancement.—*The Law Journal.*

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The Appellate Jurisdiction Bill.—If the Appellate Jurisdiction Bill which Lord Haldane has introduced into the House of Commons is less satisfactory than the measure bearing the same title which he brought in over eighteen months ago, it is a great improvement upon the Bill similarly named which the Attorney-General introduced into the House of Comons last year. Under the Bill introduced by Lord Haldane in 1911, which was framed to carry out the recommendations of the Imperial Conference, the House of Lords and the Judicial Committee were to be amalgamated into one great Imperial Court of Appeal sitting in two divisions, and the combined Courts were to be strengthened by the appointment of two additional Lords of Appeal in Ordinary. This Bill, though it passed the House of Lords, failed to make any progress in the Lower Chamber, and a very attenuated edition of it was introduced by the Attorney-General in 1912, but, so slow are the legislative wheels where law reform is concerned, even for this smaller scheme no time was found. For the union of the two Courts the Attorney-General's Bill made no provision. It merely provided that two additional Lords of Appeal should be appointed. Nor does the measure now introduced by Lord Haldane provide for the amalgamation of the two tribunals. The proposed increase in the number of Law Lords is only, according to a memorandum published with the Bill, the 'first step' towards carrying out the resolution of the Imperial Conference in favour of the fusion of the two Courts. But the present Bill is free from one defect that marred both its predecessors. The proposal to appoint two additional Lords of Appeal was originally accompanied by the parsimonious provision that the salaries of all Lords of Appeal appointed in the future should be 5,000*l.*, instead of, 6,000*l.* The provision, which was condemned by the Bar Council as 'tending to detract from that high dignity and consideration which should attach to membership of the Supreme Appellate Tribunal of the British Empire,' no longer finds a place in the measure. There is, too, another useful provision in the Lord Chancellor's new Bill which was not in that of last session. The maximum number of Colonial judges who may become members of the Judicial Committee by reason of the Judicial Committee Amendment Act, 1895, is to be increased from five to seven. Recent events have shown that

there is urgent need for making the Imperial Court of Appeal more representative of the Empire, and this provision will do something to satisfy it. Still more satisfactorily will it be met if one of the new Lordships of Appeal is given to a Colonial lawyer of acknowledged eminence.—*Ibid.*

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Emergency Judges.—More domestic in its interest is the provision in Lord Haldane's bill empowering Lords of Appeal in Ordinary to sit in the Court of Appeal. Every ex-Lord Chancellor is, like the Lord Chief Justice and the President of the Probate, Divorce and Admiralty Division, an *ex officio* member of the Court. Every puisne judge, too, is qualified to give the Lords Justices a helping hand when the condition of its business requires it. That no Lord of Appeal should be free to sit in the Appeal Court is obviously an anomaly which calls for removal. Mr. Justice Bray, withdrawn from his ordinary duties as a King's Bench Judge, is temporarily filling Lord Justice Farwell's place in the Court of Appeal, with the result that the work of the King's Bench Division is getting more seriously into arrear than ever. The assistance of a Law Lord in the Court of Appeal where arrears are almost as plentiful as in the King's Bench Courts, would be of special value at the present time. No judicial staff can be so large that illness will not sometimes lead to a dislocation of the business of the Courts, and the principle of judicial assistance might well be extended in other directions. With the suggestion that Commissioners should be appointed to serve in the Royal Courts of Justice as well as on circuit we are not in sympathy. It is, for obvious reasons, undesirable to encourage a system under which eminent counsel are on the Bench one day and off it the next. There are, however, two ways in which on emergency the High Court might be assisted to which, so far as we can see, no reasonable objection can be taken. The Lord Chancellor might be empowered to request a County Court judge to sit temporarily in the High Court or an ex-High Court judge to resume for a while his place on the Bench. Lord Loreburn, while he occupied the woolsack, was desirous of appointing Lord Gorell a Commissioner of Assize, but his authority to make the appointment was questioned and the experiment was not made. Is it not anomalous that ex-High Court Judges like Lord Gorell and Lord Mersey, while competent to sit in the highest tribunal in the land, should be unable to give a helping hand in the Courts in which they won their judicial fame ?—*Ibid*

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LAW OFFICERS' SALARIES AND FEES.

Mr. Masterman, in reply to Mr. Ginnell, stated that the salaries of the English and Irish Law Officers, as shown in the annual estimates, and the fees as shown in the appropiation accounts 1911-12 are as follows :—

England.						
Attorney-General ...	Salary	£7,000	Fees	£6,321	17	5
Solicitor-General ...	,,	£6,000	,,	£4,247	6	0
Ireland.						
Attorney-General ...	,,	£5,000	,,	£646	16	0
Solicitor-General ...	,,	£2,000	,,	£405	6	0

Mr. Masterman added that the total amount of the fees for 1912-13 was not yet available.—*Ibid.*

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SIR FREDERICK POLLOCK contributed a paper on 'The Transformation of Equity' to the Legal Section of the Historical Congress, which met in the Old Hall of Lincoln's Inn, Sir Frederick Pollock said that the current use of 'equity' and similar terms disguised the fact that there were two quite different ways of moderating the strict application or limitation of legal rules. The archaic method was to exercise an undefined power of dispensing with rules: this was not judicial at all. The modern method was to develop and qualify the rules themselves, by free rational interpretation: this was an operation of scientific law. Early English equitable jurisdiction was of the 'dispensing' kind, the dispensation being from the requirements of the regular procedure rather than from substantive rules. Under James I., the jurisdiction had become regular, and the Court of Chancery prevailed in the well known conflict with Coke, expressly on the ground that it was an ordinary Court of Justice. But fear of political bias in the Chancellor, who was specially the King's officer, roused a new suspicion among the Puritans and the Parliament men. This dislike and suspicion might be traced beyond the Atlantic in the judicial institutions of the American colonies, before the War of Independence, where the provision for equitable jurisdiction was very imperfect. From the eighteenth century onwards, all English Courts had claimed and exercised the power of applying equity, in the larger sense, to legal interpretation. On the other hand, Courts of Equity had equally disclaimed any power to dispense with legal rules or administer natural justice. Dr. W. S. Holdsworth, Reader in English Law in the University of Oxford, read a paper on 'The Influence of Coke

on the Development of English Law,' in which he pointed out that the age of Coke was a critical time for the Common Law. In the seventeenth century many new courts administering law outside the Common Law had arisen, and by their help England had become a territorial State of the modern type. Would the Common Law maintain its supremacy ? Coke, by his career and writings, did more than any other single man to answer this question in favour of the Common Law. The chief facts in Coke's career were its apparent inconsistency. His writings made the influence of his career permanent, and the two literary works which had this effect were the Reports and the Institutes.—*Ibid.*

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The Late Professor Westlake.—England has lost by the death of Professer Westlake the most distinguished of her jurists. Other writers on international law remain who excelled him perhaps, in attractiveness of style, but none who have equalled him in the depth and range of his learning or in the practical service he rendered the cause of peace. His many contributions to the literature of jurisprudence covered more than half a century; the first edition of his famous treatise on 'Private International Law' was published in 1858, and the fifth edition appeared only last year. His works gave him a world-wide reputation, and his death will be deplored by lawyers abroad to whom the names of even our distinguished judges are unknown. He was something far more than a mere bookman. His profound knowledge, his acute analytical power, his sagacious judgment, and his remarkable power of lucid statement found expression not only in his books and lectures—they were given freelly to the movements towards that international amity from which the study of international law derives its inspiring interest. He had the instincts of the statesman as well as the learning of the jurist. It was Professor Westlake who suggested the ultimate solution of the difficulties that arose in 1896 between England and the United States in regard to the boundary between Venezuela and British Guiana. As one of the founders of the Institute of International Law, no less than as one of the British members of the International Court of Arbitration at the Hague, he put his great store of learning to practical use, and made a real, if unostentatious, contribution to the welfare of mankind. Some may be inclined to believe, amid the disturbing talk of increasing armaments, that labours such as Westlake's have been in vain. To hold so pessimistic a belief is to take too narrow a view. The cause of international arbitration, assisted by the study of international law, has, notwithstanding some hostile tendencies,

made great and permanent progress in recent years, and English lawyers have reason to be proud that so earnest and learned a man as Westlake should have come from their ranks to give it such distinguished aid.—*Ibid.*

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The Theatre Queue.—Last week Mr. Justice Joyce delivered his reserved judgment in *Lyons, Son and Co.* v. *Gulliver*—the Palladium queue case. The plaintiffs carried on business as lace merchants three doors from the Palladium, and conceived that they were injured by the formation of a queue of people at the music-hall doors three times a day. An action was, therefore, brought against the manager and proprietors of the Palladium for an injunction to restrain them from allowing the formation of a queue so as to cause an obstruction to the entrance of the plaintiffs' premises. The judge found on the evidence that the queue did actually obstruct persons who desired to enter the plaintiffs' premises, and did actually deter their customers to some extent from going in. It was, therefore, held that, as the crowd only collected in front of the Palladium door because the doors were not opened sufficiently early, the defendants were responsible for the presence of the queue in the street and the nuisance which it caused. Technically, the defendants has used the highway in such a manner as to cause a public nuisance and an injury to the plaintiffs. As the defendants undertook to open the doors earlier in future, the injunction asked for was not, in fact, granted, but the legal liability of the defendants was formally recorded by an order being made against them to pay 20s. damages and the costs of the action, with liberty to restore the action if the undertaking were not observed. There is an impression abroad, judging by statements in the daily Press, that this decision of Mr. Justice Joyce is the death-knell of the theatre queue. This is far from being the case. The decision lays down a principle, or rather states a familiar principle, which is strictly limited in its application by the facts of the case. The central feature in the proceedings was that the queue was the direct effect of a cause which was under the sole control of the defendants—the late opening of the doors. It by no means follows from *Lyons, Son and Co.* v. *Gulliver* that every theatre or music-hall queue can be treated as a public nuisance inflicting injury on private person. The proprietors of a theatre could not be held responsible, or liable to an action, for the formation of a queue which the management were unable to keep down by their utmost efforts in the way of opening doors early and affording all reasonable facilities for ingress to the theatre—*Ibid.*

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The Late Lord Gorell.—By the death of Lord Gorell, at the comparatively early age of sixty-four, the legal world has lost one of its most distinguished and popular men. Few judges have ever won in larger measure the confidence and esteem of the public and the profession. The varied work of the Probate, Divorce and Admiralty Division requires a peculiar combination of judicial gifts, and Lord Gorell, who resigned the office of President little more than four years ago, possessed the requisite qualities in an eminent degree. He had a keen entellect that never leaned to technicality, a dignity and courtesy that no untoward incident could disturb, and a readiness to listen that was all the more noteworthy because of his own economy in words. The premature close of so distinguished and useful a life is deeply to be regretted, but the recollection of the service he gave so ungrudingly to the public, as well as of the strong personality that impressed all who knew him, will long remain–*Ibid.*

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A Great Law Reformer.—Lord Gorrell's judicial services did not cease when he resigned the Presidency of the Division in which he worked with such conspicuous success for seventeen years. He freely gave the country the benefit of his learning and experience in the House of Lords and on the Judicial Committee. No ex-Judge of the High Court, indeed, ever showed so great a willingness to place his services at the disposal of the country, not only as a Judge of the two Supreme Courts of the Empire, but also as an advocate of organic changes in the administration of the law. He presided over two of the most important inquiries into our legal system held in recent years. He was chairman of the County Courts Commitee,to whose recommendations we are largely indebted for the County Courts Bill, and of the Divorce Commission whose conclusions, whenever they are adopted, will exercise so large an influence upon the life of the community. To both these inquiries Lord Gorell, who possessed the true spirit of the law reformer, devoted his time and energy most unsparingly, and the public, no less than the profession, has reason to regret that his zeal, sincerity, and judgment will no longer be available for the causes which he did so much to promote.—*Ibid.*

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Branding as a Punishment.—Reactionaries have been indulging in a great deal of license since the excesses of 'white slave' traffickers on the one hand, and of Suffragettes on the other, have roused a demand for exceptional punishments. Illregulated minds fly at once, on occasions such as these, to crude and savage remedies,

forgetting—or oblivious of-the principle of penology that excess of punishment defeats itself. It has been reserved for Judge Rentoul, K.C., sitting as a commissioner at the Old Bailey, to involve the administration of justice itself in these reprehensible teachings, by suggesting that the mediaeval penalty of branding for crime should be re-introduced in the case of foreign offenders to prevent their entering the country again after expulsion. The viciousness of the suggestion is the more remarkable when it is remembered that sentences of deportation may, on conviction of an alien, be added to the usual punishment for all offences for which there is power to impose imprisonment without the option of a fine, and that in the hands of magistrates (if there are any) who share Judge Rentoul's views the penalty of branding might be imposed for the most ordinary offences; not really for the offence itself, but for the crime of being a foreigner. The commissioners's extraordinary outburst was the less called for because there is, in fact, no justification for the idea that large numbers of criminals return to this conntry after having been deported: the last Returns issued by the Home Office show that the number of such cases has never in any year exceeded some four per cent. of the total number expelled since the passing of the Act. Still less excusable was it in the case before the Court, which was that of a young Frenchman who had never been convicted here previously, and who, therefore, did not come under the ban of the Commissioner's observations. Judicial excesses such as these cannot be tolerated, even in minor judges, and it is high time that a stop were put to them at the Central Criminal Court.—*Ibid.*

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Omissions in a Statute—In view of the fact that for upwards of five hundred and fifty years Justices of the Peace have constantly exercised, and still exercise almost daily, the powers first conferred upon them by 34 Edward III., section 1, to bind over unruly persons to keep the peace, it required some hardihood on the part of Mr. Muir, the senior Treasury counsel at the Old Bailey, to argue at Bow Street, in *Rex* v. *George Lansbury and others*, on April 25, that the traditional translation of the statute is absolutely erroneous. In the first volume of the Revised Statutes, which are published under the authority of an Act of Parliament, the relevant part of the statute is given in the following words: '. . . . and to take all of them that be [not] of good fame, where they shall be found, sufficient surety and mainprize of their good behaviour towards the King and his people, and the other duly to punish; to the intent that the people be not by such rioters or rebels troubled nor endangered. . .

'The word[not] is given in square brackets just as we have printed it, with a note on the part of the Revision Commissioners to the effect that 'All translations read thus.' Since, however, the Norman-French is given in a parallel column with its English translation, it is clear that all the translations have added this word 'not.' Three conclusions are possible. The omission of 'ne pas,' in the French, may have been an obvious printer's blunder which the translator corrected. Or the mediæval judges may have held in some unreported judgment that there had been a 'casus omissus'; in which case the translator would supply the omission in his version upon good judicial authority. Or, again, Parliament may really have intended to omit 'not,' and the correction may be based on a misapprehension as to the true meaning of the Act. In th t case, the meaning of the words in the Act would be this: All rioters and rebels would be regarded as of two classes persons 'of good fame' and 'others'; the former are to be 'bound over' and the latter 'punished'—which in those days probably meant 'whipped.' This distinction in the case of a political offence between persons of good character and ordinary rogues is not unreasonable, and is in harmony with the modern system of Prison Administration (which divides prisoners into three classes according to character), and the powers conferred on justices by the Probation of Offenders' Act, 1907. But, while speculation on this point has an academic interest, it is unlikely that any Court would now overrule the traditional translation of the statute, especially after its statutory incorporation in the Revised Statutes.—*Ibid.*

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CONTEMPT OF COURT.

Two allied branches of our criminal law are generally agreed to be at present in a very chaotic and unsatisfactory case, namely, the law of criminal libel, and that which relates to 'substantive contempt' of Court, *i.e.*, contempt which is committed not by a party to legal proceedings but by a newspaper or other independent party commenting on them, or otherwise interfering with them, in such a way as to interfere with the course of justice. The general rule as to the limits of permissible newspaper comment has been laid down by Lord Justice Cotton in *Hunt* v. *Clarke* (58 L.J., Q.B 490 at p. 492): 'If any one discusses in a paper the rights of a case, or the evidence to be given, before the case comes on, that, in my opinion, said the learned Lord Justice, 'would be a very serious attempt to interfere with the proper administration of justice. It is not necessary that the Court should come to the conclusion that a judge or a jury will be prejudiced, but if it is calculated to prejudice the proper

trial of a cause, that is a contempt.' So far, this rule is quite reasonable, but an extended meaning has been given to the words discusses in a paper . . . . the evidence to be given, which is very embarrassing to a newspaper editor; they have been held to include the publication of any evidence (not contained in the report of magisterial or other court proceedings) which may deprive the Court of the power of doing that which is the end for which it exists, namely, to adminisiter justice . . . . with reference solely to the facts judicially brought before it (Mr. Justice Wills in *Rex* v. *Parke*, 72 L.J., K.B., at p. 842). The result is that a newspaper must take care not to print facts about an accused person which may have an influence on the mind of potential jurymen. The test would seem to be whether the facts printed, and calculated to prejudice a jury, are relevant to the charge or so irrelevant that they could not influence any reasonable person. Two recent cases illustrate the application of this vague and unsatisfactory rule; both came before the Divisional Court last Wednesday (April 23), on motions to commit newspaper editors. In *ex parte Baxter*, the *Daily Mail* had devoted a paragraph to the case of a woman accused of murdering a man, and had erroneously stated that the man had made a will in her favour. This statement was held to be a contempt, and a fine of 100*l.* was inflicted. In a second motion relating to the same case *The Globe* was alleged to have committed contempt by publishing likewise a news paragraph on the same case; this paragraph referred to a supposed duel fought by two men on the prisoner's account. This was held to be so irrelevant to the issue of murder that it could not possibly affect the mind of any juryman adversely to the prisoner on the actual charge of murder, and the motion was dismissed.—*Ibid.*

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SIR ROBERT FINLAY AND THE SAMUEL CASE.

Mr. Ginnell asked the Secretary to the Treasury if any public expense had been incurred in connection with the retention of his seat in that House by Sir Stuart Samuel; and would he say at whose instance, how much, and to whom paid.

The Attorney-General: My right hon. friend has asked me to answer this question. About 150*l.* was expended on shorthand writing and printing in the Select Committee. In connection with the proceedings before the Privy Council 740*l.* was incurred on the authority of the Treasury, this sum including fees to counsel and the cost of shorthand writing, printing, etc. The right hon. and learned member for Edinburgh and St. Andrews Universities, who argued

the case before the Privy Council at my request, has refused to accept a fee on the ground that he appeared in a sense on behalf of the House of Commons and was performing a public duty. The Prime Minister has already expressed his appreciation of the services of the right hon. and learned gentleman, and I have also thanked him. I am glad of this opportunity of informing the House of Commons of the action taken by the right hon. and learned gentleman.—*Ibid.*

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The Scott Judgment—In camera.—When Mr. Justice Bargrave Deane first declared that publication of any part of the proceedings of a case heard before him *in camera* was a contempt punishable, if necessary, by imprisonment, we made a protest against this assertion of ' a claim too broad even for the Court of Divorce,' and we maintained that the better view was that instead of enlarging the doctrines as to contempt and the power to commit for it, there was great necessity for jealously watching the exercise of that exceptional jurisdiction (Law Journal 1911, p. 766). The decision of a majority of the full Court of Appeal that this judgment was unappealable on the ground that the contempt was of a criminal nature was also immediately challenged in these columns, and we pointed out that to disclaim jurisdiction or the right to interfere was seldom a satisfactory way of dealing with a substantial legal controversy, least of all where the liberty of the subject was involved (Law Journal 1912, p. 438). In both these matters we believe we expressed the general view of the profession as well as of the public who could not understand how the sending by a successful petitioner of a copy of the official notes of the proceedings to persons interested in her suit in order to vindicate her character could be a criminal contempt, or how such an offence—if offence it was—could be punishable by imprisonment, without limit and without appeal at the discretion of the judge who heard the case. We are glad that on each and every one of the grounds above indicated the House of Lords has by a unanimous decision reversed the judgments in the courts below, and that by a careful and searching examination of the precedents and principles involved it has been able to lay bare the grave errors involved in the Divorce judge's usurpation of power and jurisdiction and to put the whole theory and practice of *in camera* proceedings and of punishments for contempt on a safe basis. The illuminating judgment of Lord Shaw, which will constitute the *locus classicus* of authority on these subjects for the future, was based on the dictum of the great Master of the Rolls, Sir George Jessel, that ' the

High Court of Justice has no power to hear cases in private, even with the consent of the parties, except cases affecting lunatics or wards of court or where a public trial would defeat the object of the action.' Those are the sole admitted exceptions, definite in character and founded upon definite principles, on which the House of Lords has founded its judgment that the original order to hear the Scott case *in camera* was not only a mistake, but beyond the judge's power, and that the order in the contempt proceedings was an exercise of judicial power violating the freedom of the subject. The grave and enlightened verdict of Hallam, the constitutional historian in which he ranks the publicity of judicial proceedings even higher than the right of Parliament as a guarantee of public security, is confirmed and sanctified by this judgment.—*Ibid.*

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The Bar and the Empire.—A noteworthy increase has occurred in recent years in the number of men who come to the Inns of Court from the King's dominions beyond the seas. More than one third of the students called to the Bar during the present term bear Asiatic names. This increasing use of educational facilities of the Inns by Indian and Colonial students means that the Bar is playing a larger part in the unity of the Empire. The Imperial character of the Bar of England is certainly not likely to be improved by the recent refusal of a small majority of the members of one of the Circuits to admit an Indian gentleman to the Bar Mess. The refusal—which has been the subject of a good deal of comment in the lay Press—was based solely and entirely on the complexion of the applicant. It was admitted, indeed, that, apart from that colour which is inevitable in an Empire on which the sun never sets, no objection could possibly be urged against him. If the matter were merely one of social moment there would, of course be little or nothing to say. The members of a club have a perfect right to decide whether a particular applicant for admission is 'club-able.' But a Bar Mess is something more—or something less—than a club. By one of its trade union rules a barrister who is not a member of the Mess is denied the full Mess, right to practice in the Courts on the Circuit since no member of the Mess, whether leader or junior, is at liberty to hold a brief with him. If, then, the members of a Circuit decline to recognise the Imperial character which the Bar has acquired in recent years—if they insist upon treating the Bar Mess as a club to which only 'club-able' men shall be admitted—they must be prepared to forego the right to maintain the trade union rules which hither to the have enforced. It is wholly anomalous that reputable member of the English Bar,

no matter what his colour may be, should not be free to exercise his full professional rights in all the English courts.—*Ibid.*

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SIR EDWARD CLARKE, in proposing a vote of thanks to Sir Rufus Isaacs for presiding, said: I am grateful for the opportunity which has been given me of proposing a vote of thanks to the Attorney-General for presiding at this meeting. There have been during the last few months a good many accusations, hinted and suggested never definitely made against the character of the Attoney-General. Now, the usefulness of our profession, and its title to the privileges and repute that it enjoys, depend on the maintenance in our ranks of a very strict sense of honour, and I think the members of the Bar have been greatly troubled by hearing such suggestions made against our leader and have followed with painful interest the course of the discussion. It is a matter in which we are all concerned. (Hear, hear) We share with the Attorney-General the duty of maintaining the honour of the profession although of course it is upon him that the responsibility chiefly rests. Now I have read with care all that has been proved in this matter, and I am satisfied, and I believe my brethren of the Bar agree with me, that the charge of corruption or unfaithfulness to public duty has wholly failed. (Loud cheers.) If I were not so satisfied I should not be here to-day. I notice that his assailants are now talking of mistakes and imprudence. That is a different matter. We all make mistakes, though the character of those mistakes varies with the differing circumstances of our own lives. But the important thing is that a mistake or an indiscretion leaves no stain on the character. (Hear hear.) And it is only a mean malignity that would for personal or political motives, make use of an error of judgment to check or to deflect from its natural course a long career of private honour and of public service. (Loud cheers.) I should have said this if there were between me and the Attorney-General only the bond of fellowship which comes from our both being members of the Bar. But there is much more than this. I have known him for many years—from twenty to twenty-five years —and it is because I know our leader to be a man of honour as well as an accomplished lawyer that I rejoice to be allowed to propose this vote of thanks to him to-day. (Loud cheers.)—*Ibid.*

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LORD JUSTICE VAUGHAN WILLIAMS, replying to the toast of 'The Bench,' proposed by Mr. P. O. Lawrence, K. C., said he heard it frequently said that the love of justice among the English people was declining. He was an optimist; he did not believe it. He was

told that the people had a tendency to prefer justice administered by people who did not sit in open court, who could deliver their judgments without giving any reasons for them, and who could not be effectively criticised. He did not believe that the people of England wished for anything of the sort; they wished for justice administered in open court, before the people, and, best of all, administered by judges who where open to criticism.

Lord Halsbury, in responding to the toast of 'The Bar,' proposed by Judge Scully, said he had been a member of the Bar for sixty-three years, and he claimed to be one still. No one, unless he had been a judge, could recognise the infinite advantage it was to a judge to have before him an independent Bar. There had been judges who were too impatient, who occasionally had the desire to exhibit their extreme quickness and to make up their minds before they had heard half the story. But it was a little necessary occasionally to take time to consider what was justice. Until one had heard the whole story one could not form a true judgment, and the interruption by the judge before he had heard the whole story sometimes diverted the attention of the advocate, and, it might be, induced the judge to take a certain view, whilst if he listened he would not have arrived at the same conclusion. After a considerable experience on circuit and at the Bar generally, he had never regretted that he had had such an education in life as one received by finding oneself associated with men who had an intelligent outlook on life, and at the same time were able to recognize the fact that people sometimes took different views from themselves.—*Ibid.*

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The Suppression of Names in the Courts.—An increasing tendency towards the suppression of the names of parties and witnesses is to be observed in some of our courts. The tendency was illustrated in the Bow Street Police Court on Monday, when Mr. Graham-Campbell had before him a prisoner who was charged with attempting to commit suicide at the Charing Cross Station on the District Railway. The whole proceedings were veiled by anonymity. Not only were the name and address of the prisoner, which were handed to the learned magistrate on a piece of paper, withheld from the public; the names of all the witnesses, except that of the railway official at whose instance the charge against the prisoner was made, were suppressed. There may, of course, be circumstances which make it desirable in the interests of justice for such secrecy to be observed, but there would appear to have been nothing in this particular case to warrant a departure from the wholesome rule of publicity, and it

is unfortunate that Mr. Graham-Campbell should have allowed the rule to be broken on the very first day on which he began to sit as a magistrate. When the late Sir A. L. Smith was Master of the Rolls an application in the Court of Appeal was made by a member of the Bar who desired to refrain from mentioning the names of the parties. 'I strongly object to that,' said Sir A. L. Smith. 'It seems to be getting too common. This is a public Court of justice, and I entirely disapprove of names being suppressed.' For such a rebuke there is even greater need at the present time. Publicity is a most useful deterrent, especially in the Criminal Courts, and the suppression of names is bound, in the long run, to do the administration of justice a grave mischief. Moreover, when the names of parties or witnesses are not disclosed there must inevitably be speculation as to their identity, and the names of persons who have no connection with the case may be brought into discussion. Even if occasionally the interests of justice make it desirable that names should not be given, the increasing tendency towards suppression ought to be sternly discouraged.

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Tort Arising Out of Contract.—A difficult legal problem usually arises when the question to be determined is whether a party who has failed to perform a duty arising out of a contract can be made liable in tort for injuries sustained, in consequence of his breach of duty, by a person with whom there is no privity of contract. In *White* v. *Steadman*, in which Mr. Justice Lush delivered judgment last Monday, the facts were that the plaintiff had gone for a drive with her husband in a landau hired by the husband from the defendant; she sustained injuries in consequence of an accident caused by the restiveness of the horse, and, according to the finding of the jury, the defendant knew, or ought to have known if he had used proper care, that the horse was not safe at the time when the carriage was let to the husband. It was contended that, as the lady was no party to the contract, the defendant owed no duty to her and could not be made liable on the finding of the jury. The interesting chain of reasoning by which the learned judge arrived at the conclusion that this argument was unsound may be thus summarised:—First, the plaintiff was one of the class of persons whom the defendant must be taken to have contemplated would, or might, use the carriage. This said the learned judge, was too clear to require a finding from the jury, and, indeed, it would be absurd to suppose that the defendant believed the husband had hired a landau for a drive in solitary dignity. Secondly, a horse known to be vicious is in the class of dangerous animals,

and the liability of a person who lets it out is the same as that of a person who allows another to use, or come in contact with, an animal that is dangerous in itself. Thirdly, the defendant, if through his own carelessness he did not use the means of knowledge at his disposal, was in the same position as if he knew that the animal was vicious. For these reasons the learned judge held that the defendant was under a duty to the plaintiff, and that, as she had been injured by a breach of his duty, she was entitled to judgment. A simpler ground, perhaps less open to criticism, on which the judge thought that this conclusion might also be supported, is that the defendant accepted the plaintiff as a passenger, and was bound to use due care that she was safely carried. It may be thought that the judgment conflicts with the decision in *Cavalier* v. *Pope,* that a landlord who had promised to repair a dangerous floor was not liable to the tenant's wife for injuries caused by its defective condition. There is, however, the distinction that a landlord owes no duty to anyone at common law to keep a house in good repair. If the husband, instead of the wife, had been injured, he could only have brought an action in contract, and there was no contract between the landlord and the wife on which she could base her claim.—*Ibid.*

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United Law Clerks' Society.—The Lord Chancellor, in proposing 'Prosperity to the United Law Clerks' Society,' said that it took someone who had been in contact not only with a great many phases of the law but with a great many phases of society generally to realise what the law clerks of this country meant. They all belonged to one great profession. For one case which came before the judges there were ten which came before the barrister, there were a hundred which came before the solicitors, and there were a thousand which came before the managing clerks. They it was who handled the run of the everyday cases, which concerned human nature sometimes in its least pleasing and sometimes in its more pleasing phases. They it was who came close to the grim realities and who saw near at hand what the relation of individuals to each other and society really was. It was a very human occupation, much more human than people thought who imagined that it was all routine and details. If the machine did not creak, it was because of the multitude of skilled hands that were keeping it running. Under the Anglo-Saxon constitution, whether one looked at it in this country or in the United States of Canada, for the law had a common origin in all those places, the lawyers performed a very

great function. They kept the wheels of society running smoothly, and it was more than mere law that they were concerned with. They were relations far outside the law with which they were intimately concerned. People talked of litigation. Why, for one case in which there was litigation there were ten cases in which litigation had been stopped at the outset. Law clerks were that great class which handled disputes in their first and complex details, which reduced them to smoothness and shaped them finally before they were brought before a tribunal. That was the work which was done by the law clerks, and anyone who understood English society and its constitution ought to be very grateful to that important class. It was not by any artificial demand, but from the inherent qualities of human nature, that the law and the necessity of lawyers to adjust the relations of society arose. It had been a tradition of this society since the year of the first Reform Act to do what it could to alleviate the human lot. There were some men who would always get on; nothing short of a miracle would doom them to misfortune; but those were very few. There were others who, on the whole, were likely to prosper, and most of whom did prosper; there was a still larger class which just managed to get along; and there was another class which, partly from misfortune and partly because nature had not helped them as it had helped their brethren, had a bad time and would go under but for that sense of comradeship which brought their more fortunate brethren to their rescue. He was speaking to the more fortunate brethren, those who had been able and willing to help, and who had made a position for themselves. The society was one of the earliest mutual assistance societies, and its aim had been to provide against old age, sickness, and misfortune to an extent which was very remarkable in a time when no State assistance was given. They lived in times when some people thought that there was a disposition on the part of the State to give too much assistance. There were people who actually spoke of the State poking its nose into people's private concerns. But there the new system was. The society had accomplished remarkable things in the past, and his belief was that the new system of compulsion would not really interfere with the work of a society such as theirs. He believed that it would in the end, when the friction and confusion and the smoke and the dust were cleared away, enable an association such as this to raise the level of its work and make a yet better sort of provision with no more liability and with no more effort, because the amount of work which it used to have to do would be taken off its shoulders to some extent, and at all

events the mechanism would have been simplified. He was an optimist, and some people might think that was too sanguine a view. He thought there was a tendency all round on the part not of one class but of all classes to insist that no effort should be spared to, if possible, bridge over some of the most glaring of the inequalities which separated class from class in a highly-organised State such as ours. We were a very rich nation, and he saw no signs of our riches going down. Bad days might come, bad days would doubtless come, but we were at present in good days, and it was a moral obligation that he who was prosperous should try to do something for him who was less prosperous. He believed that to be for good whether it was the work of the State or of such a society as this. It was a real tendency which manifested the truth that in the balance human nature was good and not bad. The society was deserving of support, first, because it was a society whose operations were directed to the help of those who were invaluable in the law and who constituted, after all, by far the greater bulk of the profession to which all present belonged; and, secondly, because the spirit of its work and the aims of its organisation were just the spirit and just the aims which they all desired to encourage and to see flourish.

Mr. A. J. Walter, K.C., who proposed the toast of 'The Legal Profession,' said that in no country in the world did the litigant leave the court as he did in England with the knowledge that everything had been said that could be and that his case had been fully heard. The position which our judges occupied was greatly esteemed in foreign countries, a position of complete independence, but one in which everybody felt that the judge had one single object in view—namely, to do justice between the parties without fear or favour. As to the Bar, they tried to do their duty so that the client might have his facts presented before the court. Sometimes they were blamed for doing it at a length which was considered undue, but though condensation was of great value it must not be carried too far. The solicitor had the family secrets, the business secrets, the secrets of trade in his hands, and he held them sacred, and the public knew it. They heard now and again of those who had been guilty of a breach of that confidence, but the proportion which they bore to the great body of the profession was that of a thimbleful to the ocean.—*Ibid.*

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THE APPELLATE JURISDICTION BILL.

The Attorney-General, in moving the second reading of this Bill, said it had been under discussion in the House last year and

the year before, and, in substance the same, it now came from the other House. It proposed the addition of two Lords of Appeal in Ordinary, increasing the number from four to six, the appointments to be on the same conditions as those made under the Appellate Jurisdiction Act, 1876. In the second place, the Bill provided that every Lord of Appeal should be able to sit in the Court of Appeal. At present they were not *ex-officio* Judges of the Court of Appeal, and statutory power was necessary to enable Lords of Appeal to assist the Court when requested by the Lord Chancellor to do so. In the third place, certain alterations were proposed with regard to the number of Judges in his Majesty's Dominions who were empowered to sit with the Judicial Committee of the Privy Council. It was proposed to increase the number from five to seven. This part of the Bill did not create any new Law Lords, but made seven the maximum number. The House should recognise and appreciate that the Bill carried out the obligation of the Government to give effect to the unanimous resolution passed in the Imperial Conference of 1911. One of the main connecting links between the various constituent parts of the Empire was the appeal to the Sovereign in Council. From all the Dominions these appeals came and were heard by the Judicial Committee, which dealt with vast interests in a quiet and unostentatious way. It was a tribunal with the widest and most extensive jurisdiction of any Court of justice ever known to civilization. It had jurisdiction over more than a quarter of the world. The Judges of the Judicial Committee had to be not only familiar with English, Scottish, and Irish law, but they had also to be equipped with a knowledge of the laws and customs of all the nations in the various parts of the Empire—French law, Roman Dutch law, old Roman law, Maori law, all the various laws relating to India. These were only instances; and when the House considered the vast extent and area of the jurisdiction of this supreme appellate tribunal they would understand why it was so much importance was attached by the representatives of the Dominions at the Conference to the proposals he was bringing before the House. Why was it the Imperial Conference desired that there should be this addition to the numbers? The Court, either in the House of Lords or in the Judicial Committee of the Privy Council, so far as it was made up of members who were bound to sit, consisted only of the Lord Chancellar and the four Lords of Appeal in Ordinary. That gave only five, and he doubted whether they were justified in including the Lord Chancellor, who had so many other functions to discharge. Even if they reckoned the Lord Chancellor, they could not constitute two Courts out of that numerical judicial strength.

It was true they summoned and constituted Courts from those who were not bound but were willing to sit, and he acknowledged the valuable and distinguished services rendered in this connection by Lord Halsbury and the late Lords Gorell and Ashbourne, as well as by Lord Macnaghten, one of the greatest judicial figures that the legal history of this country had ever known. They proposed to add two Judges, and even then they would not be able to man both the Judicial Committee and the House of Lords without the assistance of some of those who were not bound to sit but were ready to give their services when they were required. There had been a proposal to reduce the salary for the new Judges, but it had been decided to keep it at the usual figure. In the resolutions of the Imperial Conference it was proposed that the existing practice should be modified and that a dissentient Judge should be free to give his reasons. In the House of Lords all the members of the tribunal were entitled to give their judgments separately; but an appeal to the Privy Council was an appeal to the King in Council, and the Judicial Committee gave advice to the King on which he accepted or rejected the petition. After a good deal of correspondence the Dominions had substantially agreed to the view expressed by the representatives of the tribunal here that it was better to adhere to the old practice. No objection was raised to the proposal of the Government to increase from five to seven the number of Judges, Chief Justices, and representatives of the Dominions qualified to sit on the Judicial Committee. Under the present system, with the number limited to five, it was not possible to give a representative to New Zealand. New Zealand desired representation, and it was thought New Zealand should have it, and consequently it was proposed to extend the number to seven. It did not involve any increase in expenditure. At the present moment there were altogether 63 appeals in the lists—15 from India, 24 from the Dominions, including 15 from Canada, and 24 to the House of Lords. He hoped the objections that had been foreshadowed to the creation of two new Law Lords would not be persisted in, for it was impossible for the work of the Empire to be properly done unless the House sanctioned it.—*Ibid.*

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Mr. Justice Bankes and adjournments:—On a case coming before Mr. Justice Bankes it was stated that the plaintiff's counsel was at the moment engaged in another Court. Mr. Justice Bankes waited half an hour and then said that as there was no other case ready he must proceed. The plaintiff could, if he pleased, have the case stand over; but in that case he must pay

all the costs incurred by the defendant in consequence of the adjournment, and must pay them before the case could come on again. Or if he pleased the plaintiff could go into the box and tell his story in the absence of counsel, and he (Mr. Justice Bankes) would give him every assistance. At this moment Mr. Beresford came into Court, and said he had just been asked to hold the brief of the plaintiff's council, and he asked that there might be an adjournment until 2 o'clock. Mr. Justice Bankes said the case must proceed without further delay. On the following day the counsel briefed in the case said he wished to apologize for his absence. He had had no idea that the case was coming on, or was likely to come on, until a message was brought to him while he was actually conducting a cross-examination in another Court. He extremely regretted what had occurred, and disclaimed any intention of showing discourtesy to the Court; and if he had any idea that the case would be reached at the time, he would have seen that it was properly looked after. Mr. Justice Bankes said he was glad to have heard the explanation. He had spoken strongly, for he had felt that the client's interests had been neglected; and he was glad to know now that what had taken place had been due to a mistake and not to any intentional disregard of the interests of the client. Such difficulties did arise sometimes. It was easy to be wise after the event, but he thought it would have been better if counsel yesterday had sent him a message explaining the position. However, he fully accepted the explanation which had now been given.—*Ibid.*

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Restitutions by Infants.—MR. JUSTICE LUSH held in *Stocks* v. *Wilson*, a few weeks ago, that an infant who had by fraudulently representing that he was of full age induced the plaintiff to sell goods to him was liable to account for their proceeds, under the equitable rule that an infant guilty of fraud can be compelled, as far as possible, to put the other party in the same position in which he was before the transaction. In *R. Leslie (Lim.)* v. *Shiell*, in which Mr. Justice Horridge gave judgment last week, the same principle was applied by that learned Judge to a claim by a firm of moneylenders who had been induced by the defendant's fraudulent representation that he was more than twenty-one years old to make advances to him. The action was for damages for fraudulent representation, and alternatively for the amount of the advance as money had and received by the defendant to the use of the plaintiff. The learned judge held, as on the authorities he was bound to do, that an action for damages for fraud does not lie against an infant,

when the fraud was an inducement to the contract; but, following the decision of Mr. Justice Lush, he decided that, even when the fraud was connected with a contract, the equitable principle of restitution must now be applied. The Court of Chancery, in his view, did not consider whether or not the fraud was connected with a contract; it simply acted on the rule that an infant must not be allowed to retain what he has obtained by fraud. As a stay of execution was asked for and granted, it is possible that the case will go further, and a decision by the Court of Appeal as to the application of the equitable rule to common law actions would be welcome. According to the previous judgment of that Court in *Levene* v. *Brougham* (1909), the equitable principle could not be applied where the plaintiff was suing directly on a contract of loan, as it was there held that an infant was not estopped by his false representation from relaying on the Infants' Relief Act.

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WHAT'S THE GOOD OF MARRYING?

Scene—Interior of railway carriage. *Dramatis Personae*—Mr. EDWIN LOVE, Articled Clerk, and Mrs. ANGELINA LOVE, B.A., M.A., LL.D., LL.B., &c., &c., starting on honeymoon.

Edwin.—At last alone, Thank goodness!

Angelina.—It is indeed pleasant to get the tedious mummery of the affair over.

Ed.—It is. We are now, dear, in the eye of the law, one—one person, one heart, one mind, one purse.

Ang.—Pardon me, Edwin dear. Under the present state of the law that is scarcely accurate. You are practically penniless, whilst I am an heiress; what is yours is mine, no doubt, but what is mine is my own.

Ed.—I surely have now rights——

Ang.—Not many. The Married Women's Property Act, 1882, gives me all my property for my separate estate.

Ed.—True, my darling. But not with a restraint on anticipation. Is it not still possible for me, by "kicks or——

Ang.—"Kisses"—fossilized quotation, Edwin dear—to get it out of me. Try first kicks.

Ed.—That I could never do; but assume, for argument, that I do.

Ang.—Then should I immediately seek the protection of the justices, under the Summary Jurisdiction (Married Women) Act,

1895, and obtain an order in the nature of a judicial separation; or, if the kicks were excessive, I should petition, under the Act of 1857, for a decree of judicial separation on the ground of cruelty.

Ed.—True. But with thee, my ownest, kisses would cajole.

Ang.—Foolish expressions of sentimental affection, Edwin, I extremely dislike. Kisses would but drive me to leave you.

Ed.—That, at least, you have no right to do. A husband can both confine and chastise his wife.

Ang.—My dear Edwin, your law is really much out of date. Have you so soon forgotten *R.* v. *Jackson* [1]? When coaching you for your "Final" I have already particularly impressed that point on you.

Ed.—I must indeed plead guilty to a lapse of memory. The wife, I remember, can, at her sweet will, leave the husband, and he can neither detain her nor chastise her. Well, any way, Angelina, what's sauce for the goose——

Ang.—Want of accuracy in a lawyer is a serious fault. You evidently want to say, What is sauce for the gander is sauce for you—the goose.

Ed.—Very sharp. But I mean if you can leave me, I can leave you.

Ang.—Not against my wish, for that would amount to desertion, and I could repair to the justices, under the Summary Jurisdiction (Married Women) Act, 1895, and obtain an order on you for maintenance.

Ed.—Well, so could I if you left me.

Ang.—Really, Edwin, do you not know that the Act only gives this right to women? You, Edwin, would be under the painful necessity of first of all going to the workhouse; to the poor law guardians, in consequence of the Married Women's Property Act, I should, of course, be liable.

Ed.—But if you left me I should institute a suit for restitution of conjugal rights.

Ang.—And pray tell me, you silly boy, how would you enforce the decree?

Ed.—Why, the Court would imprison you for contempt.

Ang.—Now really, Edwin, you are most provoking. After all my careful coaching! Have you forgotten the celebrated case of

1. (1891) 1 Q. B. 671.

Weldon v. *Weldon*[1], which led to the passing of the Martimonial Causes Act, 1884 ? and that——

Ed.—Ah ! of course, yes, I remember, no decree for restitution can be enforced by process of contempt.

Ang.—Nay, you silly boy; instead of a restitution decree you would but get, if I declined to obey, the right to petition for a decree for judicial separation.

Ed.—Ah ! you don't know everything, Angelina dear. I could apply to the Court to have your marriage settlement altered in my favour. That was decided by *Swift* v. *Swift*.[2]

Ang.—Edwin, this is shocking. Did I not tell you that *Swift* v. *Swift*[2] was distinguished in *Michell* v. *Michell* [3], and that, if the property is settled with a restraint on anticipation, the Court cannot interfere ? You will I fear never scrape through your "Final."

Ed.—Well, Angelina, you needn't be so rough on me. We can't all get degrees. However,. you't desert me, and I shan't desert you.

Ang.—And if you did I have the right, if I so choose, to follow you and break into your house; at least, so Mr. Justice Barnes decided in the unreported case of *Dunhill* v. *Dunhill.*

Ed.—And can I follow you and break into your house ?

Ang.—Certainly not, That would be my separate property and I could sue you for trespass.

Ed.—Well, we shan't do that. We'll settle down and lead a quiet life for you know, Angelina, we shan't have too much income to start on—I mean I shan't–but I'll get an abatement of income tax.

Ang.—Oh ! Edwin dear, when will you know any law ? Don't you know that the Commissioners of Income Tax hold that husband's and wife's incomes have to be assessed together, and that therefore you cannot claim abatement; and moreover, that you are primarily liable for the income tax ?

Ed.—Oh ! but I say, Angelina, that will swamp all my income. I shan't have any pocket money left.

Ang.—That's excellent. That puts you completely in my power. I shall be able to keep you good by not allowing you too much pocket money.

Ed.—Oh ! but that's a beastly shame, Angelina. By Jove, that reminds me. If you do, I'll sue for that 100*l*, I lent you before we

1. L. R, 9 P. D, 52. 2. (1891) P. 129.
3. (1891) P. 208.

were married—you know, when Madame Figurante was theratening to sue you for some dresses—before the old uncle died, and you came into all that money.

Ang.—Will you, dear, really ?

Ed.—Certainly I will.

Ang.—Edwin, it's truly dreadful! you're not nearly ready for your examination! Do you not know that Mr. Justice Wills decided in 1885, in the case of *Butler* v. *Butler*[1], that the Married Women's Property Act, 1882, does not alter the old common law rule, that Marriage extinguishes pre-existing liabilities between husband and wife ? By marrying me, Edwin dear, you wiped out that debt.

Ed.—What a beastly shame! Well, it was very good of you, before we started to-day, to give me a cheque for 150*l.* to send to my tailors; but if you don't pay me that 100*l.*, my sweetest one, by Jove, I won't pay you back that 150*l.* Got you there, dear,

Ang.—Really, you're too provoking! That's a debt due to my separate estate, for which I can sue you. Your debt is extinguished, and therefore you can have no right of set-off.

Ed.—Well, never mind, we're not likely to sue each other: we shall live a nice happy, quiet life.

Ang.—I don't know. I was thinking of practising alone. Of course, if I don't trade, I couldn't be made a bankrupt; if I trade and fail I might be made a bankrupt.

Ed.—But I say, Angelina, that would be rather awful for me. Why, I might as well have married my poor little cousin, who hasn't got a penny.

Ang.—The nasty little thing! Thank goodness, I have done her a nasty turn. I told your aunt she wasn't the proper sort of girl to have as a governess, and she's going to give her notice.

Ed.—But that's slander. It wasn't true, was it ?

Ang.—No ; it's slander and actionable.

Ed.—And I can be made a party to the action. That beastly case which decided that a husband is still liable for his wife's post-nuptial torts—I've forgotten the name.

Ang.—I might have known you would—*Seroka* v. *Kattenberg*[2] Sir. Now, don't you forget it again. I didn't say anything of the kind. I only pretended I did to see if you'd know that decision.

1. 14 Q. B. D. 831.

2. See also *Erle* v. *Kingscote*, (1900) 1 Ch. 203; and *Cuenod* v. *Leslie*, (1900) 1 K. B. 880.

Ed.—Well, what's the good of a fellow marrying now-a-days?

Ang.—Well, he can't be convicted of stealing his wife's property while they are living together: so says the Married Women's property Act, 1882.

Ed.—Can't he? Then here goes (*gives Angelina a hearty kiss*).

Ang.—How dare you, Sir, kiss a doctor of laws? If my strength only permitted it, I would horsewhip you.

Ed.—If you did I'd go to the magistrates and get a judicial separation, under the Summary Juisdiction (Married Women) Act, 1895, on the ground that you had committed an aggravated assault, and that I went in danger.

Ang.—Caught you, you naughty boy. The Act only enables wives to apply, not husbands.

Ed.—Angelina dear, what a lawyer you are! you must really go to the Bar. Eh, guard? what? five minutes here? You won't go to the Bar? Well, I will (*exit in haste*).—*Law Notes.*

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Duress and Gaming Contracts.—'BONI judicis est ampliare justitiam (not jurisdictionem),' said Lord Mansfield, and the true maxim of our law is to amplify its remedies without usurping jurisdiction and applying its rules so as to secure substantial justice. This is the office of the good judge, and there is no one among our younger judges who knows better than Mr. Justice Scrutton how to fulfil it. In a reserved judgment delivered by him last week on a claim brought by the proprietors of a French hotel on a cheque given by a young Oxford man in payment of a gambling debt several points arose, on all of which the learned judge found in favour of the defendant (*Societe des Hotels Reunis* v. *Hawker*). First, it was said that the cheque, having been obtained by the manager of the hotel from a boy of 22 by a threat of criminal proceedings if it was not given and a suggestion that nothing of the sort would take place if it was, could not be enforced in an English Court. Such a compromise is lawful in France, but the cheque was an English one, so that the agreement was to be performed in England, where compromises of alleged crime are illegal, and on that ground, as well as that of duress, the action failed. But it could not succeed here for other reasons. The officials of the hotel knew that the money was borrowed for gambling at the local casino, and was, in substance, spent there for gambling. This would, as the authorities at present stand, not affect the note if the claim was

for money lent (*Saxby* v. *Fulton* [1909]), but as the action was on a security given for such money the transaction came within the provisions of the Gaming Acts, and was consequently void (*Moulis* v. *Owen* [1907]). The defendant had not pleaded the Gaming Acts, but in Mr. Justice Scrutton's view, if the Court is satisfied that a transaction is illegal or unenforceable by statute, it must take the objection itself, even though the parties do not wish to raise it. Applying his special experience in the Commercial Court, the learned judge held that what was long ago decided as to policies under the Marine Insurance Acts (see *Gedge* v. *Royal Exchange Insurance* [1900]) applied with at least equal force to common bets. Feeling bound to take notice judicially of the purpose for which the loans were made, the judge allowed the pleadings to be amended accordingly; and there, of course, was an end of the case. No excuse was required for this salutary warning to hotel-keepers and others abroad as to the practice of the English Courts when dealing with securities given in such questionable circumstances. The judgment may, perhaps, also serve another good purpose here in our own Courts, where there is sometimes an inclination to wink at such transactions and even to discourage litigants who venture to raise the defence of the Gaming Acts.—*Law Journal.*

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Absent Counsel's fees:—MUCH of the criticism of absent counsel (says the *Globe*) seems to be based on the belief that advocates do not suffer from the inability of ordinary mortals to be in two places at the same time A barrister seldom knows when he accepts a brief exactly when the case will be tried. Even a member of the Bar who receives but two briefs in the course of a term may be overwhelmed by the discovery that the two trials will clash. What, of course, an absent counsel can alway do is to return his fee

My learned profession I'll never disgrace
By taking a fee with a grin on my face.
When I haven't been there to attend to the case.

The Lord Chancellor in 'Iolanthe' is by no means the only eminent member of the profession who has acted on this principle. Mr. Atlay, in his 'Victorian Chancellors,' relates an interesting incident in Lord Halsbury's career. 'His last appearance in Court at the Old Bailey was in November, 1888, under curious circumstances. He had acted as counsel in a probate action arising out of the testamentary dispositions of an eccentric citizen of Leominster. His clients were not only unsuccessful, but were committed for trial on the charge of perjury. Rightly or wrongly, Sir Hardinge Giffard believed that he

had not done them full justice in the hearing before Sir James Hannen, and he insisted on defending them, devoting to the task, as I have been told by one of his juniors, his whole time and attention during a trial which lasted eight days, and eventually returning his fees.'—*Ibid.*

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CONGREGATION'S CONTROL OVER MINISTER.

The strained relations existing between a congregation of Particular Baptists and its pastor were the subject of an action in the Chancery Division, in which judgment was delivered last week by Mr. Justice Swinfen Eady (*Walters* v. *Hughes*, May 29). The congregation, or 'church,' seems to have consisted of some 175 effective members, and it had built itself a chapel at Pontypool. The management of the chapel was vested in trustees, and an officiating minister could only be appointed under the authority of a church meeting, duly convened, at which a majority of the members of the church were in favour of the appointment. The trust deed containing these provisions was, however, silent on the subject of dismissal. The defendant had been duly appointed as minister at a salary of 200*l.*, and the plaintiff—the trustees—now sought to have the defendant restrained by injunction from further officiating as minister. The plaintiffs alleged that the defendant had been dismissed from his post, whilst the defence was that the trustees had no right to prevent his acting as pastor to the congregation, and that a resolution passed at a church meeting dismissing him was invalid and *ultra vires*. Mr. Justice Swinfen Eady held that the church meetings whose validity was disputed had been properly called and conducted, and that the defendant was wrong in his opposition to the trustees. The plaintiffs were, therefore, entitled to an injunction. The judgment (as reported) is not a reasoned one, and nothing is said as to any technical difficulties relating to the absence of express power to dismiss in the trust deed, and to the want of any definite term of notice to the defendant. It seems, however, fairly plain that on general principles a voluntary association, such as the body of members of this 'church,' must have control over its own affairs, so as to prevent a minority from throwing the whole machinery of the associated body out of gear. Also, on general principles, the law of master and servant seems applicable, and a power of dismissal without notice seems inherent when regulations are deliberately set at naught by a salaried officer, even though he be a minister.—*Ibid.*

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PREVENTIVE DETENTION.

The only point of public interest which arose out of the sitting of the Court of Criminal Appeal on Monday was a pronouncement of Mr. Justice Darling, who presided, upon the objects and tendency of 'preventive detention.' While delivering judgment in the case of *Rex* v. *Heron*, an appeal by a habitual criminal against a sentence of three years' penal servitude and five years' preventive detention, Mr. Justice Darling intimated his opinion that preventive detention was a preliminary stage of an experimental and tentative kind towards the revival of some system of 'industrial serfdom,' under conditions of isolation from normal civilized life, for persons habitually convicted and evidently determined never to abandon a life of crime. Two points are worth noting in this connection. In the first place, the conditions which Mr. Justice Darling and some other criminal law reformers appear to advocate were satisfied on the whole by the old law of transportation. Under sentence of transportation the convict was removed to a 'distinct island'—formerly one of the West Indies and afterwards Australia or Tasmania. There he was let out as a bondsman to planters—*i.e.*, kept in a state of 'industrial serfdom.' Transportation was abolished in 1853, and replaced by penal servitude, for the following reasons: (1) Each colony in turn, as it attained self-government, repudiated the system of dumping criminals upon it—an inherent vice of all such schemes; (2) in practice discipline could only be maintained among the bondsmen by the continued exercise of magisterial powers to flog convicts—another grave objection to the system; (3) the female convicts, when released, almost inevitably led a life of prostitution. A reversion to the system would probably be faced, sooner or later with just the same difficulties. Our second comment is this. Curiously enough, 'transportation' was not originally intended as a legal punishment at all. It was introduced as a 'conditional pardon' to a convict sentenced to death (Kelyng, folio 45; Kenny, p. 482, note). Such pardons were introduced shortly before 1665, and were given to convicts on the condition that they should remain in a specified colony for seven years, five of which should be passed in service to a person named by the Governor, and at the end of the term a grant of land was made. This method of forced colonisation would be out of place in present day conditions, and one of the main grounds for transportation therefore fails.—*Ibid.*

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The Judges and the Mansion House.—The Lord Chancellor, in responding to the toast, said that the hospitality of the Mansion House, which was not only traditional but historical,

did not overlook serious people like the judges. He was glad to learn that the Lord Mayor would in a few weeks mitigate the rigour of that occasion by entertaining the bishop. (Laughter.) The connection between the City and the judges had indeed been a close one. When he thought of that long story of the relations between the lawyers and the City of London, of the conflicts over the charter and the liberties of the City, over the battles they fought for their rights—battles in which the judges, without fear and without favour, stood between them and the Executive—a long list of names came before him. He went back in memory to Sir Thomas More and Francis Bacon, to Ellenborough, Camden, and Somers, to the illustrious men of the eighteenth century, to Hardwicke, the greatest Equity lawyer who ever sat on the Bench, to the rugged Thurlow, the one man whose personality made Dr. Johnson express the fear of meeting him in conversation, to a relative of his own (for he was not the first of his family to be Lord Chancellor), John Scott, Lord Eldon, whose politics were not sufficiently progressive for the City—a defect which he hoped he himself had repaired—(laughter)—to Lyndhurst and Brougham, of whom it was unjustly said that if he had only known a little law he would have known something of everything—(laughter)—to Westbury, with his lambent wit and mordant tongue, to Cairns, that great master of jurisprudence and oratory, who could make the facts speak the law, to Selborne, with his unrivalled gift of accuracy and knowledge and his high character, and then to one still living, and at whose feet they, his brother judges, were proud to sit and learn—Lord Halsbury. (Cheers.) The training of the judge in this country was very different from the training of the judge in other countries. In other countries he belonged to a profession by itself. With us he was trained at the Bar and in the school of affairs, often in that most remarkable college in which he spent twenty-five years of his own life—the House of Commons. They might say what they liked about the House of Commons. They might say that it had degenerated, but it remained what it was—the finest school of affairs and the greatest representative institution the world contained. (Cheers.) One learnt there many things it was impossible to learn elsewhere. The judges had a training which brought them into contact with the concrete realities of life in a way which was not easy where the training was different. They learned by their very contact with public affairs to eliminate politics. Recently he sat with three colleagues, two from the opposite political party, to hear a question as to whether a member of Parliament had forfeited his

seat. He could only say that a more perfect tribunal he had never experienced, and he thought that they all forgot there was such a thing as politics, or anything in the world but law to be considered, and he was not sure that their contact with politics had been a bad thing either for justice or the nation. The Lord Mayor had spoken of the two measures which had been before Parliament for the appointment of an additional judge (to whose welcome that night he was glad to listen) and for enlarging the number of judges of the supreme tribunal of the Empire—measures which had got through their second reading in the House of Commons and which, he hoped, would soon become law. (Cheers.)

The Master of the Rolls, who proposed the toast of 'The Profession of the Law,' referred to the cordial relations existing between the Bench and the Bar and the solicitors, and said that if they ever came across a judge who said that he could get on as well without the Bar as with the Bar they might be quite sure that he was suffering from a strong attack of vanity. (Laughter.) The more experience he had the more convinced he became that justice could never be properly administered unless there was perfect confidence and mutual respect between the Bench, the Bar, and solicitors. (Cheers.)

The Attorney-General, in responding to the toast, said that the City had ever—at least, as long as there had been judges—honoured the Bar by including it at those gatherings. The relations between the Bar and the solicitors, speaking as a whole, were excellent, although there were some members of the Bar who would desire, if they had their way, that those relations should be a little more frequent. (Laughter.) He thought that solicitors were more necessary to the Bar than the Bar to the Bench. With regard to the proposals which had been before Parliament, one had already proved effective in the appointment of Mr. Justice Atkin—(cheers)—while the other had, perhaps, a little more tempestuous crossing to make. The one thing the people of this country had come to realize—in which the public conscience was quickened—was that law to be justice must be speedy and prompt. (Cheers.) Now-a-days all the people knew was that it was a denial of justice if there was delay of justice, and consequently they had recognised in Parliament the necessity for the additional judge, and, more important still, the appointment of two additional Lords of Appeal. The Lord Chancellor had as much as any human being could bear upon his shoulders, and if with the help which two additional Law Lords would afford they would lighten his labours by finding sufficient Law

Lords to constitute his Court they would have done good work indeed. (Cheers.) He was certain that one of the greatest and strongest of the connecting links between the various Dominions of the Empire was the fact that there was the appeal to the Sovereign in Council. The Dominions turned with confidence to that supreme tribunal, many thousands of miles away as it was, because they knew that justice was impartially and most capably administered. (Loud cheers.) Alluding to the presence of M. Labori as a fellow guest, the Attorney-General remarked that in the part he had played in the history of the French Bar he had shown what courage and tenacity could achieve, and had raised and glorified the profession of the law not only in his own country but throughout the whole of the civilized world. (Cheers.)

CONTEMPORARY LEGAL LITERATURE.

In the *Law Magazine & Review*, for May, Mr. C. A. H. Bartlett gives an account of the *French Judicial system* (Civil). French judicial practice presents many fundamental points of difference from the English. In the French system, for instance, the elaborate rules as to the admissibility and relevancy of evidence that form a marked feature of the English system are totally absent. All things go in without objection and the sifting comes in only when the advocate addresses the Court. And then the question is one of logical relevancy. While so liberal in one direction, the French system is very narrow in another. Self-interest is still a disqualifying circumstance for a witness. But witnesses are rarely heard in Civil cases. Even if heard they are not sworn. Official surveillance is so complete that documentary evidence is always available. Unlike here, the Judge conducts the examination of the witnesses; the advocate can only suggest questions which it is left to the judge to put or not Cross-examination by counsel is not allowed.

The principle of *Stare decisis* or precedent is not accepted in France. On each question, there have arisen multitudes of theories or systems as they are called which the judges choose between as their inclination leads them. The individuality of the judges is not disclosed in the judgment which is of the Court.

There are two classes of legal practitioners in France, the avocats (corresponding to barristers) and the avoues (corresponding to solicitors). Among the avocats there is a select body which has the exclusive privilege of appearing before the Cour De Cassation, the highest tribunal in the land.

Coming to the tribunals, there is first the Cour De Cassation which is the Court of final resort. Appeals lie to it only on questions of law and its decision is final. One of the most important courts in France is the Counseil 'D Etat or the Council of State of which the Minister of Justice is the presiding officer. It is the court which finally decides controversial questions or disputes arising in administrative departments or involving the power or jurisdiction of an administrative officer. It has exclusive jurisdiction in matters coming under the law of eminent domain and in all land acquisition proceedings. For settling conflicts between the Judicial and administrative departments, the French system provides a special tribunal called. *Tribunal Des Conflits.* Intermediate between the *Cour de cassation,* and the *Tribunal De Premiere Instance* (Court of first instance) there is the Cours d'appeal (the court of appeal). The *Tribunal De Premiere Instance* is the ordinary Civil Court. There are four other courts to be noticed. Commercial disputes are settled by a special tribunal called *Tribunal De Commerce* composed of business men, not lawyers as judges. This tribunal is noted for its promptness. The judges of this court are elected. Disputes between employers and employees are settled by another Special tribunal *Conseil Des Prudshomes* which also consists of only business men. This court is so constituted as to avoid the possibility of a dispute being judged except by a representative body composed of an equal number of partisans affiliated in position and occupation with each of the parties. *Conseil De Prefecture* is another Court of special jurisdiction. The last but by no means the most insignificant court is that of the Justice De Paix, (Justice of the Peace) whose jurisdiction extends ordinarily up to 600 francs, in exceptional cases to 1500 francs. His decision is final where the subject matter is of less value than 300 Francs.

In another article in the same journal, Mr. R. L. Marshall traces the evolution of *Freedom of Contract,* under the English Law by which from the position where only certain kinds of contracts were recognised as in Edward I's time, we have come to the present when validity of contract is the rule, its invalidity the exception. This development is largely due to actions on contract being in their origin, in most part, actions of trespass on the case. Just as there is no limit to the possible kinds of trespass for which an action is available at law, there is no limit to the conceivable instances of broken contract for which damages may be claimed. According to the writer, the doctrine of con-

sideration is not and was never the essence of contract. It was more or less of a buttress to support it. The source of obligation is the promise of one and the agreement of both. As late as 1765, Lord Mansfield held that agreements in writing, at all events in commercial affairs were valid without any consideration at all. The present law requiring consideration to support a promise is highly composite. There is the artificial common-law rule itself borrowed from equity that there must be (present or future) consideration, there is the equally artificial common law exception to the rule *viz.*, that in favour of past consideration laid down in the cases of *Lampleigh v. Braithwait* and *Bradford v. Roulston.* There is also the old canonical rule traceable to the middle ages which regards consideration as having a merely evidentiary value. This is supported of course only to a very limited extent, by the modern authorities on *Lampleigh v. Braithwait* and *Bradford v. Roulston.* For instance, in *Stewart v. Casey*, Lord Justice Bowen says "even if it were true as some scientific students of law believe that a past service cannot support a future promise, you must look at the document and see if the document cannot receive a proper effect in some other way. Now the fact of past service raises an implication that at the time it was rendered, it was to be paid for and if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences or as a positive bargain which fixes, the amount of that reasonable remuneration, in the faith of which the service was originally rendered.

In an article on "*Positive Right*" Mr. George Del Vechio justifies the antithesis between "positive right" and "natural right" recognised by a certain class of writers. "Positive right" is according to the writer what is considered as binding rules of conduct at any particular time while the criterion of justice to which these rules are constantly referred to apart from any historical sanction, is "natural right." This criterion persists in the human conscience and is one and uniform in its principles.

In the *Harvard Law Review* for April, a learned writer makes certain suggestions to the legislature to remedy the grave situation which is arising by the existence of "*interlocking directorates*" i. e. by several corporations having one or more directors common. The Law as it is, though strict, is not sufficiently so as it avoids contracts only if the directors concerned take actual part in the passing of contracts and does not take note of their presence at the meeting and the exercise of their influence by being so

present. One of the suggestions of the writer is that no two companies should have common directors.

In the *American Law Review* for March and April, Mr. R. Gwynne elaborates the theory that consideration is only a token evidencing the intention to be bound and that intent to incur obligation taken in connection with motive constitutes the mainspring of contract. In the absence of a valid motive, he argues, a promise to pay a large sum in consideration of a trivial sum would be bad, though it cannot be said there is no consideration for the promise.

Another learned writer suggests a law should be made so that persons that attempt to commit suicide may for sometime be kept in detention. That is because except in two states which have recently made attempts to commit suicide a crime, there is no aw punishing such attempts. The writer deprecates treating suicide as a crime; he would have detention as a preventive measure against the man attempting again.

BOOK REVIEWS.

The Indian Decisions Old Series.—Vols. 3, 4 and 6 to 8 published by the Law Printing House, Mount Road. Price of each Rs. 7.

These volumes contain the reprints of reports specially useful for the legal profession. The 3rd volume contains among others the reports of cases decided by the Supreme Court of Bengal and published in Boulnois reports and Sir Edward Hydes East's notes of cases. The 4th volume contains reports of cases decided by the Supreme Court of Bombay and published in Perry's Oriental cases a rather rare book. Volumes 6 to 8 contain reports of cases decided by the Sudder Dewanny Adawlut and published in the Select Reports by Macnaghten. The Sudder decisions of Bengal will also be published and the 8th volume contains the reports published in the 1st volume of the Sudder Dewanny Adawlut. It will be remembered that in many of these reports very often the same cases will be reported and the Editor should be careful to see that the same is not published twice. This will be specially so in the volumes containing the reports of the Sudder Decisions, Bengal and the Editor in the Eighth volume has been careful in this matter and in reporting the decisions from Vol. I he has merely referred to the page wherever they have already been reported in the Select Reports of Macnaghten's. In the 4th volume if a similar plan had been adopted some decisions reported twice might have been avoided but however we are glad to find the plan adopted in the subsequent

volumes where such adoption is very necessary. The publication of the decisions by the Editors is very useful to the profession and the present volumes show the care and energy bestowed by the Editors in editing these publications and making them especially useful to those for whom they are intended. We have no hesitation in commending the volumes to the profession.

Indian Decisions (*New series*) by T. A. Venkasamy Rao and T. S. Krishnasamy Rao, the Law Printing House, Madras.

The present series with the Indian Reports and the Indian decisions (New series) purport to give a reprint of the decisions of all the superior tribunals in this country including the Privy Council. As at the time of commencing the series the publishers had not the sanction of the Government of India to reprint the I. L. R. they could not use the headnotes, or facts or adopt the arrangement in the I. L. R. As a result in the first 5 vols. we have the reports published in the order of dates with the publishers' own head-notes and statement of facts. The method of publishing in the order of dates however valuable to a pure student of law would have caused a certain amount of inconvenience to the busy practitioner. Now that the Government's sanction has been obtained from the sixth volume upwards the series will be printed verbatim in the order of the I. L. R. headnotes, facts and all. The publishers promise to give subscribers of the series from its commencement reprints (according to the new plan) of the official reports contained in the first 5 volumes. The series as at present published are bound to be very popular. While about a third as cheap as the original reports they are quite as handy. Whether the volumes will be as handy when the 3 vols. of the Calcutta series will have to be printed in one volume remains to be seen but the enterprise of the publishers we have no doubt will find a way for it. Whenever a case reported in the series is reported also elsewhere, reference to non-official reports is given at the top thus saving a lot of labour to the practitioner.

By giving references to cases where a particular case is followed, distinguished, overruled, or dissented from, these reports in a measure serve as a digest and will be particularly welcome to the profession. The get up like all Lawyer's Companion publications is good and leaves nothing to be desired.

The All India Digest 1811—1911 Civil Vols. V and VI published by the Law Printing House, Mount Road, Madras, 1913. Price Rs. 8 each.

These are a continuation of the All India Digest published by the Law Printing House. The fifth volume contains the headings from Idol to Limitation. The sixth volume contains the headings from the Limitation Act to Muktearnamah. We must point out however that the Editors should be careful where a case is digested from a particular report to note the other reports in which the same case is to be found. The object of the Editors is to digest the reports of all cases decided by the four High Courts and reported both in the official reports and non-official journals but also of all cases decided by other Courts and reported in the official and non-official reports and such a reference would be found very convenient and will help the legal practitioner in finding out the cases wanted by him. We may also point out that when a case decides different points as where it decides questions bearing under different headings and articles under Limitation Act it would have been useful to refer the same case to the different articles and headings also. The heading and sub-headings have been conveniently arranged and every effort has been made to make the digest useful to the Legal profession. The volumes maintain the reputation of their predecessors and we have no doubt that they will be found useful by the practitioners in this country.

Aids to Law Series: The law of Obligations in British India, by S. Venkatachariar, B.A., M.L., Advocate, High Court, Madras, published by P. R. Rama Iyar & Co. This publication aims at directing the attention of students to salient points in the sections of the chief enactments bearing on the law of obligations in British India. The plan adopted is to give the text in the body with brief notes at the foot. Decided cases are copiously cited wherever they explain or illustrate the meaning of the sections but never so copiously as to obscure the text. The divergence between the English and the Indian Law is invariably noted. The failing of students generally is to overlook the text while labouring at the commentary. The merit of this publication consists in shewing the two in their proper relation. Students are likely to find the publication very useful. As the references are up to date and can be taken in at a glance, it may not be without use to the practitioner as well.

The Madras Law Journal

Vol. XXV] AUGUST, 1913. [Part V

[The following is the full text of the address delivered by the Hon'ble Mr. T. V. Seshagiri Aiyar at the Vakils' gathering of 1913 held in Mr. K. Srinivasa Aiyangar's bungalow on Friday the 8th August.]

Gentlemen,—I am not addressing you on any question of jurisprudence; I want to talk to you about ourselves to take a bird's eye view of our past and of our future, or to use the language of the merchant, to take stock of our situation. I shall thereafter endeavour to draw your attention to a few subjects which ought to engage your attention.

Efficiency and Integrity.

The admission of Vakils to practice in the High Court dates from 1863. Since the establishment of the High Court, the work of the Vakil has shown a steady and continuous onward course. A feeling of jealousy and ill-will towards us, as a class, has been the natural result: we can derive some consolation from the fact that Lawyers all over the world and in all ages have been looked down upon with disfavour by the lay public. It is not easy to analyse the contributory causes which have led to this distrust. I do not agree with the writer in that excellent liberal periodical, the *Nation* that the dislike is due to a belief that the work of the Lawyer hinders and does not help justice. I think that is a baseless criticism; and from all that one knows of the standard of efficiency and integrity which the Bar has reached in England, it is absolutely incorrect to speak of Advocates as not furthering the cause of justice. We, in this country, in this as in other matters look up to the guidance and example of England and many of us, not on a few occasions, feel consoled and encouraged by the sturdy independence, sobriety and rightmindedness of the English legal profession. In the matter of maintaining a high standard of the ethics of the profession, we ought to be even more aplomb, more circumspect, and more anxious to advance the cause of justice than our compeers

in England. The reason is this: In England the legal profession does not occupy the same conspicuous place in the work of political and social regeneration as it does in India. The fact that the present Cabinet is largely composed of practising Barristers ought not to blind us to the fact. But, as a rule, the landed aristocracy and the wealthy middle class furnish men who rule and guide the destinies of the Empire. I hope that the time may not be far distant in this country when other independent professions will take their full share of responsibility in reshaping and remodelling India. At present there are very few of this kind; and however much Mr. Lily, who, I understand, drew his official salary in Madras, and persons of his way of thinking may feel upset by the possibility of political power remaining in the hands of lawyers in India, there is no disputing the fact that we have endeavoured our best to serve our motherland in every department of human activity; and we have succeeded beyond our expectations. We are proud of our share in the noble work that has been achieved; and we look forward to rendering even more signal service in the time to come; and we may feel sure when the history of new India comes to be written the impartial historian's verdict will be that amidst calumny, in spite of dislike and dissuasion, and notwithstanding the supineness of a few whose lives have been supremely selfish and self-centered, the legal profession has striven patriotically to serve the motherland and to gain for it a due recognition among the nations of the world. If I am right in this estimate of our share in the work of regeneration, it follows that we on whom so great a responsibility rests should be *Sans reproche*, that our ideal should be high and our conduct should be above suspicion. (Cheers).

RECTITUDE AND HONESTY.

Now, gentlemen, although it is true that our career in the past has been such as to satisfy the most exacting critic, you must not forget we are increasing daily; and young men of the highest university distinctions are joining us in increasing numbers. To them we owe the duty of directing their energies in the path of rectitude and of honesty. We ourselves—I am now speaking of the senior members—have sat at the feet of men who have raised our profession to its present high level; and we owe it to ourselves that in our turn we impart to our juniors those lessons in professional ethics which have served us to float up and on. I am not afraid of being misunderstood when I say that mere intellectual eminence in the profession is not the only thing that is expected of us. It must be possible to speak of us in the language which Mr.

Bonar Law recently used with reference to the late Mr. Alfred Lyttleton, himself, a practising Barrister. The leader of the Opposition said "The great position to which he had attained, both in this House and out of it, was due, not so much to ability as to character, which still counts, and I hope will always count, far more in our political life than even ability. There are many men of whom we can say with confidence that they would never do a mean action. There are some men, but they are few, of whom we know, not only that they would not, but that they could not do anything small or mean, and Mr. Lyttleton was one of these." That must be the standard of morality which should animate us. The ways of winning a case as those of earning money are many and various; but in our career through life a few accepted ideas should govern all our dealings. We must assist the course of justice and not make its path difficult; we should not encourage litigation. It has been our boast and this we have inherited from England—that no man shall go undefended, but this does not mean that we shall engineer the work which we are to assist in grappling with. We are in the habit of training apprentices and taking work from juniors. By no act or conduct of ours should these young men be led to believe that the work of the Lawyer is not of the highest morality as of the highest utility. We have to hand down to others traditions which shall render our profession respected and looked up to. If those that look to us for guidance are impressed with the idea that the exercise of the calling does not demand the highest qualities of the head and of the heart, we will be false to our profession, false to the training we have received, and false to the best interests of the country. I have spoken out frankly because I am convinced that we need not be afraid of criticism, because fearless introspection can only result in good and can do no harm, and because I am anxious that we should do nothing to make our work and usefulness in the future less commendable than heretofore.

Etiquette of the Profession.

Before I leave the subject I wish to draw your attention to the fact that at present we have no rules regulating the etiquette of the profession. Generally we are prepared to follow the traditions of the English Bar; but the conditions under which we follow our profession are somewhat different, and what was said by Sir Courtney Ilbert, of the British House of Commons, is equally true of the English Bar, namely, if it is a model to be followed, it is also a museum of curiosities. We are not bound to observe rules of eti-

quette which are relics of by-gone days—we have to make our own rules—which shall oblige us to observe the best dictates of morality of right conduct and of fearless advocacy. There are dangers which threaten us on all hands. The Judicial Committee of the Privy Council have taken it for granted that our position approximates to that of Solicitors in England. There are in this country men in high position who are inclined to brand as sedition honest expression of opinion by Lawyers on political subjects. On the other hand, there are practitioners who carry on their work as if they are not bound by any code of morality. It is therefore necessary that we should at once frame a set of rules which shall be regarded as binding upon all professional men. Naturally enough this association in the city of Madras is looked up to by the Mofussil Bar for example and guidance; and I sincerely hope that before we meet again, this question will have been settled.

ADVICE TO JUNIORS.

May I say a word also to our young friends who are assembled here in such large numbers? It is believed that a spirit of want of respect is observable in them; they probably think their mental equipment compares favourably with that of the seniors. But they must not forget that it is true of the soldier as of the young practitioner that he who has not learnt to obey can never learn to command. If they show want of respect, they cannot expect to receive it from others when their turn comes. If, on the other hand, they show that while not yielding a single point in favour of their seniors, they are not unwilling to consider some respect to age and experience, they will strengthen the bond of union amongst us all and render themselves loved and respected. Remember my young friends, that you have now before you brighter careers than we had. Remember also that you are subject to more hostile criticism than we were. You have therefore to be cirumspect; after all, if you are honest in the work that you do, firm but respectful in your behaviour, steady and not spasmodic in your application to the work that lies before you, you will raise the profession to a higher status than it has yet attained and to a higher degree of efficiency than before.

CORPORATE RESPONSIBILITY.

Pardon me, gentlemen, the liberty I have given myself in addressing you these words. I am convinced that the training received by a Lawyer, if it is rightly understood and conscientiously acted upon will fit him to cope successfully with the heavy responsibilities

which good citizenship involves; and I am equally sure that a Lawyer who forgets what is due to the profession will be a canker in society. Let us all co-operate to enable Lawyers as a class, not only to get rid of the general disfavour which attaches to them, but to enable them to gain the confidence and good wishes of the general public. We must develop a feeling of corporate responsibility. It is instinctive in us to feel commiseration when any man is charged with an offence; and more so when one of our brethren is accused of any misconduct; we are anxious to help him. But assistance to a client or to any erring professional man should not blind us to the duty which we owe to the profession as a whole. Our first allegiance is to the profession, and we are bound to see that its name is respected. We have now reached a stage in the life of the profession when a keen sense of what is due to it and a feeling of resentment against those who misuse their opportunities while in it, should inspire our conduct. I do not want you to understand that in our profession there have been many men of the class to which I have referred. But in a growing profession like ours, we must expect to find some men with shady reputations and with inclinations to behave in a manner inconsistent with the true ideals of a Lawyer. The learned Judges of the High Court have shown a disposition to consult us as a body in matters pertaining to the conduct of legal practitioners. I ask you all to assist the Association in discharging these new duties to our own satisfaction and to the satisfaction of those who are inclined to place trust in our wisdom and capacity. It must be our duty under such circumstances to unflinchingly hand up the erring man to punishment. No false sense of compassion should deter us from performing an obvious duty. The lopping off of a dying or dead branch would give vigour and vitality to the tree. The self-evident truth should not be forgotten.

URGENT LAW REFORMS.

I shall now draw your attention to a subject which deserves your careful examination. As I said before, we have put our hands nobly and well into many departments which have contributed to the welfare of the people, but we have left severely alone the sphere of work most germane to our profession. Apparently it has not struck most of us that the law of this country stands in need of urgent reforms: and it is in that department our contribution is practically nil. Every day in court we come across cases which show that some of the pronouncements of the Smiriti writers are incompatible with modern conditions of society. We are often confronted by omissions which ought to

be supplied and by directions which ought to be ignored. The task of reforming law has never been attempted as becomes the importance of the subject and the gravity of the situation. It has been left to Judges to declare that some texts of Smriti writers are obsolete and ought not to be regarded as binding authority. It is time that the subject of Law reform engages our serious attention; I shall not on this occasion go into particulars, but it will not be amiss to mention a few instances by way of illustration. Take the case of widows. The law relating to their rights in the property of their husbands is almost barbarous. The Benares School of Law is the worst offender in this respect. Take again the place assigned to sisters and their children in the scheme of inheritance. One begins to lose faith in the longsightedness of our sages when you contemplate their position in the table of heirs. Look at the position of the daughters when there are sons. Look at the way persons born blind or lame are treated by the lawgivers. I am not going into legal history. I am not endeavouring to see what justification there may have been for the law as it stands. I wish to impress on you this. It behoves you as belonging to a profession which has done so much for India to devote a portion of your time to the state of the law. You cannot expect our Government to move in this matter. It is never a congenial task for a Government to attempt to change the laws of inheritance. The British Government in India labours under a great disadvantage in this respect. They have no means of knowing what the wishes of the people are. They have no idea how far these laws are felt to be outlandish and oppressive. It is the duty of Indians to place before the Government the collective opinion of the people. You have your representatives in the Legislative Council and they might take up this subject. In order to do this they must have your support. My suggestion to you is this: There ought to be a Committee of the association which should be engaged in studying the reform of laws. That Committee should centre its attention upon special departments of law each year. It ought to invite the opinion of laymen and Lawyers on the question. The columns of newspapers, and especially Vernacular papers should be availed of to invite suggestions; and to each gathering of the Vakils annually a blue book containing the volume of evidence and the opinion of the commission should be presented. I have no faith in Government being asked to appoint a Law Commission. Government is not likely to accede to this request. This blue book should be in the hands of the Government and of every member of the Legislative Council; and I feel no doubt that some of the members at least will be

willing to bring the matter in a concrete form before the Legislative Council.

The above suggestions are by no means exhaustive. I have given expression to what comes uppermost in my mind. I have an idea that the time will not be far distant when the initiative of Madras will be followed by other provinces and when there will be annual conferences of Lawyers from the whole of India to consider the steps that ought to be taken to reform law and legal procedure and to bring about uniformity as to succession and inheritance throughout the whole of India.

BENEFIT FUND FOR VAKILS.

Gentlemen, I have indicated the lines along which you should proceed and I feel no doubt that before practical effect is given to the suggestion, the matter will receive fuller consideration.

There is another matter to which I would make a passing reference and then close. If I have you with me in my exhortation to eliminate from the profession the undesirables, I think I can also count upon your support to inaugurate a system of Benefit Fund for the Vakils. Many a man is stranded in life for reasons which bring him no discredit. Many a young life is snatched away early. It is the duty of those who are in the profession to make provision for the family of these unfortunate brethren of ours. I soon expect to have a copy of the rules which have been framed in England on this subject. I ask each of you to resolve to contribute his share towards providing some annuity to the widows and children of such of our fellow practitioners as have left them destitute behind.

After all, forms and rules will not secure for an organisation like ours respect from outside and safety within. We must realise that we have a mission to fulfil. We are Officers of Court and Servants of Justice not only for the purpose of submitting ourselves to disciplinary jurisdiction, not only to claim privilege for words spoken in the cause of the client, but officers and servants in its truest sense, namely, we exist to succour the weak in obtaining justice and to help the Court in rendering that justice. That is the ideal which we shall always keep in mind. If we are guided in life by this lofty resolve, the country will have cause to be proud of our

profession and we shall have the satisfaction of feeling that we are discharging our duties honestly and fearlessly. (Cheers).

BOOK REVIEWS.

The Law of Libel by Valentine Ball, M.A., published by Stevens and Sons Ltd., 119 and 120 Chancery Lane, London. Price 6s.

This little book is specially useful to newspaper writers and journalists. It purports to deal with the law of Libel as affecting newspapers and journalists. The author was invited to deliver a course of lectures by the Faculty of Law of the University of London at the Institute of Journalists, and these lectures have been published in the form of a book. So far as it goes the law has been fairly and accurately stated and only such leading cases as may throw light upon the principles have been referred to. We have no doubt the book will be found useful to the lawyer and specially to those for whom it has been intended.

The Madras Law Journal

VOL. XXV] AUGUST, 1913. [PART VII

VALUATION OF SUITS FOR PARTITION.

A Full Bench of our High Court, has recently decided in *Challasami Ramayya* v. *Challasami Ramaswamy*[1], that the valuation made by a plaintiff of the relief sought by him in a suit for partition of properties of which he claims to be in joint possession along with the other co-parceners, cannot be revised or rejected by the Court on the ground that the valuation is arbitrary and not *bonafide*. In coming to this conclusion, their Lordships followed the previous decisions of this Court in *Guruvajamma* v. *Venkatakrishnama Chetty*[2] and in *Chinnammal* v. *Madarsa Rowther*[3] and expressed their unwillingness to alter the longstanding practice prevailing in this Presidency. With respect to the resulting anomaly pointed out by *Mukherjee* J. in the case in *Krishnadas Lala* v. *Haricharan Banerjee*,[4] *viz.*, the anomaly of suits for partition of very large properties having to be tried by Courts of the lowest jurisdiction, their Lordships thought that it could be avoided by framing rules under S. 9 of the Suits Valuation Act.

As the matter is a very important one affecting suits of frequent occurrence in this country, and as it is desirable that the following matters should be borne in mind before framing rules, it is proposed to discuss the history of the legislation on the subject and the extent of the necessity which exists at present for framing such rules.

Before entering into this discussion it may perhaps be well to make a few general observations on the existing state of the law in this Presidency. It has been held by a Full Bench in this Court in *B. Rengiah Chetty* v. *B. Subramanya Chetty*[5] that a suit for partition, where the plaintiff alleges to be in joint possession of the properties along with the defendants, falls under Section 7 (iv) of the Court Fees Act, and that the plaintiff is entitled to put his own valuation on the relief sought by him for purposes of Court Fees.

1. (1912) 24 M. L. J. 233.
2. (1900) I. L. R. 24 M. 34.
3. (1903) I. L. R. 27 M. 480.
4. (1911) 14 C. L. J. 47.
5. (1910) 21 M. L. J. 21.

And in the case reported in *Chalasani Ramiah* v. *Chalasani Ramaswamy*[1] their Lordships held on a construction of the sections of the Suits Valuation Act that the same valuation determines jurisdiction also. On these decisions the further question arose whether in such cases the Court has power under Order 7 rule 11 (b) of the Civil Procedure Code (corresponding to Section 54 of the Code of 1882) to call upon the plaintiff to correct the valuation he puts on the relief claimed by him. At first sight it looks as if the two powers are inconsistent with each other and cannot have been intended by the legislature to co-exist. If the matter stood alone one would have little hesitation in coming to the conclusion that it was hardly likely that the Legislature would have conferred on the plaintiff the liberty to value the relief sought by him in the classes of suits dealt with in Section 7 (iv) of the Court Fees Act and at the same time to have given power to the Court to correct such valuation. It looks like giving with the one hand and taking with the other. But that the powers mentioned above were originally conferred by the Legislature on the parties and Court respectively in the same classes of suits, would appear from the express words of Section 7 (iv) of the Court Fees Act. "In all such suits the plaintiff shall state the amount at which he values the relief sought *and the provisions of the Code of Civil Procedure* 1859 *Section 31 shall apply as if for the word 'claim' the words 'relief sought' were substituted*" as they stood before the repealing and amending Act of 1891 repealed the words in *italics*. If these words did not originally exist in the section it may very well be argued that the rule of the Civil Procedure Code [order 7 rule 11 (*b*)] does not qualify or govern the Section of the Court Fees Act, the two Acts not being in *pari materia*, the one being a fiscal enactment passed with the object of computing the Court fees payable in particular classes of suits and the other regulating the procedure to be observed in the trial of suits etc. It has now to be seen why the words referred to above were repealed and what the effect of such repeal would be on a construction of the sections as they exist at present. In the case reported in *Musst Bibi Umatul Batul* v. *Musst Nauji Kuar*[2] *Mukherjee* J. dealing with this question lays down two broad propositions as the result of his reasoning based on the history of Legislation on the subject, viz., (1) that when S. 7 of the Court Fees Act was originally passed the Legislature intended that the right of the plaintiff to state the value of the relief claimed by him should be exercised subject to the power and duty of the Court to ascertain if

1. (1912) 24 M. L. J. 233. 2. (1907) 6 C. L. J. 427.

the valuation was proper and (2) that the Legislature subsequently repealed the concluding portion of the clause, because the language of the Code was modified so that the altered provision of the Code became applicable of its own proper vigour without an express provision in the Court Fees Act. It may be observed here that in S. 31 of the C. P. C. of 1859 (corresponding to Order 7 Rule 11 of the present Code) the words were "if it appear to the Court that the *claim* is not properly valued.................the Court shall reject the plaint". In the Code of 1877 the word 'claim' of the old Sec. 31 was altered into 'relief sought' in Sec. 54 of the latter Code and this was reproduced without alteration in the Code of 1882. It is from this that *Mukherjee* J. draws his second inference stated above. To the first proposition it is not necessary to demur. The second proposition, it is submitted with all deference to the learned judge, does not appear to be accurate for the following reasons :—

(1) The change in the language of the section of the Code effected by the Code of 1877, did not render it necessary that the whole portion of the clause should be repealed as was done by Act XII of 1891. It was enough if the words "*as if for the word 'claim' the words 'relief sought' were substituted*" only were repealed. From the repeal of the whole portion in italics it may safely be inferred that the words were omitted not for the reasons stated by the learned judge but for some other reason which we have to find out. The solution is to be found in the provisions of the Suits Valuation Act as explained below.

(2) The Court fees Act and the Civil Procedure Code not being enactments in *pari materia* as already stated, one cannot be held to control the other in the absence of express words in either enactment connecting the two.

(3) If the Legislature thought the words in question were unnecessary by reason of the change in language of the section of the Code, it would have repealed the words in 1877 alone when the Code of 1877 was passed and not waited for 14 years to find out that those words were unnecessary.

(4) It does not appear that the language of the section of the Code was altered in 1877 with the object of bringing it into conformity with the language of the Court Fees Act and this could hardly have been intended, because the power of the court to correct the valuation was certainly not confined to cases falling under S. 7 clause iv. alone, which would be the result if the view of *Mukherjee* J. is to be accepted, but exists with greater reason in the classes of suits referred to in the other clauses of S. 7.

(5) The change again in the language of S. 54 (*b*) of C. P. C effected by the Code of 1908—"Relief sought' is again altered into 'relief claimed,' again rendering the language dissimilar to the language of the Court Fees Act. If the language of the Code was altered in 1877 so as to bring it into harmony with the language of the Court Fees Act and if the concluding portion of S. 7 (iv) of the Court Fees Act was repealed in 1891 for the above reason as being no longer necessary, the Legislature would not have altered the language again in the manner it did in the Code of 1908.

(6) The real reason for the repeal appears to be this, viz., the giving to the High Court, by S. 9 of the Suits Valuation Act in 1887, power to frame rules if necessary for the valuation of Suits dealt with by S. 7 (iv) of the Court Fees Act. This power when exercised (and it has been exercised by this court in particular classes of suits) would render the other power conferred on the courts under Order 7 Rule 11 (*b*) of the Code superfluous and it is quite possible that the Legislature itself saw the inconsistency and inconvenience of giving this power to the Courts, in conferring the power on the High Court under S. 9 of the Suits Valuation Act to frame rules for the valuation of suits falling under S. 7 (iv) of the Court Fees Act. And the reason therefore for the repeal of the concluding portion of the above section should have been the conferring of the power to frame rules on the High Court and not the change in the language of the Code in 1877. This, it is submitted, fits in better with the whole scheme of the Legislature in making the various enactments and repeals above referred to than the reasoning of *Mukherjee* J. in *Musst Bibi Umatul Batul* v. *Musst Nauji Kuar*[1]. The anomaly which the learned Judge was struggling to surmount would be better met in the mode adopted by this Court than by placing the interpretation put upon the section of the Court Fees Act by the Calcutta Court.

It may also be mentioned here that there is nothing in the Bombay and Allahabad cases which conflicts with the above view. The only Bombay case which takes a different view from that of Madras is that reported in *Dayaram Jag Jivan* v. *Gordhan Das Dayaram*[2], and the view there taken that the word "determinable" in S. 9 of the Suits Valuation Act means "determinable by the court" is, it must be said with all respect to the learned judge who decided the case, obviously wrong, because the section is not confined to suits falling under S. 7 (iv) alone where the value is left to be determined by the party, but to various other classes of

1. (1907) 6 C. L. J. 427. 2. (1909) I. L. R. 31 B. 73.

suits where it is neither the function of the court nor of the party to determine the valuation. 'Determinable' simply means "determinable by the rules laid down in the Court Fees Act." Any other construction would lead to anomalies. And the case reported in *Zair Husain Khan* v. *Khurshed Jan*[1], proceeds on what the learned judges consider to be the practice of that Court and is no authority for the general proposition that courts have power under S. 54 (*b*) of the code to correct the valuation put by the plaintiff.

It becomes therefore clear that apart from the anomaly of questions relating to property of considerable value having to be determined by Courts of the lowest jurisdiction, the view taken in the previous Madras Cases is not open to attack.

Next as to the extent of the necessity for framing rules, the Suits Valuation Act gives power to frame rules for valuing the relief sought both for the purposes of Court Fees and jurisdiction. It is submitted that there is no necessity for the valuation of partition suits for Court fee purposes. There is no anomaly at all in allowing the plaintiff to value the relief sought by him in any manner he chooses. The exhaustive reasoning of their Lordships in the Full Bench case in *B. Rangiah Chetti* v. *B. Subramanya Chetty*[2] in support of their view that suits of this class fall under S. 7 iv (*b*) of the Court Fees Act clearly shows that the relief sought is susceptible of no other than an arbitrary valuation and the value of such relief bears no proportion to the value of the property or the plaintiff's share in it. This view receives support from the following other cases :—

Rajendra Loll Gossami v. *Shama Churn Lahoori*[3], *Kirti Churn Mitter* v. *Annath Nath Deb*[4], *Bidhata Roy* v. *Ram Charitra Roy*[5] and *Monohar Ganesh* v. *Bava Ramachurn Dos*[6] and also from the definition of the word 'partition' contained in the Mitakshara which is to this effect. "Partition or *Vibhaga* is the adjustment of divers rights regarding the whole by distributing them on particular portions of the aggregate". Power being given to the plaintiff to value such relief in any manner he chooses and Courts not being in a position to value it in a better manner and on a more satisfactory basis, such power ought not to be taken away by the High Court by framing rules for the purposes of Court Fees. Moreover the stamp revenue is not defrauded by computing Court Fees

1. (1906) I. L. R. 28 A. 545.
2. (1910) 21 M. L. J. 21.
3. (1879) 4 C.L.R. 417. s.c. I.L.R. 5 C. 188.
4. (1882) I. L. R. 8 C. 757.
5. (1907) 6 C. L. J. 651.
6. (1877) I. L. R. 2 B. 219.

on the valuation put by the plaintiff, as the definition of "Instrument of Partition" in the Stamp Act now in force includes final order or decree of a Civil Court decreeing partition. Though the plaintiff escapes with a light fee at the time of the institution of the suit he has, before obtaining possession of his share in suits of this sort where he is in joint possession, to pay full stamp duty on the market value of his share. And it seems hard to tax the party twice in suits of this sort for getting exclusive possession of his share in joint property. It is no doubt true that as the law at present stands a plaintiff out of possession in a suit for partition has to pay stamp duty twice, once on the plaint, Court fees on the value of the share claimed by him computed in accordance with the rules contained in Section 7 (V) of the Court Fees Act, and again before obtaining possession of the share decreed to him, stamp duty on the market value of his share. This provision works hardship on poor litigants and it is hoped that the legislature will take steps for remedying it by exempting parties who paid Court Fees on the value of the share at the time of instituting the suit from the further stamp duty payable in execution, or at least by providing for their paying only the difference between the stamp duty payable under the Stamp Act and the Court Fees paid under the Court Fees Act. And the fact that this hardship exists in certain classes of suits is no reason for extending this hardship to other classes of suits. And as stated at the outset there is not only no anomaly in allowing the plaintiff to put his own valuation on the relief sought by him in such cases but there is every reason for giving this power to the plaintiff, and therefore no necessity, as in the case of valuation for jurisdiction purposes, exists in the case of valuation for Court Fees purposes. It is therefore hoped that the learned judges of the High Court will confine themselves to the framing of rules for the valuation of suits for partition, *for jurisdiction purposes only*. Otherwise the whole reasoning in the F. B. Case in *B. Rangiah Chetti* v. *B. Subramanya Chetti*[1], which is quite unexceptionable will lose its weight and any rules that might be framed for Court Fees purposes would have the effect of running counter to the above reasoning and conclusion when there is no need or justification for it.

T. RAMACHANDRA ROW,

High Court Vakil.

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1. (1910) 21 M. L. J. 21.

NOTES OF INDIAN CASES.

Suraj Narain *v.* Iqbal Narain.—I. L. R. 35 A. 80.—Syed Amir Ali in pronouncing the Judgment in the above case while holding that it must depend on the facts of each case to say what will amount to separation or what conduct on the part of the members of a joint family will constitute such makes the following rather startling observations. " A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed." It was indeed contended on behalf of the appellant's counsel that an oral expression of intention on the part of one member was sufficient and that one person could 'separate himself against the wishes of the rest of the family' and one or two cases apparently supporting this contention were cited. We hope the Privy Council have not subscribed to any such proposition. Of course it is open to one member to sue for separation against the wishes of the rest of the family. A partition can also be effected by agreement of the parties and such an agreement necessarily implies the consent of all the members of the family. It has been held that a decree or award effects a severance. It has also been held that severance is not necessary by metes and bounds but that the members may agree to become separate in interest without an actual division by metes and bounds. In the case of such an agreement it is necessary to see what is the intention that may be gathered from the acts and declarations of the parties. The agreement to become divided may be express or implied from the conduct of the parties. In all such cases unless there is an intention to become divided in status there can be no partition. Where however there is only an intention or a desire such an intention on the part of only one member to become separate while the others do not agree to divide or give the member a share we know of no principle by which it can be held that such a mere intention or desire to become separate effects a severance. The only remedy of such member is to institute a suit for partition.

That is the principle laid down by *Bashyam Aiyangar* J. in *Sudarsana Maistri* v. *Narasimhalu Maistri*[1] also cited before their Lordships. We hope the judgment of the Privy Council in this case will not be taken as affecting the said principle. In the case before the Privy Council their Lordships were considering the effect of a compromise between the members. They hold that such

1. (1901) I. L. R. 25 M. 149 at 156.

compromise can not be taken as effecting a severance. In considering whether there was severance the Privy council looked to the intention of the parties as appearing from the compromise and their conduct thereafter. Evidently therefore the attention of their Lordships was directed to the conduct of all the parties and the intention of all of them as appearing from such conduct and compromise which is not a unilateral act. If expression of intention on the part of one member is sufficient to effect a severance notwithstanding the dissent of others the bringing of a suit for partition must be enough to constitute a severance but this has been held not to be sufficient (See *in the matter of Phul Koeri*[1]) and it is the decree in the suit that effects a severance. There was some doubt whether a decree effects a severance when there is an appeal but it has now been settled that it has that effect. See *Subbaya Mudali* v. *Manicka Mudali*[2]. An agreement in which all parties concur will equally have that effect as already stated; see *Muktakasi Debi* v. *Umapati*[3] and *Ashabai* v. *Haji Tych Haji Rahimtulla*[4].

Narain Dei *v.* **Durga Dei.**—I. L. R. 35 A. 138.—We should think that the question decided in this case requires re-consideration. The learned judges held in this case that the plaintiff who claimed as the reversioner to recover property as appertaining to the estate of the last holder on the ground that the property purchased by the defendant in the case was really purchased by the widow of the last holder was not claiming through the widow and that therefore S. 66 of the New Code of Civil Procedure did not bar the suit. It should be observed that in arriving at this decision their Lordships were not giving effect to the words in the section "on behalf of some one through whom the plaintiff claims" or to the cases decided under S. 11 where similar language is employed. S. 66 says that no suit shall be maintained against a person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims. In this case the purchase was alleged to have been made by the widow. If it was out of her savings it would be her absolute property which she could dispose of at her pleasure and the subsequent incorporation into the estate would in no way be inconsistent with her absolute rights at the time of the purchase. If it was the corpus of her husband's estate the property would appertain to the estate from the moment of her purchase and no question of incorporation could arise. Even in this latter case a question may

1. (1869) 8. C. L. R. 388.
2. (1896) I. L. R. 19 M. 345.
3. (1870) 8 B. L. R. 396 (Note).
4. (1882) I. L. R. 9 B. 115.

arise whether the widow does not represent the estate and in such a case it has to be seen whether he is not a person claiming under her. In the former case where the purchase was made out of income or savings of the husband's estate and the plaintiff should claim that by reason of her act she incorporated it with her husband's estate there could be no doubt that the plaintiff must claim through her. Apparently a distinction seems to be drawn between a person claiming through another and under another. If the widow herself cannot maintain a suit against the certified purchaser on the ground that it was made on her behalf, a person who should claim after her death that the property by reason of the widow's act of incorporation became part of the estate of the last owner could hardly be said to be in a better position. Where a widow purchases a property in a Court sale out of the corpus of her husband's estate in the name of another in order to defeat the reversion such act on her part would be fraudulent and S. 66 could be no bar in such a case. It may be observed that the language of S. 11 is only "under whom they or any of them claim" and yet the courts have held that a decision against a widow binds the reversioners.

SUMMARY OF ENGLISH CASES.

In re **Vic Mill Limited**: [1913] 1 Ch. 465. (C.A.)

Contract for purchase of manufactured goods—Damages for breach of—Principle of assessment—Profits lost—Entitled to, in the absence of proof of inability to meet all orders.

In this case, a nice point as to the principle of assessing damages in a case for breach of contract for the purchase of manufactured goods arose. The goods were of two classes: one class had been manufactured by the time the purchaser had declared his inability to purchase; the other class had not been manufactured, only some materials were in the maker's hands. In the one case it was agreed that the goods were used to meet another order after making slight alteration and therefore all that the seller was entitled to was the difference between the price under the contract and the price realised by the re-sale. In the other case, the argument was that the sellers were even otherwise fully engaged and therefore were not entitled to the whole profit they would have made under the contract.

Held both by Neville J. and the court of appeal that in the absence of evidence that the seller was unable to meet all the orders, or would not have got all the orders that they actually got, they were entitled to the profits they would have made if the contract had been kept.

In re **Seymour: Fielding *v.* Seymour:** [1913] 1 Ch. 475. (C. A.)

Deed of gift—Void for want of authority in agent—Re-delivery by principal—What amounts to—Knowledge of want of authority not essential.

Where a deed of gift executed by a lady in favour of her daughter was bad as the attorney who had executed it for her had no authority under seal to do so, but the lady asked the solicitor when the deed was brought to her, to keep it for her daughter and declared that the property belonged to the daughter it was held both by Joyce J. and the Court of Appeal that there was a second proper delivery by the lady and the title passed as from that date to the daughter.

To validate such re-delivery their Lordships held that it was not necessary that the lady should have known that the deed as first executed was void and should have intended to deliver it herself with a view to ratify the transaction.

In re **Midland Express, Limited: Pearson *v.* The Company:** [1913] 1 Ch. 499.

Floating charge—Debenture holder's action—Holders paid interest when company going concern-Effect of—Rateable distribution in respect of principal and interest.

In a debenture holder's action to enforce their floating charge on the assets of a company, it was found that some of the debenture holders had received interest when the company was a going concern while others had not. It was held however that this gave no right to those that had not been paid interest to any preference in respect of such interest; they were bound to go rateably in respect of the whole money due to them with the rest.

In re **Ackerly: Chapman *v.* Andrew.** [1913] 1 Ch. 510.

Will—Construction—Two powers-Special power and general power—Appointment by will-Construction of—Exercise of special power.

A lady had two powers of appointment, a special power to appoint for the life of her husband, and a general power to appoint to the reversionary interest contingent upon no children of her living long enough to take a vested interest in the property. The lady who died leaving a daughter, by her will appointed her husband guardian for the child and then proceeded to "give, devise, appoint

and bequeath all my estate, property and effects which I have a power to dispose of by my will to my husband absolutely." *Sargant* J. held upon a construction of the will that the appointment was under the special power and not under the general power.

Sutton *v.* Bowden: [1913] 1 Ch. 518.

Factum Valet, doctrine of—Consecration at the instance of managing body acting without authority, effect of.

In this case, *Farwell* L. J. was prepared to apply the *factum valet* doctrine to the *consecration* of a chapel though it should be found that it was made at the instance of the managing body of an institution acting beyond its powers.

***In re* Simcoe: Vowler-Simcoe *v.* Vowler: [1913] 1 Ch. 552.**

Will—Technical words—To be given their legal effect—To issue male—Words of explanation—Effect of.

In the construction of the words used in a will, technical terms or words of known legal import should have their proper legal effect attributed to them although the testator uses inconsistent terms or gives repugnant and impossible directions. To deprive the technical words of their appropriate sense there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense and to show what that sense is.

Applying this rule, Swinfen Eady J. held in a case where the testator gave his estate to " J. W. and his issue male in succession so that every elder son and his issue male may be preferred to every other younger son and his issue male and so that every such son may take an estate for his life with remainder to his first and subsequent son successively according to seniority in tail male etc.," that the intention to give an estate in tail male shown by the words " to J. W. and his issue male in succession" was not rebutted by the words that followed as they were merely words explaining the nature of the estate that each would take if the entail was not barred.

***In re* Gordon and Adams' Contract: *In re* Pritchards Settled Estate: [1913] 1 Ch. 561.**

Power—Appointee under—Takes under original instrument—Trustees of original settlement trustees for new disposition.

Where an appointment is made under a power conferred by a will or deed, the appointee takes under the original instrument and where there are trustees under the original document they become trustees for the appointee and a good title can be made for the purpose of the Settled Land Act without any further appointment of trustees.

Manks *v.* **Whitely** : [1913] 1 Ch. 581.

Charge—Action for sale—Order declaring charge, directing accounts and sale in default of payment within time fixed—Power of extension by court of first instance.

By an order of the Court of Appeal, plaintiff was declared entitled to a charge and an account was ordered to be taken of what was due on the mortgage and a time was fixed for payment of what is found due, in default a sale was directed to take place. Pending an appeal to the House of Lords, one of the defendants made an application for extension of time for redemption to the court of the first instance. *Sargant* J. held that though the court where stay of execution was ordinarily to be had was the court of appeal, having regard to the fact that it was a Chancery action and the time fixed was not of the essence but merely fixed for the purpose of the working out of a complicated order, the court of the first instance had power to extend the time.

In re. **Finlay** : **C. S. Wilson & Co.** *v.* **Finlay** : [1913] 1 Ch. 565.

Principal and agent—Stock broker—Right to close account—Sale—Taking over at fair valuation, permissible, if sale impracticable—Sale to agent himself,—Impropriety of.

An agent can under no circumstances sell to himself but where there is an open account between a broker and his client, on the death of the client, the broker who is entitled to close the account may where he finds that the sale of the shares would be detrimental to the interests of his client, take over the shares at the market price. The burden of proving that the shares were taken at a reasonable and fair price is on him.

JOTTINGS AND CUTTINGS.

Stories of English Law and Lawyers.—The prolixity of Counsel has provoked much good-and-bad humoured interruption from the Bench.

In Mr. Darling's Court a few years ago, counsel in cross-examining a witness, was very diffuse and wasted much time. He had begun by asking the witness how many children she had and concluded by asking the same question. Before the witness could reply, Justice Darling interposed with the remark.

"When you began she had three."

Of the same genial order was the retort of Justice Whiteman to Mr. Ribton, when that Counsel, in addressing the Jury, had spoken at some length, repeating himself constantly and never giving the slightest sign of winding up. He had been pounding away for several hours, when the good old Judge interposed, and said, "Mr. Ribton, you've said that before." "Have I, my Lord?" said Ribton, "I am very sorry; I quite forgot it." "Don't apologize, Mr. Ribton," was the answer. "I forgive you, for it was a very long time ago."

With these two creditable specimens of kindly, spontaneous humour, compare the remark of a United States Judge, which was much praised in the press at the time it was made, but which in our opinion is far inferior to Justice Darling's impromptu. The American visited the Court of Appeal, and was invited by the late Lord Esher to take a seat on the bench. A certain Queen's counsel was addressing the Court. "Who is he?" asked the Yankee. "One of her Majesty's Counsel," replied Lord Esher. "Ah," said the American, "I guess now I understand the words I hear very often since I have been in your country, "God Save the Queen."

Bethel, afterwards Lord Westbury, confessedly adopted as a ruling principle the maxim, "Never give in to a Judge," and his overwhelming egotism enabled him to successfully carry off situations that would have brought a less fearless man to grief. All his sayings have a touch of bitterness and cynicism, and in reading those accounted most brilliant, one somehow feels that they savor of what might be termed colossal cheek rather than legitimate repartee. "Take a note of that," he once said in a stage aside to his junior. "His Lordship says he will turn it over in what he is pleased to call his mind." The discursive habits of Lord Justice Knight Bruce he detested. "Your Lordship," he once pointedly cut short an obser-

vation of that Judge by declaring, "Your Lordship will hear my client's case first, and if your Lordship thinks it right, your Lordship can express surprise afterwards." And all the gratitude that fell to the successful suggestion of one of his juniors was the *Sotto Voce* remark, "I do believe this silly old man has taken your absurd point."—*Canada Law Times.*

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Constructive Murder.—A recent ruling of Mr. Justice Darling at the Central Criminal Court as to the distinction between Murder and Manslaughter has raised some comment in the Profession. A woman charged with the wilful Murder of another woman, by shooting her, raised the defence that, having received great provocation from her husband and the woman, she intended to shoot him and herself, but by mistake shot the other woman. It was contended on her behalf, and the learned Judge charged the jury to the same effect, that such facts, if proved, might amount only to manslaughter if the husband were killed, and must justify a verdict of manslaughter in the case in question. The tendency of the Courts to narrow, rather than to enlarge, the cases which come within the category of "constructive" murder is well known, but the old rule still obtains that if a person, whilst doing or attempting to do another act, undesignedly kills another person, if the act amounted to felony, the killing is murder, if merely unlawful, manslaughter. Manslaughter is a felony, and it seems somewhat difficult to reconcile the above ruling with the old established rule of law.—*Ibid.*

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WORKMEN'S COMPENSATION.

Mary Ann, while cutting bread,
Cut her finger. With elation
Mary Ann went off to bed,
Claiming compensation.

William Jones, while carting coke,
Bruised his shin. With jubilation
William cried: "A happy stroke!
One year's compensation."

Charles, the waiter, dropped the cheese
Hurt his toe, retired from waiting.
Six months' claim. At Brighton he's
Now recuperating.

Jane, while cooking, trod and slid
  On some fat, and fell obliquely ;
Interesting invalid,
  Drawing two pounds weekly.

Jack, the hodman, scratched his wrist,
  Scratched it with a scaffold splinter ;
On the compensation list,
  Resting for the winter.

On a job at Maida Vale
  With his hammer, Green, the plumber,
Hit the wrong nail, (finger nail),
  Resting till next summer.

Bless the goodness and the grace,
  And the thoughtful legislation
That conferred upon our race,
  Workmen's compensation.

The Green Bag.

* * *

The worm turned.—Dr. L. M. Thompson, formerly Superintendent of the Home for the feeble-minded at Marshall, Missouri, was on the stand the other night as an expert witness in a case where one side claimed the testator was of unsound mind. In answer to the long hypothetical question of the attorney who called him, Dr. Thompson gave it as his opinion that the testator was afflicted with " Senile dementia ".

Across the room sat a young attorney with formidable battery of medical books close to hand. It was his duty to cross-examine the expert and to show his opinion was at variance with the books. The stenographer sweat blood while the young lawyer fired interrogatories with ten jointed italic words at the witness's head. In varying forms the same questions were asked and re-asked at wearisome length. Dr. Thompson was good natured and stood the ordeal without complaint until nearly midnight. Then retribution came as simply and as naturally as an infant's smile.

" Doctor, " said the young cross-examiner, pointing a severe finger at the witness, " you have given it as your judgment that the testator was suffering from what you are pleased to term ' senile dementia. ' Now, I wish you would repeat to this jury some of the evidences of ' senile dementia ' in a patient. "

There was just the ghost of a gleam in the doctor's eyes as he replied,

Well, the books say when a man has 'senile dementia' one of the symptoms is to ask the same question over and over again after it has been clearly answered."—*Ibid.*

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Humours of German Courts.—In Berlin not long ago an iron worker was sent to prison because he had laughed at a policeman. It appears that, as this man was proceeding along a street one day, his risibilities were aroused by the sight of a particularly stout policeman giving a chase to a dog. The offender was promptly hauled into Court and "sent up" for "scandal."

A German, in attempting to board a moving train, fractured his leg. After six months in a hospital, he was discharged; whereupon the State Railway Department at once prosecuted him for "infringement of regulations." He was fined a sum equivalent to five dollars.

Upon entering an Omnibus a man trod on the foot of a woman who was so incensed by the accident that she remarked that he walked like a hen. For this term of reproach the lady was fined twenty marks.

Claire Waldoff, the Berlin singer once cleverly outwitted the Police. She had been warned that if she sang any of her songs on Easter Sunday there would be trouble. But announcement was, nevertheless, made that Claire Waldoff was positively to appear. She did so; so did the police: and she sang the German National Anthem. The promised prosecution did not take place.—*Ibid.*

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Bombay Gazette.—An Indian Judge, when first appointed to his position was not well acquainted with Hindustani. He was trying a case in which a Hindu was charged with stealing a "nilghai." The judge did not like to betray his ignorance of what a nilghai was, so he said, "produce the stolen property."

The Court was held in an upper room, so that the usher gasped "please, Your Lordship, it's down stairs."

"Then bring it up instantly" sternly ordered the judge.

The official departed, and a minute later a loud bumping was heard, mingled with loud and earnest exhortations. Nearer came the noise, the door was pushed open and the panting official appeared dragging in the blue bull.

The judge was dumb founded, but only for an instant.

"Ah! That will do," said he. "It is always best, when possible, for the judge personally to inspect the stolen property. Remove the stolen property, usher."—*Ibid.*

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The Adalphomacheus Cat.—Here is a story that illustrates some fine points of law and equity that arose in the carrying out of an amicable contract, and if it is not a new one it is no fault of ours. The editor would be pleased to have readers send him any facts of its pedigree.

There were four brothers who had inherited a storage warehouse from their father. He had divided the property equally among them.

Among the appurtenances was a cat a fine animal, excellent for mousing. This too, was divided, the eldest brother owning the right front quarter, the second brother the left front quarter, and the younger brothers the two hind quarters.

Now, unfortunately, the cat, in one of its nocturnal prowls, injured the right front paw, and the eldest brother attended to that portion of his property by binding the injured member with a greased rag.

The cat, thankful for this relief to its sufferings, went to sleep contendedly before the fire ; but in the midst of its slumbers a falling coal ignited the rag, and the animal, howling with agony, dashed through the warehouse, and coming in contact with some combustibles, set the building on fire.

When the loss came to be figured out, three younger brothers wished to throw it all upon the eldest, on the ground that had he not tied up his part of the cat with the inflammable rag, the building would not have been destroyed.

He, on the contrary, contended that had the cat only had possessed of the right front paw, his property, it would have stood still and burned to death. It was the three other paws that caused the damage.

The brothers argued the case until they died, but they never reached an agreement.—*Ibid.*

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STOGENICS.

The report of a posthumous case recently
heard before all in Court,
By Sabivins Benedictus.

When the clerk was arranging the docket one day,
Several groans from above made him look up that way,
Where Judge Stogy's picture, though he's long since dead,
Was perplexed by frowning and shaking his head,
When that ancient man with visage most grim
Bestirred himself slowly and thus spoke to him:—
"Youngman," quoth he, with accents grave,
"I cannot make my ghost behave,
For there's just one case, I could not solve,
When I was dwelling here above:
When riding one night on the B. & O.,
To relieve my mind of care and woe,
I checked my brand new pair of pants,
Lest I should lose the same, perchance;
On awaking, I tendered the porter the check,
And gruffly demanded my breeches back,
But the porter merely grinned at me,
For the pants he wore conspicuously
And said he had become trustee.
To wear those splendid pants for me."
Then the clerk replied. "It's very clear,
This little trip has cost you dear,
But the All-in Court will sit to night,
And no doubt relieve you from your plight."

(*Cur. ad. vult. The opinions were delivered seriatim*).

This the opinion of Snagoby J:—
"None can my knowledge in law gainsay,
Volenti non fit injuria—
The pants were stolen now who mast pay?
Why! *Qui facit per alium facit per sa*,
This is as easy, as easy can be
The railroad's stuck most certainly,
For pants and outraged modesty."
Then up spake Chancellor Guppy:—
"This cause should be in Equity
For the porter said he was trustee
But *Vigil antibus non dormientibus acquitas subvinit.*
Which says as plain as plain can be.
That *sleepers* get no equity
The Fool-man Company works this plan,
If the railroad does then this court can."
Judge jobling spoke quite learnedly:

"I agree with the reasons of Brother Guppy.
But from them the opposite conclusion deduce.
That the defendant here has no excuse."
Seeing how the opinions went
Judge Fogg sprang up, shricked, "I dissent!
For with all respect to Stogy, J,
He owes money and he must pay
The presumption is he forgot the trip,
He owed the porter on a former trip
So the porter had a lien you see
And thereby got the pants in *fee*.
Since he went through the pants he now produces
Like seisin through the feoffee to uses
A warranty Judge Stogy broke
And so he is the man to soak!"
Good Sergeant Buzzfuzz thought the chance
For a coon to get some brand new pants
Was an Act of God, so an exception
Relieving a carrier from compensation.
Then Lord Chief Justice Weevle awoke,
And with kindly beenevolience he spoke,
"Great Plaintiff, good defendant, share
The friendly law's impartial care;
A leg for him, a leg for thee
This is the rule of Admiralty,
And for their use, I would surmise
De minimis non Curat lux, applies."
The Court adjourned them without day,
While Stogy's ghost in dire dismay,
Shivered once—then passed away.

—(*The Green Bag*).

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LIPPINCOTT'S.

"I'm certain, William," she began,
"When Johnny grows to be a man,
And his mind's biar finds expression.
He'll choose the medical profession.
Last night I noticed at the table
How thought fully he cautioned Mabel
About the hurtfulness of pie."
"His talents." William answered, "lie,
Judging from what I heard and saw,

Rather along the lines of law
Though all he told her might be true,
He ate his pie and Mabel's to."

(*The Green Bag.*)

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HAPPENINGS IN COURT.

A motion for an injunction and receiver was being resisted before Judge Adelor Petit of the Circuit Court in Chicago, a Judge that has acquired quite a reputation because of continual newspaper attacks upon him.

"This is simply a political intrigue to kill my clients's hopes as aldermanic candidate of the 7th Ward!" exclaimed his political attorney, handing a newspaper clipping to the Judge. "Just look that article about him."

The Judge glanced at the long article, pushed it aside, and with a smile said, "Ah! that is nothing, nothing. It isn't a hundredth as bad as they say about me every once in a while. He will get used to that."

The lawyer withdrew with his client from the Court room after a very bitterly contested motion for temporary alimony. In the hall he turned to his client and asked :—

"Say, you heard your husband in there make some very serious charges against you and threaten to file a cross-bill. Can he prove anything like that?"

"Well, I should say not! Every word of it was a lie."

Then after a few months of silence, she added, meekly, "Say, how many witnesses would he have to have?"

The military courts had been more or less interrupted in their session, and all the officers on it had become more or less irritated. Finally the Judge Advocate asked for a short recess until a certain witness for the prosecution would arrive, as otherwise there would be a break in the chain of evidence.

"Don't you think," interrupted one of the officers on the court, rather sarcastically, "that the intelligence of this court is sufficient to supply that link in the testimony if it is introduced later?"

The Judge Advocate reddened, he hesitated and then sputtered out, "Perhaps—perhaps, Sir,—it is possible, Sir,

The accused was on trial before a military court and was seated near his counsel, when a witness was brought in and asked the formal question :—

"Do you know the accused ? If so state who he is."

The witness looked at the prisoner, and then at his counsel, hesitated a moment and sputtered. "Which one Sir—?"

In one of the southern States a colored gentleman had succeeded in getting elected Justice of the Peace.

One day when he was holding court, he discovered he had no Bible to swear the witnesses by. After looking all over the room, in his despair he spied the colored parson, and his face instantly glowed with a smile.

"Reverend Dr. Johnson," he courtesied, "I sure have lost my Bible, and I can't swear my witnesses by having them place their right hand on the Bible, but another section says that I must follow the spirit rather than the letter of the law, and if you wouldn't mind coming up here and letting the witnesses put their right hand on your brow, I know the statute will be complied with, for you sure's get the Bible in your head."—*Ibid.*

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A fatal answer.—A representative in Congress tells of an experience when, as an attorney for the defendant, he was examining the complainant in a certain case.

His client, one Wheelock, had got into a quarrel with a certain Mc Donald, during their negotiations for the trade of horses. The quarrel had gone so far that Mc Donald had made applications to a magistrate to have Wheelock bound over to keep the peace, alleging that he had threatened to do him, Mc Donald, bodily injury.

When the case was called, Mc Donald testified to the circumstances under which Wheelock had threatened him. The cross-examination began.

"Now, Mr. Mc Donald," the lawyer said, "you declare that you are under the fear of bodily harm ?"

"I am, Sir."

"You are even afraid for your life ?"

"I am, Sir."

"Then you freely admit that Wheelock can whip you, Pat Mc Donald ?"

The question aroused Mc Donald's "Irish" instantly.

"Bill Wheelock whip me? never!" he shouted. "I can whip him and any half dozen like him!"

"That will do, Mr. Mc Donald," said the attorney. The Court was already in a roar, and the lawyer rested the case without further testimony or argument. The case was dismissed, for it was evident that Mc Donald could not be under serious bodily fear of a man whom, in his own opinion, he had only to use one seventh of his strength to whip.—*Ibid.*

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THE LAWYER'S BRIEF TO HIS LOVE.

Priscilla, it is more than wrong,
To keep me in suspense so long!
(See Bigelow's "Torts" and Wharton's "Crimes,"
And Callahan *v.* Grimes!)
Now, while the year is at the May,
You ought the happy "Yes" to say,
Conforming to the well known rule.
("Ex-parte James O' Toole!")
Too long I have been at call and beck
(Smith *v*, Jones, Page 9, et seq.),
I tell you dear, it is no't right!
(See Gibbons *v.* White!)
Should you refuse to grant my prayer,
I'll have to find a girl elsewhere;
Relying on the well known case
Of Simkins *v.* Chase!
But I'm assured that when you've read
The cases cited just ahead
You'll recognize with mind profound,
That my opinion's sound;
Which done, you'll enter, blithe and free,
A large "*nolo contenderce*!"
And marry me to save, to boot,
The further costs of suit!"

(*The Green Bag.*)

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Resignation of Farwell L. J.—Lord Justice Farwell's resignation must weaken the Court of Appeal. All will regret the cause, which is stated to be ill-helath. His Lordship is sixty-eight; he has been a judge fourteen years—seven in the Chancery Division and seven in the Appeal Court. He was Chairman of the Royal

Commission on War Stores in South Africa, and his most famous judgment was in the Taff Vale case, which was upheld by the House of Lords. His name will always be remembered in connection with his great book "Farwell on Powers." Lord Justice Farwell was not the type of judge whose name is always in the papers. He did his work quietly. Probably the only occasions on which his name came prominently before the public were the War Commission, the Taff Vale case, and when he declined to read Daudet's "Sapho" in a dramatic case which he heard. May resignation restore his health!

* * *

Judicial changes.—Judicial changes have been numerous during the past month Mr. Justice Swinfen Eady will add greatly to the strength of the Court of Appeal on its Equity side. Mr. Astbury's appointment as a Chancery judge was more or less anticipated. He has had a large practice as a special in Chancery, and is a great authority on patent law. These appointments are generally approved by the profession.

* * *

The appointment of Mr. J. R. Atkin, K. C. to the Bench was approved by the legal profession. To the public Mr. J. R. Atkin is not much known. His work lay chiefly amongst commercial men. The way to the Bench at the present time seems to be through the portals of the Commercial Court. His Lordship will prove a success. By birth he is an Australian.

* * *

Solemnity of Oath:—Mr. Justice Bailhache deserves much commendation for his effort to restore some solemnity to the administration of the oath. Last month his Lordship asked Sir Frederick Low, K. C., to cease speaking while a witness was being sworn, saying: "I have strong views regarding the solemnity of the oath. It is sometimes disregarded, and that is partly due to the fact that people do not pay sufficient attention to it while a witness is being sworn." Sir Frederick Low apologised, remarking that he was not aware the witness was in the box.

* * *

A difficult task:—The papers have been much exercised with a case which was heard last month in the German Imperial Court. A lady commissioned an artist to paint a fresco in the hall. The artist turned out an island and some nude figures of Sirens, to which figures the lady took objection, and employed another artist to drape them. The first artist brought an action for the restoration

of the painting. The Court ordered that the Sirens should be immediately undressed. Nude Sirens can have clothes painted over them, but it must be a difficult job to take " the oils " off a Siren.

* * *

Burglary and punishment :—That burglary is a crime not properly punished has long been advocated in these columns. A burglar is a man who generally speaking, is prepared to effect his object with violence, and our judges are unduly lenient. He is generally an habitual criminal. Unpremeditated burglary is a rare crime. Mr. Neame, a very competent authority, quoted by the late Mr. Tallack in his "Penological and Preventive Principles," estimated the number of burglars in London alone at a score of thousands. This was some years ago, and their number has been constantly increasing. In the year 1911, of the 916 persons sentenced by the Courts to penal servitude only 118 had not been previously convicted, the vast majority of old offenders having from six to twenty convictions against them. Further, the Prison Commissioners, in their report, observe:—" The proportion of persons having previous convictions has, in the last few years, risen from 78 to 87 per cent." Surely Society is justified in taking extreme measures to protect itself from lawlessness of habitual criminals.

* * *

Sir Rufus Isaacs and Judicial Office.—Nobody with a sense of propriety and fairness can fail to deplore the renewed attack on the Attorney-General. Lord Alverstone is, unfortunately, not likely to resume his judicial duties, but the office of Lord Chief Justice is not yet vacant, and the declarations in certain quarters of the Press concerning the fitness of Sir Rufus Isaacs to succeed him are as unseemly as they are unfair. All the members of the Marconi Committee, as well as both parties in the House of Commons, have expressly stated that nothing in the Attorney-General's conduct has cast the slightest reflection upon his honour. Yet his persistent adversaries in certain journalistic circles, having signally failed to assail his honour, are now meanly seeking to deprive him of his legitimate claim to promotion. From one dilemma they cannot escape. If Sir Rufus Isaacs has been guilty of conduct which renders it undesirable that he should be appointed to the Bench, he ought not to continue to be the official head of the Bar. If, on the other hand, he is fit to be Attorney-General—and even his most malignant critcis have refrained from asserting that he is not—his appointment as Lord Chief Justice could not be unbecoming. The inopportune

comments upon his possible promotion to judicial office are the outcome of a paltry vindictiveness which the Bar will strongly resent.

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The Attorney-General and the Lord Chief Justiceship.—Whenever the Lord Chief Justiceship does become vacant the Attorney-General will have a traditional claim to the office. Nearly all the modern occupants of the office—Mansfield, Kenyon, Ellenbororough, Denman, Campbell, Cockburn, Coleridge, Russell, and Alverstone are among them—filled the office of Attorney-General before they reached the Bench. Some of them it is true, were not promoted direct to the Lord Chief Justiceship from the post of Attorney-General. Lord Russell of Killowen, for instance, was a Lord of Appeal for a few months before he became Lord Chief Justice, and Lord Alverstone filled the position of Master of Rolls before he was appointed to his present office. But it may safely be assumed that ultimate promotion to the higher position was an understood thing. ' The cushion of the Common Pleas,' Coke once said, ' belongs to the Attorney-General to repose upon.' Upon the resignation of the Lord Chief Justiceship by Lord Denman in 1849, Sir John Jervis claimed, in a correspondence with Lord John Russell, that he had, as Attorney-General, a claim by usage to the vacant post. Lord Cottenham, who was appealed to, ruled that the Chief Justiceship or the Common Pleas was the only Chief Justiceship to which the Attorney-General had a traditional right. This incident, so far from weakening the Attorney-General's claim to the Lord Chief Justiceship, strengthens it. It emphasises the fact that the Attorney-General had a recognized right to the important office of Chief Justice of Common Pleas. That position, which was scarcely inferior, to ' the chair of Mansfield, ' having been abolished by the Judicature Act, the Lord Chief Justiceship is the only office remaining that is akin to it. The Lord Chief Justiceship absorbed the offices of Chief Justice of the Common Pleas and Chief Baron of the Exchequer, and, since the Judicature Act can scarcely have been intended to destroy the Attorney-General's traditional rights, they must have been transferred to the surviving office.

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The claim of woman for Admission as Solicitors.—There never was any doubt as to the result of the attempt of women to get admitted on the Roll of Solicitors by a forced interpretation of the Solicitors Acts ; and Mr. Justice Joyee made short work of the contentions raised on behalf of the plaintiff when the matter came

before him this week in the action by Miss Bebb against the Law Society claiming (*a*) a declaration that she was entitled to be admitted to the preliminary examination held by the Society under the Acts ; (*b*) a *mandamus* directing the Society to admit her to the examination ; and (*c*) an injunction to restrain the Society from refusing to examine her for the purpose of qualifying as a solicitor. The claim was endeavoured to be supported by a series of logical inductions derived from the fact that the interpretation clause of the main Act of 1843 (section 48) enacted that ' every word importing the masculine gender only shall extend and be applied to a female as well as a male ' ; but this was qualified by the proviso ' unless there be something in the subject or context repugnant to such construction. ' There was nothing repugnant in the context, but was there not something in the subject ? The short answer was that before the Act there was no known instance of a woman practising as an attorney or solicitor, and the new legislation proceeded on the footing that it was dealing with men, and men only, who, up to that time, had acted as solicitors. Mr. Justice Joyee went further and indicated his opinion that women were disqualified by their sex from acting as solicitors ; but in that he was only expressing the view of the Common Law that women were incapable of exercising public functions. That point was established nearly fifty years ago in *Chorlton* v. *Lings* [1868], where, in an attempt to assert the right of women to vote under the Representation of the People Act 1867, all the Judges held that there was a ' legal incapacity ' established by the uninterrupted usage of centuries ; and Mr. Justice Willes, of whom it was said that a more learned Judge never lived, laid down the proposition that neither by the Common Law nor by the Constitution of this country, from the beginning of the Common Law until the present time, could a woman be entitled to exercise any public function. The case went even further, for it decided that such being the Common Law of England, it is to be taken that a statute dealing with the exercise of public functions, unless it expressly gives power to women to exercise them, is to be construed as conferring such powers on men alone. An attempt was made by the lady litigant's counsel to get out of that difficulty by pretending that solicitors do not exercise a public function, but there is no doubt that, whatever may have been the case in ancient times (an instance in the time of Edward II, was cited), the office of a solicitor is now and has long been a public one, and it is for that very reason that it is so carefully controlled by the Legislature. What was proposed by this action was to bring about a revolution in the status of women, but that cannot be done by the application of a

spices of chop-logic to the existing law, which was enacted on quite other considerations. If it is to be done at all, it must be done by a change in the view of the State, and that can only be indicated by a change in legislation.

* * *

Trial of Nullity Suits.—Important as was the decision of the House of Lords in the *Scott Case*, there are few considered judgments of recent times which have contained so many *obiter dicta*, and there is some inclination to forget already that the direct points involved, on which only it is a fully binding authority, were but two in number : (*a*) Whether the publication of proceedings in camera after the close of the case was contempt of court ; and (b) if so, whether such contempt was of a criminal nature, so as to be unappealable. Among the questions raised in the course of the case for the elucidation of one or other of these points was, naturally, the foundation of the current practice of the Divorce Court to order the hearing of certain cases *in camera.* Great stress was laid on the undoubted fact that before the Matrimonial Causes Act, 1857, which constituted this Court, it was not usual to make such orders ; that for some years after the passing of the Act these cases were heard, like others, in open Court, it being assumed that, whatever power the old Ecclesiastical Courts might have exercised in special cases, they were superseded by the new system ; and that it was in 1875 for the first time that, by an assertion of plenary powers derived from the old Courts, Sir James Hannen establised the rule for the trial *in camera* of nullity suits. A later President, Sir Francis Jeune, extended this claim to make orders for private hearings under the assumed ' inherent jurisdiction ' of the Court, so as to include ordinary suits for dissolution (D. *v.* D. [1913] ; and the growth of these exceptional powers, which led to the extravagant judicial claims in *Scott* v. *Scott,* made it necessary for the House of Lords to deal with the whole subject. After his elaborate historical survey of the authorities, Lord Shaw came to the conclusion that there was not only no foundation for the alleged claim, but that the Court had no power to order the private hearing of any suit. But there were indications in the judgments of other learned Lords that this was rather a personal view, and it certainly did not amount to a deliberate and settled decision of the whole House on the points at issue. The result was, undoubtedly, a strong rebuff to the exceptional claims to the Divorce judges, and the question has arisen for them—What is to be done with the hearing of nullity suits ? Rather than invite another defeat they have decided, apparently, to

make no more orders for hearings *in camera*, even with the consent of all parties, and on Monday last, on the first nullity suit since the Scott judgment being brought to trial, it is reported that Sir Samuel Evans ' invited all women, boys, and girls to leave the Court ; and, these people having left, the learned President intimated that all men who wished to leave the Court and an opportunity of doing so.' They may be all very right and proper ; but we doubt whether an entire abdication of power and authority to control the hearings of nullity suits, even in the most nauseous cases, is likely to further the cause of justice. That, after all, is the over-riding consideration ; and we fail to see in the Scott judgment any necessity, or exeeuse, for ignoring it.

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Lord Lindley writes to the Times.—' No one acquainted with the practical working of the trial of civil actions by juries can be ignorant of the unsatisfactory consequences of a failure by a jury to agree on their verdict. Unless the litigants agree to accept the verdict of the majority, the trial and all the annoyance and expense to jurors and witnesses and the parties concerned will have been thrown away and their time and that of the Judge will have been wasted. The litigants may still come to terms or drop further proceedings altogether, or have a new trial with another jury. This involves calling witnesses all over again and further trouble, annoyance, and expense to all concerned. Attention was called to this important matter by one or two of the gentlemen consulted by the Committee presided over by Lord Mersey, whose admirable report on juries has recently been published (see Part II., 1.561 and 1,636-1,644). The report itself, however, contains no recommendation on this particular subject. It reports in favour of trial by jury of 12 (or of 11 in case of death or accident), but it does not allude to what ought to be done when juries are not unanimous. It is to be hoped, however that when Parliment deals with the report it will also take the opportunity of dealing with this important matter. All that is wanted is to enable the judge who tries the case to decide it on the evidence before him if the parties do not agree to accept the verdict of the majority of the jury or if the jury are equally divided. An appeal would still lie from the decision of the Judge, and if the Appeal Court could not come to a satisfactory conclusion without further evidence it could obtain such evidence, or as a last resource decide the case against the litigant on whom the Court considered the burden of proof ultimately to fall. A further great improvement in jury cases would be to abolish motions for new trials and substitute for them appeals from the judgments finally pronounced. The

Court of Appeal could then deal with such cases as above mentioned. The recommendation of the Committee that the whole law relating to juries should be consolidated in a single statute will, it is hoped, lead to so desirable a result. Provision should then be made for taking the verdict of a majority; and, in my opinion, both in criminal and in civil cases. The majority should be a fixed proportion of the whole; and in capital cases, if 12 are to concur, the number of jurors should be increased so as to allow for two or three dissentients.'

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Land Law Reform.—Two Bills of considerable importance have been introduced by Lord Haldane with the view of amending the law of real property and simplifying transfer of land. And, if these pass, we are promised a Consolidation Bill which will provide a code of modern statute law relating to land, and form the basis of a genuine attempt for the reform of the land laws. We welcome this programme of regulated reform all the more because it is to proceed by steps and is not put forward, as have been some earlier legislative proposals, as a panacea for all the troubles and difficulties which surround the subject. An old conveyancer himself, Lord Haldane knows that most of these difficulties are of historical origin, and while imbued with the spirit of progress which he finds abroad, he still proceeds with the deliberation of the expert, so that his new and improved system may not only meet the demands of the hour but stand the test of time. Disdaining all appeals to vulgar prejudice and recognising that all the great reforms of recent times in real property law have been moved within the ranks of the legal profession itself, he has sought the assistance of conveyancers of high standing and now offers his proposals to the general scrutiny, with the view not of forcing them on an unwilling public, but of getting his Bills into such a shape that they will be adopted by common consent. That is right spirit and the right policy, and the Lord Chancellor may be assured that if it is pursued throughout the different stages of his legislative programme there will be no need for compulsion, but that any system really beneficial to landowners will be welcomed and furthered by all ranks of the profession.

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The Lord Chancellor's Proposals.—Lord Haldane's outline of his proposals, brief as it was, in introducing his two Bills indicates a determination to deal drastically with the present systems both of land tenure and land transfer. Under the Real Property Bill it is proposed to abolish copyholds and other special tenures and perpe-

tually renewable leaseholds, and to give to life teants an absolute power of dealing with the fee simple or settled term of years. The Conveyancing Bill adopts substantially the late Mr. Wolstenholme's scheme for shortening titles and abolishes as legal estates life and other particular interests, leaving all such lesser interests to take effect in equity by way of trust, with protective provision by means of cautions and inhabitions. But there is more than this. The Memorandum which accompanies the first Bill shows that it will embody among other things (*a*) the amendments of the Settled Land Acts contained in the Law Society's Bill of 1912; (*b*) the recommendations of the Royal Commission as to the automatic conversion of land of copyhold tenure into land of freehold tenure, and the abolition of all special customs of descent; (*c*) provisions for the absolute extinguishment of all manorial incidents of tenure subject to proper compensation; (*d*) amendments of the general law rendering acknowledgments of deeds by married women and the enrolment of disentailing deeds unnecessary, simplifying the transfer and discharge of mortgages, and giving powers to the Courts to discharge obsolete restrictive covenants; (*e*) extensive alterations in the present system of land transfer in the direction mainly of a recognition of deeds off the register, particularly as to mortgages. On this last point the greatest possible latitude is given to the registered proprietor for dealing with his registered estate by way of mortgage or charge, the *clou* of everything being still the register, but cautions or notices or mere deposit of the land certificate being substituted, where desired, for registered charges. There is also a Memorandum to the Conveyancing Bill which indicates as near an approximation as possible to the ideal of the land transfer reformers; that is, to assimilate the sale of real property to the sale of stock. With this object it is proposed that there should be two kinds of estates or interests in land—the proprietary and the subordinate; and the former would be the only estate with which a purchaser would be concerned. The owner of a 'proprietary estate' (a fee simple or term of years absolute) is to be empowered to convey to a purchaser for value subject to all 'paramount interests' but free from all 'subordinate interests,' *i.e.*, all interests taking effect by way of trust, except so far as protected by cautions or inhibitions. A purchaser will not be concerned with any subordinate interests which are not so protected, and then only to see that the cautions or inhibitions are removed before he takes his conveyance. It is too early yet to criticise these various proposals, but this at least is apparent, that we have here a carefully thought out and comprehensive scheme,

and one which we believe it will be the wish, as well as the interest, of the profession to render workable.

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The Great Seal in Commission.—During the Lord Chancellor's absence from England in the Long Vacation, when he will deliver an address before the American Bar Association at Montreal, the Great Seal, it is announced, will be placed in commission. Lord Haldane will, it is said, be the first Lord Chancellor to leave the Kingdom on an official visit since Cardinal Wolsey went on his famous mission to France. Not, of course, that all the modern occupants of the Woolsack have refrained from going abroad. Lord Loreburn, for instance, paid a visit to America during his term of office. But these journeys abroad of the holders of the Great Seal have been for purposes of health or pleasure. Lord Haldane will be the honoured guest of the American Law Association in his capacity as Lord Chancellor, and it is fitting that the official character of the occasion should be ceremoniously recognised at home. When the Great Seal was placed in commission on the resignation of Lord Cottenham in 1835, owing to the unexampled difficulties of the Gevernment in choosing his successor, the Lords Commissioners were Lord Langdale (Master of the Rolls), Vice-Chancellor Shadwell, and Baron Rolfe. It is hardly likely on this occasion that the Master of the Rolls—if he himself be selected—will have two puisne judges for his colleagues. The Law Lords will afford a more fitting choice.

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Law and Education.—Sir John Macdonell, whose election as a member of the British Academy is a fitting tribute to the position he holds as an exponent of the scientific side of the law, has been declaiming before the Society of Public Teachers of Law against the abandonment, in favour of other studies, of that large field of philosophic inquiry and scientific truth which falls within the province of jurisprudence. We have gone a long way back from the position which the study of the law held in the education of an English gentleman even in the Middle Ages, not to speak of the dignified place which Locke assigned and Blackstone secured for it in a later generation, and even the high example of Bentham and Austin, which revived the interest in the law as a science a century ago, has failed to be maintained. Much of this neglect, no doubt, is due to the keener struggle of competing studies, but it must be confessed a large part of it must be attributed to the attitude which, nowadays, those who are engaged in the practice of the law take towards it as a science. Our studies are directed too much to the

wants of the practitioner, and so we lose touch, so far as law is concerned, with the liberal side of education, and law becomes a 'mystery' of the few, instead of an object of intellectual interest for the whole body politic. The change is exemplified even in our legal literature—'Hail to Halsbury' has taken the place of 'Back to Blackstone.' But there are graver symptoms even than that. The latest scheme for the reconstruction of London University finds no place for a Faculty of Law; and this is only one of many indications of the tendency to expel law wholly from the curriculam of liberal studies. Sir John Macdonell does well to invite the public teachers of law to undertake a combat for their science. No time could be better than the present for the renewal of the movement to establish a legal University—a General School of Law—for in Lord Haldane, English law has at its head one who is a jurist as well as a lawyer.—*Law Journal.*

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The Privy Council and Convictions for Murder.—It is related that a traveller in India recently found the inhabitants of a village doing worship to a new deity, and on inquiry found that the god who had been installed was named 'The Judicial Committee of the Privy Council.' The story bears witness to the beneficent influence which the Judicial Committee has exercised for the better part of a century upon the administration of justice in our Eastern Empire. Perhaps no better illustration of that beneficent influence could be found than the recent judgment of the Board in an appeal from the capital conviction for murder which came from the Madras High Court *Vaithianatha Pillai* v. *The King-Emperor.* The appellant was under sentence of death passed by a district court in India and confirmed (though by a divided judgment) in the Appellate Court, and he received special leave to appeal to the Privy Council on the ground that there was a *prima facie* case of the miscarriage of actual justice. It is rare for the Judicial Committee to allow appeals against criminals convictions; it is rarer still for them to allow appeals against a conviction for murder; it is rarest of all, but not absolutely unprecedented, for them to quash a capital sentence. But the rule in *Dillet's Case* (1883), which is the leading authority for the exercise of the prerogative in Criminal appeals to the Privy Council, supports the authority of the Board to review any case where the procedure of the lower court has rendered possible a denial of justice. In the present instance it was urged that the Judicial Committee had no precedent for quashing a conviction on the ground that it was against the weight of evidence, but the Board refused to accede

to any technical plea, and, holding that the conviction was broadly unjust, admitted the appeal. There are obvious grounds for restricting narrowly the right of appeal to the King in Council in criminal cases, and in several of the self-governing dominions, notably in Canada, the prerogative right of granting special leave in such matters has been taken away by statute—though whether validly or not, is doubtful. But, on the other hand, the ultimate right of the Sovereign to prevent any abuse of legal process against his subjects in his Eastern Empire in matters touching their persons is more than a symbol of the unity of justice throughout the Dominions. It is one of its most real safeguards. And the constitution of the Committee in this case, consisting of an English, and Irish, an Anglo-Indian, a Mahommedan, and an Australian Judge splendidly typified the Imperial character of the Sovereign's Judicial Council.—*Ibid.*

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The Bench and the Empire.—The judicial bonds of the Empire have been illustrated in apleasing and unprecedented fashion during the past few days. Lord de Villiers, the Chief Justice of South Africa, exercising for the first time the right to take part in the judicial work of the House of Lords which he acquired when he was made a Peer three years ago, has been sitting with the Lords of Appeal to hear appeals from the Scottish courts, while Sir Samuel Griffith, the Chief Justice of Australia, has been engaged on the Judicial Committee in hearing Indian appeals. Lord de Villiers, whose right to sit as a Law Lord in the House of Lords is derived from his membership of the Judicial Committee, personifies the connection which already exists between the two tribunals, and has imparted a fresh significance to the oft-repeated proposal for amalgamating the two tribunals into one Supreme Court of Appeal for the whole Empire.—*Ibid.*

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The Marconi Inquiry.—Judicially regarded, the one thing which counts in the findings of the Marconi Select Committee is that which is common to all the three reports which have been published—the finding that 'no Minister, official, or member of Parliament has been influenced in the discharge of his public duties by reason of any interest he may have had in any of the Marconi or other undertakings connected with wireless telegraphy, or has utilised information coming to him from official sources for the purpose of investment or speculation in any such undertaking.' That is the wording of the Minority Report, and although it does not go to the

whole length of that of the Majority, nor even as far as that of the impartial Chairman, it is conclusive on the single substantial issue as stated by Lord Robert Cecil—'whether there were any financial transactions of an improper character by Ministers or others with the Marconi Company or anyone connected therewith.' With the unanimous verdict of all the members on this issue the legal interest in the whole question is solved, and the Marconi Committee, notwithstanding all its unjudicial lapses and irregularities, may be said to have fulfilled its judicial functions with effect. With the political bearings of the Inquiry we have here no concern. But there is another aspect which does touch us—the professional one involved in the original gross attacks on the Attorney-General's action and the suggestions of 'impropriety' or 'indiscretion' to which those attacks were later on attenuated. It is now universally admitted that there was no foundation for the personal charges to which nobody in the profession ever gave a moment's credence, and the mover of what was practically the vote of censure on the Report was careful, when challenged by Sir Rufus Isaacs, to exclude even 'indiscretion' from the category of his complaints. The frank and courageous statement of the Attorney-General in the debate on Mr. Cave's motion has won for him the sympathy of the whole country, and there must be few indeed now who, in the significant words of the tribute recently rendered to Sir Rufus Isaacs by Sir Edward Clarke, the *doyen* of the Bar, 'would, for personal or political motives, make use of an error of judgment to check or to deflect from its natural course a long career of private honour and of public service.'—*Ibid.*

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The Independence of the Bar.—Sir Edward Carson, the heir contingent to the position of leader of the Bar now held by Sir Rufus Isaacs, has not escaped the effects of the blindness of prejudice and distortion of view which have marked every development of the various campaigns arising out of the Marconi contract. Like the Attorney-General, he is acquitted by his assailants of 'any deviation from the very highest standard of professional honour.' But, says the *Times*, which has opened its columns to this new inquiry into the independence of the Bar, 'plain people' may be forgiven for not understanding how men so distinguished 'came to be in a position which might prevent them in possible developments from having a perfectly free hand as Parliamentary critics.' That is very like the sort of language which is held after every specific charge has been exploded and abandoned in the case of the head of the profession, for defending whose honour at the bar of justice

these scandalous attacks are levelled against his great rival and probable successor. Sir Edward Carson has not been wanting in supporters both from the Bar and the Bench, and there are no two opinions in the profession as to the perfect propriety and regularity of his conduct. It would have been strange, indeed, and, if not a positive breach of duty, an abandonment of the highest traditions of the Bar, if he had refused his professional services in such a case because of any political considerations. It will be a bad day for the English Bar when the freedom of the advocate is exchanged for the trammels of party, or, we may add, when the standard of duty fixed by the traditions of a great and honourable profession is displaced by the uninformed opinion of the man in the street.'—*Ibid.*

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Advocacy and Politics.—In the discussion on Sir Edward Carson's action in the *Matin* and *Chesterton* cases Sir Harry Poland has cited with effect the famous pronouncement of Erskine on the duties of an advocate when he was assailed by every art of calumny for having undertaken the defence of Tom Paine in a Crown prosecution for the publication of the 'Rights of Man.' A pendant to that notable precedent was furnished only a few years later by Erskine himself when he appeared as counsel for the Crown on the prosecution of a bookseller, Williams, for the circulation of the same author's 'Age of Reason.' The principles on which the great advocate acted in both these cases were confirmed and put on record formally by Lord Chancellor Eldon thirty years later in a reported case (*Exparte Lloyd* [1822] in the following terms:—'A barrister ought not to exercise any discretion as to the suitor for whom he pleads in the Court in which he practices. . . . He is, however he may be represented by those who understand not his true situation, merely an officer assisting in the administration of justice, and acting under the impression that truth is best discovered by powerful statement on both sides of the question.' The Bar Council has recently expressed its view of the rule of etiquette still binding the profession thus:—'A barrister is bound to accept any brief in the Courts in which he professes to practice, at a proper professional fee,' and he can only be excused from this general obligation if 'special circumstances' arise of such a nature as to justify his refusal of a particular brief. Mr. F. E. Smith, who shares with Sir Edward Carson the credit of having made a stand against the demand that they should have set the claims of party above the obligations of the Bar, has shown in his trenchant reply to the *Times*' criticisms that there were no special circumstances in either of the

cases in which their action is impugned to relieve them of the duty which is the correlative of the monopoly they are permitted to enjoy as advocates. The only special circumstance was that the persons they were called on to serve were the subject of attacks by their own political party; but if that is ever to be regarded as a bar to forensic service the functions of the advocate will be confused in those of the politician, and the 'plian people' to whose judgment the *Times* appeals will be the first to lose by such a result.—*Ibid.*

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Enforcement of Foreign Judgments.—That a plaintiff must sue in the Court to which his defendant is subject at the time of suit (*actio sequitur forum rei*) is a good general rule, and it carries with it the corollary that 'when the action is personal the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice' (per Lord Selborne in the *Faridkote case* [1894]. So that our Courts will not enforce a German judgment against an English subject for damages for breach of contract to be performed abroad, unless the defendant was either resident in Germany at the time of issue of process or has submitted to the jurisdiction of the courts of that country, for he can be sued on the contract in his own courts, which will do justice. But what if the circumstances are such that the courts of the country where the defendant resides will not do justice? That was the problem discussed in a considered judgment of Mr. Justice Scrutton delivered last Tuesday in an action to enforce a judgment of a foreign court (the High Court of Bengal) for 7,200*l*. damages awarded to the plaintiff as petitioner in a suit for divorce in which the defendant was co-respondent (*Phillips* v. *Batho*). The Indian Divorce Act, 1869, authorises the provincial courts of that country where (*a*) the petitioner professes the Christian religion and resides in India at the time of presenting the petition, and (*b*) where the marriage shall have been solemnised in India (both of which conditions were fulfilled in this case), to act and give relief on principles and rules as nearly as may be conformable to the principles on which the Divorce Court in England gives relief. The defendant, who had resided for many years in India, left that country shortly before the filing of the divorce petition in which he was a co-respondent, but he was duly served in England with process of the Indian Court, and damages were awarded against him in his absence. Could payment of these damages be enforced here in an action on the judgment? In *Emanuel* v. *Symon* [1908] the Court declined to give effect to a judgment of the High Court of Western Australia against the defendant for a sum found to be due by him on a partnership account, the defendant

having left the colony before the issue of the writ, but having been served here with notice of the proceedings, on the ground that he was not bound by the judgment, which was not that of a court of competent jurisdiction over him. Lord Justice Buckley in his judgment said there were five classes of cases of actions in personam in which the courts would enforce a foreign judgment: (1) where the defendant was a subject of the foreign country in which the judgment had been obtained: (2) where he was resident in the foreign country when the action began: (3) where in the character of plaintiff he had selected the *forum* in which he was afterwards sued; (4) where he had voluntarily appeared; and (5) where he had contracted to submit himself to the *forum* in which the judgment was obtained. The judgment in the case before Mr. Justice Scrutton did not come within any of these five classes, and the question for him was whether there was anything in the peculiar character of divorce procedure which provided yet another and sixth case in which a foreign judgment might be enforced. He found this in the fact that the courts of the country where the defendant resides could not do justice in such cases. The English Courts could not give damages against the co-respondent, for their jurisdiction is limited to dealing with marriages of persons domiciled in England and the consequences following from the infringement of such marriage ties. The reason for the judgment in the *Faridkote Case* (that the *forum rei* which can do justice should be resorted to) did not, therefore, apply. A new class of case arises, then, where the judgment to be enforced is in proceedings *in personam* ancillary or accessory to the dissolution of a marriage of persons domiciled or otherwise within the jurisdiction of the court pronouncing the decree, were both the Court pronouncing the judgment and the court enforcing it are courts of the same Sovereign, but where the court enforcing it cannot itself grant the relief because it has not jurisdiction over the marriage to whose dissolution the proceedings are ancillary. Stated more widely, the sixth class is a class where (the court pronouncing and the court imposing judgment being courts of the same Sovereign) the judgment is one in *rem* affecting status or a judgment *in personam* ancillary or accessory to such a judgment and regularly pronounced by the law of the courts which have given it. That is, no doubt, a salutary addition to the old jurisdiction of our courts.—*Ibid.*

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THE LATE LORD MACNAGHTEN.

Lord Mersey, in asking the Lord President to be allowed to present him with the picture on their old friend, said, Lord

Macnaghten was a great lawyer who for 25 years or more administered justice in that tribunal with such consummate ability that he secured for his decrees the admiration and confidence of the whole nation. He was more than a great Judge—he was a good man and a kind friend.

Lord Morley, in the course of his reply, said he was sure that they all accounted this gift of Lord Mersey's as due to a most liberal and happy thought, and it was his duty, and it was a very great gratification to him, in his office as Lord President, to accept that gift from his hands. Nobody would dispute the full title of Lord Macnaghten to the honour that was now paid him in memory of the great public service he rendered in the most important of all public callings, as he ventured to think the judicial office was. He had been reading some of the judgments of Lord Macnaghten, and what struck him, and used to strike him when he had the pleasure of talking to him in the House of Commons or at Lincoln's Inn or elsewhere, was this—he did not consider the judicial points in a case on an argument as being the exhaustive aspect in all its bearings of which the case was capable. Many would remember the Scottish Church case eight or nine years ago. He had read that judgment—not with any view (Heaven forbid!) of pronouncing on the legal right or wrong, but he regarded it as a literary composition, and he could not say how much he was struck by the breadth of mind and elevation of thought and the recognition of the importance of the historical interests concerned. He took in all his cases—some of them very complex—an elevated and broad view; he did not allow (if he might say so with all respect) that statute and precedent were everything. Apart from that particular point, what struck him, as a critic, was Lord Macnaghten's arrangement of his topics, and the structure of his arguments left him entirely free from what he regarded as a mortal sin of all writing and pronouncing of judgments—that of being either involved or obscure. Lord Macnaghten had, as he was told, a gift which was not bestowed on all of them—the gift of listening. He would listen all through a case—however complex—with unbroken silence, but when the silence was broken then it was found that he had grasped all the arguments of the matter, and, when that was done, he went directly to the point. Reading the Scottish judgment and others of his, what struck him was Lord Macnaghten's shrewd common sense, because law was not always entirely reconcilable (if he might say so) with shrewd common sense. Lord Macnaghten was cool without being languid. He thought his colleagues would agree that his reasoning was (as it

was in the House of Commons) luminous and weighty, and though he had none of the subtle humour that Lord Bowen and others possessed, nevertheless there was in him—it was quite evident—whether in politics or in law, a real fund of genial humour—very often ironical. But ironical humour was part of the salt of literature, of human nature, and of human life. His language was always excellent. He liked terse, short sentences and simple and homely words in which he went directly to the point. He never went in for overdrawn emphasis, which was the ruin of true force. Someone had said that a man's profession, is gifts, even his opinions, were not all. Besides all these there was the man himself, and they would all agree—both those who knew him well and those who knew him little—that if ever there was a man who deserved this language it was Lord Macnaghten. They all felt the loss caused by his departure from their midst—and especially had the Judicial Committee suffered a great loss—and, that being so, he thought Lord Mersey had done very well in enabling them to put on record as it were in that Court so good a token of the regard in which he was held by his colleagues and the Bar.—*Ibid.*

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THE ETIQUETTE OF THE BAR.

An interesting correspondence has been proceeding in the *Times* on the question of professional etiquettee raised in connection with the appearance of Sir Edward Carson and Mr. F. E. Smith in the *Matin* and *Chesterton* cases. The *Times*, in a leading article on June 13, said: The etiquette ef the Bar, we are told by some of its members, left these counsel [Sir Edward Carson and Mr. F. E. Smith] no choice: they could not refuse briefs delivered to them; they acted in accordance with a laudable practice and tradition, which give all comers the services of eminent advocates.'

Sir Harry Poland, K.C., referring to the statement of the *Times*, writes: There can be no doubt that this is not the etiquette of the Bar. These eminent advocates were absolutely free to refuse briefs in the *Matin* case, and in the prosecution of Mr. Chesterton by Mr Godfrey Isaacs, if they thought that appearance in such cases would interfere with their duty in Parliament to their constituents. . . . It seems to me that the conduct of these counsel is a matter between themselves and their constituents, and that the public has nothing whatever to do with it. The leaders, of course, of the Unionist Party may regret that they are deprived of the assistance of these two advocates in the forthcoming debate, but with that again the public has nothing to do. There are, of course, some cases in which

counsel is bound in honour to appear for a client. Let me give an instance. Tom Paine was in 1792 prosecuted for a seditious libel—the first part of the "Rights of Man"—and Erskine was retained for the defence. He was then Attorney-General to the Prince of Wales. Every effort was made to induce Erskine not to appear for the defendant. In his speech for the defence he referred to 'the calumnious clamour that by every art has been raised and kept up against me.' Then he went on to say:—'Little indeed did they know me who thought that such calumnies would influence my conduct. I will for ever, at all hazards, assert the dignity, independence, and integrity of the English Bar; without which impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practice, from the moment the liberties of England are at an end. If the advocates refuses to defend from what he may think of the charge or of the defence, he assumes the character of the Judge; nay he assumes it before the hour of judgment, and in proportion to his rank and reputation puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of the English law makes all presumptions, and which commands the very Judge to be his counsel, (State Trials, vol. 22, p. 411) Erskine for his brave and honest defence was removed from his office of Attorney-General to the Prince of Wales. Clients often like to have as their counsel men opposed to them in politics. Frost the Chartist, for instance, when indicted for high treason, retained two Tories to defend him, Sir Frederick Pollock and Mr. Kelly. A counsel who practises at the Central Criminal Court, in the Crown Court on circuit, or at the sessions is bound for one guinea to defend any prisoner if he has no previous engagement and to attend to the case throughout, even if it lasts a week. I am sure that most counsel would act as Sir Edward Carson and Mr. F. E. Smith did, because they feel bound to give their services to any client who requires them. No one could possibly have foreseen that the Marconi affair would stir both political parties as it has done. The oath of the King's Serjeants bound them faithfully to serve the King 'and his people.'

Mr. Justice Neville writes: To my mind the question raised is no mere question of etiquette, but one which affects the existence of the Bar, holding, as it does, the exclusive right of audience before the Superior Courts in the country. In the past loss of favour at

Court, in the present unpopularity with public or party, may mar the realisation of a barrister's ambition. If they allow themselves to pick and choose between their clients it will not be long before the unpopular cause has to put up with inferior advocacy. As it once was put to me, always remember that you are in a position of a cabman on the rank, bound to answer to the first hail. I regret to differ from my senior at the Bar, but surely the noble eloquence of Lord Erskine in the quotation referred to by Sir H. B. Poland himself might have led him to another conclusion than that which leads him to tell us that advocates are absolutely free to refuse briefs if they think that appearance in the case would interfere with their duty in Parliament to their constituents. No man is forced to become or to remain a member of the Bar or of the House of Commons, but so long as he exercises the privileges of a barrister he is bound to give his services without fear or favour to those in a position to require them. Judges are precluded from sitting in the House of Commons; barristers are not, but only on the condition that they recognise no claim that may interfere with their duty to their clients while they continue to practise their profession. It is, I think, because this duty is so often misunderstood that there are heartburnings over the etiquette of the Bar. It should always be remembered that a barrister in the conduct of a case not only does not, but may not express any opinion of his own upon the guilt or innocence of a prisoner, the justice or injustice of his client's cause. Every case has something to be said for it, something to be said against it. It is the duty of the barrister simply (it is not a simple duty) to put the points of his client's case as forcibly as he can, to reduce the points against him to their proper proportions to the best of his ability. So long as the advocate recognises that this is the limit both of his right and his responsibility perplexity as to his duty will seldom arise. The politician not infrequently girds at the advocate for what he supposes to be the insincerity of his profession. For my part, as a member of the House of Commons. I found the question of when and how far personal opinion on minor matters ought to be subordinated to party welfare far more perplexing than any question of duty which ever arose in the course of my practice at the Bar. But the services of counsel are open to every member of the public alike, and that it must be first come first serve is the rule as I understand it, handed down to us by long generations of men who have left the reputation of the Bar of England for integrity, fearlessness, and impartiality unrivalled in the world. That members of the public should come as they do

over and over again to commit their most vital interests to the hands of men whose political interests are directly opposed to their own seems to me the highest compliment ever paid in any country to any body of professional men. Judges, we all know, should avoid controversy, and it is with no desire to break this rule that I seek the publicity of your columns. But when I remember the injunctions laid upon me when the sacred torch was handed on by abler and better hands, I feel that if I kept silence now I should fall short of the duty which I owe to that profession to which it has been the pride of my life to belong.

Mr. F. E, Smith, K.C., M. P., whose letter, he explains, was written without his having any opportunity of consultation with Sir Edward Carson, writes: I agree with Sir Harry Poland, who writes, of course, with great authority, that we could not have been compelled to accept briefs in either the *Matin* or the Chesterton case. We were never under any delusion upon this point. The relevant considerations in a difficult decision were two:—1. Was it or was it not our duty under the Rules of the Bar to accept the retainers which were offered to us, or were there in the material words 'special circumstances' entitling or obliging us to refuse those retainers? 2. Whatever the Rules of the Bar may have been, was it or was it not our duty in relation to the general public and the profession to accept the retainers which were offered to us? The considerations involved in these two questions overlap and may without inconvenience be considered together. It is proper to remember that our conduct under circumstances so singular may easily become a precedent. Bearing this in mind, it is necessary to ask whether at the commencement of the *Matin* action we should have been justified in lending such weight as our names afford to the view that the circumstances were so 'special' as to relieve us of the duty which is the correlative of the monopoly which we are permitted to enjoy. The Postmaster-General and the Attorney-General of England were accused in a reputable French paper circulating widely upon the Continent of corruption in their high public offices. The Attorney-General is the head of the profession to which we both belong. He has been intimately known to us both in many capacities for many years. Under these circumstances we were offered retainers on behalf of the plaintiffs. I invite our critics to indicate with precision the grounds upon which it is suggested that it was our duty to refuse these retainers. Were we to say, 'We cannot accept them because the plaintiffs are Liberals and we are Conservatives, and therefore, the issue being political, the circumstances are "special"?

I would recommend those who take this view to examine with some care the certain consequence of such an action. Political issues constantly present themselves for decision in the Law Courts. In the overwhelming majority of cases juries have done their duty indifferently between the parties, treating their own views upon politics as immaterial. How long do you think this state of things will endure if every Conservative case is to be presented by Conservative advocates and resisted by Liberal advocates, and every Liberal case conversely resisted by Conservative advocates? How long do you think it would be before our Law Courts reproduced the grotesque travesty of judicial procedure which has disfigured the record of the Marconi Committee? . . . Your leader writer observes in this connection that 'there are not two Sir Edward Carsons.' In the only sense in which this is true this statement is a meaningless common place recording the accepted fact that human personality is not physically duplicated. In the only sense in which it is relevant it is notoriously untrue. Was the author of the four Philippics the 'same man' who delivered the speech. Was Cicero the same man when he declaimed against Catiline and when he argued Pro Muliere Arretina? In their public utterances Cicero, Demosthenes, Erskine, and Sir Edward Carson are judged by the same standards as any public man who is not by profession an advocate, and are expected when they speak to express their own opinions with the candour required from other public men. But when they speak as advocates every cultivated person in the world knows that, discharging a function vital to the very existence of civilized society, they give trained but strictly representative expression to the contentions of their clients. . . . . It is suggested that our professional commitments have put it out of our power to take part in the debate upon the Report of the Marconi Committee, thereby depriving the Opposition of such assistance as it might otherwise have been in our power to give. I agree with Sir Harry Poland that this is in the main a question for our constituencies. But I am not unwilling to analyse elsewhere the nature of the complaint. Let us consider first what it involves explicitly and impliciitly. It means that no barrister who is a member of Parliament can properly accept professional employment in a matter which may possibly or perhaps one should say probably, become the subject of Parliamentary discussion. Is this the standard proposed? Was Sir Edward Carson wrong in accepting the Archer-Shee case? Was Mr. Duke wrong in appearing for Sir Stuart Samuel? Was Sir Charles Russell wrong in appearing

before the Parnell Commission? And finally—a still more pregnant question—would Sir Edward Carson and myself have been wrong, in the opinion of our critics, if we had appeared against Ministers in the *Matin* case and for Mr. Chesterton in the Chesterton case? Or to put the same question in another way, was Mr. Rigby Swift wrong in appearing for Mr. Chesterton? If not, why not? We could not in either case have taken part in the debate. Is our offence not that we acted as advocates in these cases, but that we acted as advocates upon the wrong side? If this indeed be the meaning no grosser affront was ever put upon an honourable profession. It means that we may with propriety appear in a particular case upon the conservative side, but that we cannot without impropriety appear in that case upon the Liberal side. . . . . On the general question Sir Harry Poland quotes Erskine's noble vindication of the position of the Bar. He cites this well-known case as one in which an advocate was bound in honour to appear. But here, with respect I am unable to understand his position. Why was Erskine specially bound to appear in Paine's case? Why was this obligation of higher quality than that of any other advocate? Himself a Whig and an intimate friend of the Prince of Wales, he defended Paine for scandalous attacks upon the Royal Family. Surely it is altogether wrong for an advocate ever to base his duty upon the facts of a particular case. If he does so he breaks Erskine's own rule and becomes a judge. But if such considerations are relevant how did Erskine's position differ from ours? We appeared for a private citizen who having regard to the record and the submissions of Mr. Chesterton's counsel, was as clearly upon his trial for grave criminal offences as if he had stood in the dock.—*Ibid.*

CONTEMPORARY LEGAL LITERATURE.

"*Is the doctrine of consideration senseless and illogical?*" as some writers for instance Dean Ashley in the Harvard Law Review for March seem to think or is it a useful principle to be retained in our system of law is the question which Mr. Ballantine considers in the *Michigan Law Review* for April. He thinks that the doctrine of consideration is not irrational but that the old definitions and tests are not wide enough to cover all cases where a promise should be justly enforced. There should be recognised he says, three distinct forms of consideration, meaning thereby three different grounds why it is unjust to break a promise and why a promise should be enforced (i) the usual one, the reciprocity of bargain or exchange (ii) justifiable reliance on gratuitous promise

(this is a sort of Estoppel) (iii) existing obligation legal, equitable, even moral if based on value received. Instances of these last are payment of another's debt, improvement on another's land, &c. He has much to find fault in the usual "legal detriment" view of consideration. On this theory, he argues that the validity of a promise for promise and the recognition of contracts binding at the option of one party cannot be justified. He would substitute instead a conception of consideration as a test of the intrinsic nature of the transaction, based on an exchange present or future. This would rationalise according to him the doctrine of consideration and furnish a key to the maze of conflicting views as to the element of consideration in bilateral contracts.

In the March number of the *Candian Law Times*, Mr Lemnel Foster gives much useful advice to young men, for "*building up a law practice.*"

In the April number of the same journal there is a summary of the law in America as to the liability of owners of irrigation ditches. The rule laid down in *Rylands* v. *Fletcher* is not law there; the owner of the ditch is liable only if he does not take due care and caution to prevent injury. There is also a note as to whether a past debt is a valuable consideration for a security. The result of the decisions in *Fullerton* v. *Provincial Bank of Ireland*[1], *Wigan* v. *English and Scottish Law Life Assurance Association & Co.*[2] and *Clegg* v. *Brow*[3], is stated to be that past debt is not consideration unless there is an agreement to give time or on the faith of the security time is given. The forbearance to sue need not be for any definite time; some forbearance is all that is necessary.

In the May number of the same journal, a writer summarises the contributions of Chief Justice Holt to the development of English Law. In *Coggs* v. *Bernard* Holt gave a final shape to the law of bailments. By his judgment in Ashby v. White, he laid down the principle *ubi jis ibi remediem.* He was the first to lay down that the status of slavery could not exist in England. (*Smith* v. *Brown*) He put an end to trials for witchcraft by directing the prosecution of complainants and seeing them convicted. He put a stop to the practice of trying prisoners in fetters. It was during his regime that evidence of former crimes became inadmissible.

In the Harvard Law Review for June, Mr. Charles P. Hine subjects the doctrine of *Election of* remedies to vigorous criticism.

1. (1903) A. C. 309.
2. (1909) 1 K. B.
3. (1912) 3 K. B. 474.

The rule is thus stated in an American case. "An election once made with knowledge of facts between co-existing remedial rights which are inconsistent is irrevocable and conclusive irrespective of intent" "The commencement of an action upon one theory constitutes an election". In the first place, courts differ as to the principle on which the rule depends. According to some courts, it is only another name for estoppel; in that view, the rule is a mere surplusage. The ratio of the majority of the decisions, however is that a party ought not to be permitted to experiment with the remedies the law affords. Again, if it is a growth from the equity doctrine of election, the original purpose of the rule has been long forgotten and is applied most harshly to the prejudice of innocent parties. By the operation of this rule, the mere bringing an action precludes a party from bringing an action on an inconsistent theoryt hough nobody has acted on the faith of such election and though he does not prosecute it to the end. And yet the law allows a party to dismiss an action and recommence another for the same remedy. The courts are not all agreed whether mere commencement or only prosecution to the end that constitutes the bar. A difference may reasonably be made between actions to rescind contracts and actions based on the affirmance of contracts. In the latter case, commencement of an action may well be viewed as a binding election. The rule is cumbersome in that it puts the court to the necessity of trying in one action the question whether the plaintiff would have succeeded in another. The old common law rule on which this doctrine is supposed to be based only precluded a person who had a choice between a real and a personal action after choosing one form of action from resorting to the other. The rule did not apply where the choice was only between different kinds of personal actions. Most of the recent decisions upon the authority of which the rule is supposed to rest, are merely obiter (See *Morris* v. *Robinson*[1], *Valpy* v. *Saunders*[2], *Brewer* v. *Sparrow*[3], *Lythgoe* v. *Vernon*[4], *Smith* v. *Baker*[5], and *Scarf* v. *Jardine*[6]) and are traceable to a misconception as to the common law rule stated above.

In the same issue of the Harward there is a learned controversy between Professor Gray and Professor Kale as to the application of the rule against perpetuities to the exercise of general testamentary powers *i.e.* whether a person holding a general power of appointment by will can appoint only to such persons and in such ways as

1. (1824) 3 B. and C. 196.
2. (1827) 7 B. and C. 310.
3. (1848) 5 C. B. 686.
4. (1860) 5 H. and N. 180.
5. (1873) L. R. 8 C. P. 350.
6. (1882) 7 App. Cases 345, 360, 361.

consistently with the rule against perpetuities the original donor could have made dispositions of the property or whether the donee can appoint as if he is making the disposition himself. Professor Gray is of the first opinion. Professor Kale holds the other view. The argument on one side is that the donee of a general testamentary power cannot, unlike a donee of a power of appointment by deed, appoint to himself and therefore you cannot regard him as the owner of the property. The answer to this by Professor Kale is that when you do not make a difference between the case where a man owns property during his lifetime and where he acquires it just before his death, why should you make a difference between the two kinds of powers?

The same issue contains a learned note on the maxim "*In pari delicto melior est conditio possidentis.* The writer of the note thinks that this maxim which is merely of method one expressing a consideration of policy is so much broader than the legitimate scope of the policy that it ought to be discarded altogether. The reluctance of courts to adjust the right of criminals is hardly a sufficient reason for allowing clever scoundrels to defraud their victims whenever they can involve them in a crime. These remarks were made with reference to a case in one of the American courts where the court refused to a participant in a felonious marriage the recovery of property conveyed to the supposed wife who had induced the crime in order to defraud him of his property.

BOOK REVIEWS.

Indian Decisions (New Series): Calcutta Vol. I by Messrs. T. A. Venkasawmy Rao and T. S. Krishnasawmy Rao.

The promptness with which the first volume of the Calcutta Reports (I. L. R.) has been brought out, may be taken we hope as an earnest of the Editors' desire to carry out the publication expeditiously. While expeditious, we are glad to note it bears no signs of hasty preparation. So far as we have examined, the book is free from typographical errors.

Lawyer's Reference (Bengal Law Reports Vol. Calcutta Law Reports (Vols. 1 to 14) by the Lawyer's Companion Office.

Books of this sort have a justification for their existence only in the absence of a good digest; otherwise one should regard it as a sheer waste of time to go over the same ground in bits, now Bengal

Law Reports, now Indian Law Reports now Weekly Reports and so forth. Granting a justification for its existence, the work is well done. The index is full and accurate.

Transfer of Property Act by Mr. A. K. Ray (1913) Published by Messrs. R. Cambray and Co., Calcutta.

Though we cannot say that there is any distinction about this work, it is certainly a useful publication. The notes are brief and to the point. The headnotes in bold type enable one to take in the whole matter at a glance. References to English statutes and an account of the Hindu and Mahomedan Law of gifts and mortgages are special features of this work. The extracts which the author gives from leading English text-books and decisions are apt and sure to be found useful. The references seem to be up-to-date and fairly (we would have said quite, but for the omission of a few Madras cases which we were able to detect) exhaustive. The treatment given to the doctrine of subrogation is not quite as adequate as one would have desired. In one place, the author is positively misleading *i.e.* where he deals with the admissibility of evidence of conduct to determine whether a transaction is a sale or a mortgage. He does not refer at all to the Madras cases after 13 Madras. One should have very much liked the author to give the I. L. R. references wherever possible and not merely the references to non-official reports. But these are minor defects and do not detract from the usefulness of the volume as a whole. As a handy book of reference, we have no hesitation in recommending the book to the profession.

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CRITICAL NOTE.

Srinivasa Iyengar v. Secretary of State for India.

(24 Madras Law Journal 41.)

The judgment in *Srinivasa Iyengar* v. *Secretary of State for India*[1] cannot be said to be satisfactory. The only question that arose was expressly left undecided, and the conclusion is based upon cases decided under repealed Acts.

The question that actually arose for decision was on the following facts. A suit was brought to set aside a sale held for arrears of revenue. Admittedly the suit was governed for purposes of limitation by the six months' period prescribed by section 59 of Madras Act II of 1864. The suit was brought after the expiry of six months. The plaintiff however, urged that the suit was not barred by reason of the provisions of section 15 of Act IX of 1908. If the provisions of section 15 be applicable to the suit, then there is no doubt that the suit was instituted in time. The only question therefore was whether the provisions of section 15 were applicable to the suit. To put it still more clearly—the question was whether section 29 of the Act precluded the application of section 15 to the suit.

The learned judges hold that the provisions of section 15 are applicable to the suit, but refuse to consider whether the effect of section 29 is to prevent the application of section 15. The learned judges are of opinion that the whole question turns upon the construction of section 59 of the Revenue Recovery Act. "We are of opinion that if on a construction of Act II of 1864 the conclusion can be arrived at that the period of six months was intended to be subject to the general provision of the Limitation Act, *Abu Bucker Sahib* v. *Secretary of State for India*[2] would not preclude us from giving effect to that conclusion."

It is obvious that the learned judges have altogether misconceived the question that must necessarily be answered before

1. (1912) 24 M. L. J. R. 41. 2. (1911) I. L. R. 31 M. 505.

they arrived at their decision. There is nothing in Madras Act II of 1864 which would help in the answer to the question whether the provisions of the Limitation Act are or are not applicable. Section 59 prescribes the period for certain suits, and is altogether silent as to the application of the provisions of the Limitation Act. It is in the latter act and in that alone, that an answer to the question must be sought for. A consideration of the provisions of the Limitation Act of 1908, leads, I venture to think, to the same conclusion as that arrived at by the judges.

Section 3 of the Act lays down, "subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, ..., after the period of limitation prescribed therefor by the First Schedule shall be dismissed....................".

Section 29 says, "Nothing in this Act shall......................

"(*b*) affect or alter any period of limitation specially prescribed for any suit,............by any special or local law now or hereafter in force in British India."..................".

Madras Act II of 1864 is a local Act, prescribing the period for the suit in question. The plaintiff does not want anything in the Limitation Act "to affect or alter" this period. He merely states that the *computation* of that period must be done in a particular way. Sections 12 to 25 deal with "computation of period of limitation", and the plaintiff relies on Section 15, which is one of such sections, for the method of computation he wants the court to adopt. The period prescribed will remain just the same, however it may be computed.

The history of legislation in regard to limitation of suits &c., also points out that section 15 is well applicable to the suit in question. The corresponding provision in Act XIV of 1859 was contained in section 3. It runs as follows. "When, by any law now or hereafter in force, a shorter period of limitation than that prescribed by this Act is specially prescribed for the institution of a particular suit, such shorter limitation shall be applied *notwithstanding this Act.*"

In Act IX of 1871, section 6 stated,—

"When, by any law not mentioned in the schedule hereto annexed, and now or hereafter to be in force in any part of British India, a period of limitation differing from that prescribed by this Act is especially prescribed for any suits,............*nothing herein contained* shall affect such law."

In Act XV of 1877, section 6 stated,—

"When, by any special or local law now or hereafter in force in British India, a period of limitation is specially prescribed for any suit,..................*nothing herein contained* shall affect or alter the period so prescribed."

Around these sections had clustered numerous decisions of all the High Courts in British India laying down that the general provisions of the Limitation Act are applicable to suits the period of limitation for which is prescribed by any local or special law. It is almost impossible to think that the Legislature contemplated by the light verbal and (if I may say so) typographical alterations made in the wording in Act IX of 1908 to reverse the long uniform course of judicial decisions of all the highest courts in British India. As their Lordships of the Privy Council say in the well-known case of *Vasudeva Mudaliar* v. *Srinivasa Pillai*[1]. "The narrower construction escapes the necessity of attributing to the Legislature a great and sudden change of policy. It also gives effect to the ordinary presumption that the Legislature when it repeats *in substance* in a later Act an earlier enactment, that has obtained a settled meaning by judicial construction, intends the words to mean what they meant before." (The italics are mine).

The learned judges were also pressed to adopt the reasoning in the Full Bench of *Abu Bucker Sahib* v. *Secretary of State for India*[2] and it was apparently thought that decision went against the plaintiff. The facts and the actual decision in *Abu Bucker's case*[2] are briefly as follow. Appeals under the Forest Act are to be preferred within thirty days of the decision or order appealed against. An appeal was filed after the expiry of 30 days, and was sought to be maintained on the ground that the time spent for obtaining a copy of the order appealed against should be excluded, as provided under section 12 of the Limitation Act of 1877. The question whether section 12 might be applied was referred to a Full Bench. The learned Chief Justice held that section 12 was not applicable and stated three reasons for holding so. They are:— (1). The right to extend the time for appeal was expressly given in the Forest Act to the Governor in Council, and that fact showed that "the legislature intended that the general provisions of the law requiring the courts to extend the period of limitation in certain cases should have no application to appeals under section 10 of the Act in question". (2). The effect of section 6 of the

1. (1907) I. L. R. 30 M. 426. 2. (1911) I. L. R. 34 M. 505.

Limitation Act was to exclude the application of section 12 of the Act. (3). The Forest Act which gave the right of appeal did not require that the notice of appeal should be accompanied by a copy of the order appealed against. *Wallis* J. who was "of the same opinion" and *Miller* J. who "agreed", have also made short observations regarding sections 6 and 12 of the Limitation Act. When more than one reason is given to support a conclusion, and any one reason is enough to support it, it is not a necessary inference, that the *pros* and *cons* in reference to each of the reasons are fully considered. It is especially so in the case under discussion, as the learned Chief Justice begins by saying that his conclusion "might reasonably be based on the short ground" mentioned above as the first ground. The other two grounds are superfluous, though they might afford a basis for a larger amount of self-satisfaction. The learned judges *Benson* and *Sundara Aiyar* JJ. themselves distinguish the case on the ground *inter alia*, that the Full Bench decision does not notice the several prior decisions of the Madras High Court.

It may not, perhaps, be improper to raise a question that was not raised in the case. The period of six months prescribed for the suit expired on 31st December 1908, and if there was a court of competent jurisdiction sitting that day, the suit if not instituted that day would altogether be barred. The courts however were closed on the last day of the period, and the suit could be instituted on the first court day thereafter. This could be done, not necessarily because section 5 of Act XV of 1877 or section 4 of Act IX of 1908 permits it. Section 10 of Act X of 1897 (General Clauses Act) permits the filing of the suit on the next court day. If then the period prescribed for the suit expires before Act IX of 1908 came into force, can a suit instituted subsequent to its coming into force, not because it is governed by it, but because of an accident, attract the new provisions of the new Act?

N. SUNDARARAJA AIYENGAR.

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THE LAW RELATING TO THE SUCCESSION OF A DEGRADED HINDU.

The law as regards the succession to a degraded Hindu is in a somewhat confused state and the cases on the subject can hardly be regarded as satisfactory. A person notwithstanding his degradation does not cease to be a Hindu and as such the law applicable to him is the Hindu Law or usage governing that class. He is certainly not governed by the Indian Succession Act. See *Sarnamoyee Bewa* v. *The Secretary of State*[1]. There are two views regarding the effect of degradation: firstly, that it has the effect of severing the connection of undegraded members and his or her undegraded relations; secondly that it has not that effect. *Taramunnee Dassee* v. *Mutee Buneanee*[2] seems to be the earliest authority and the decision in this case appears to be the basis for the statement that degradation has the effect of severing the relationship of a degraded person from his or her relations. The decision, however, is no authority for any such proposition and in fact the actual facts in the case do not raise any question as to the effect of degradation. The facts are these. One Konal Monni Dassee lived as a prostitute and purchased property. She died leaving three daughters one of whom married and had sons who claimed to be heirs of their grandmother and the other two lived with their mother leading lives similar to that of their mother. The married daughter herself did not claim the property but her sons claimed the estate. If the question had arisen between the married daughter and the prostitute daughters then the decision might be regarded as an authority bearing upon questions relating to the succession of a degraded woman. It would seem difficult to say what was the law applied in this case. If it was the Hindu Law, was it the Hindu Law of Stridhanam of the Bengal School? Nothing, however, appears from the judgment. All that appears from the Report is that the Principal Sudder Amin differing from the Munsif held that the deceased was an outcaste of the family but referred the question of

1. (1897) I. L. R. 25 C. 254 at 258. 2. (1846) S. D. A. 207

heirship to the Zillah Pandit who gave it as his opinion that the prostitute daughters should succeed to their prostitute mother. The Sudder Amin accordingly reversed the decision of the Munsif. The Sudder Dewani Adalat admitted a special appeal. The Sudder judge put the following question to the Pandit of the Sudder Court: "Of the three daughters of the outcaste mother one of whom is married and respectable and other two prostitutes, who will inherit the mother's property?" The reply of the Pandit was that the two prostitute daughters will inherit and added as his reason that the relationships of the married and respectable daughter to the outcaste had been severed. It does not appear from the report whether the married daughter was a legitimate daughter of the woman. The decision in the case can hardly be regarded as satisfactory.

It seems to be regarded as settled law that a Hindu woman leading a prostitute or an unchaste life and has became degraded is governed by Hindu Law. (See *Narain Das* v. *Tirlok Tiwari*[1], *Subbaraya Pillai* v. *Ramasami Pillai*[2], *Sarna Moyee Bewa* v. *Secretary of State*[3], *Sundari Dosse* v. *Nemye Charan Daw*[4], *Hari Lal Singh* v. *Tripura Charan*[5]). Considering the case of a degraded woman first, there seems to be some doubt about the character of the property acquired by such woman. The Madras High Court in *Sivasangu* v. *Minal*[6] seem to have held that it would not be Stridhanam but ordinary property. The learned judges there observed: "A prostitute is certainly *not* a maiden within the meaning of the rule applicable to the sister's fee. Nor can property acquired by her with funds earned by prostitution be treated as stridhanam or property given to a woman who contracts an *asura* marriage or a legal marriage though in one of the forms prescribed by the law. A legal marriage and the character of the property as stridhanam are the pre-requisites of the rule of succession mentioned by the Subordinate Judge. The decision of the High Court in the *Sivaganga case*[6] which was confirmed by Her Majesty in Council is clearly against the view that all property vested in a woman, however acquired, is her stridhanam governed by the special rules of succession prescribed by the Mitakshara in regard to woman's peculiar property. We are of opinion that the property left by Kuppayi must be treated as ordinary Hindu property, if the Hindu law regulated its devolution. The rule of law applicable to the children of a prostitute mother

1. (1906) I. L. R. 29 A. 4.
2. (1899) I.L.R. 23 M. 171 at pp. 177 & 178.
3. (1897) I.L.R. 25 C. 254 at 258.
4. (1907) 6 C. L. J. 372.
5. (1913) 17 C. L. J. 438 (448).
6. (1889) I. L. R. 12. M. 277.

who have elected to retain Hindu usage is that of Hindu Law as laid down in the decision of the Privy Council in *Myna Boyee* v *Ootaram*[1]. We are, however, not inclined to apply this rule at once." The learned judges, thereupon, directed the Sub-judge to make the brother of the deceased a party and to submit a finding on the following issue, among others whether the rule *viz.* of succession applicable to ordinary Hindu property was applicable to the property left by the deceased degraded woman. The Subordinate Judge held upon this issue that though the property acquired by a woman by prostitution might fall under the category of presents of earning by skill or mechanical arts the deceased woman was neither a maiden nor a married woman nor a widow, that the text of Katyayana of presents from strangers or earning by labor, skill etc., would only cover cases of acquisitions made by a female under coverture and that there was no provision at all in the text books regarding the property acquired by a female through prostitution except a statement of Strange in his Manual of Hindu Law para 66. He, therefore, answered the question in the negative and held that the rule of succession applicable to ordinary Hindu property was not applicable. It is, however, difficult to say what the rule of succession to ordinary Hindu property is where the property is acquired by a woman who is undegraded if by ordinary Hindu property the learned judges make a differentiation between stridhanam and other kinds of property which a woman may hold absolutely. In Calcutta, however, there is authority for the view that such property may be regarded as Stridhanam. In *Tripuracharan Banerjee* v. *Harimati Dassi*[2] *Stephen* J. observed: "The facts seem to me to point strongly to the conclusion that the property in question represented the earnings of a prostitute but it is not necessary that I should hold more than that it was the absolute property of a prostitute at the time of her death. If this is so the view I have expressed seems to me consistent with the rules laid down in the Dayabhaga Chapter IV Section 1 as to what is the separate property of a woman. Paragraphs 1 to 4 describe six modes in which a woman may acquire separate property, none of which seem to apply to acquisition by a prostitute as it would be doing violence to the text to suppose that the wages of prostitution could be described as 'what has been conferred on the woman through affection'. But these modes of acquisition do not exclude others as is shown by the very plain language of paragraph 18 which concludes 'that alone is *Stridhan* which she has power to give, sell or use, independently of

1. (1861) 8 M. I. A. 400. 2. (1911) I. L. R. 38. C. 493 at p. 496.

her husbands's control.' But the defendant argues that all the rules presuppose that a woman has a husband, that *Stridhan* is not limited to some kinds of property, but is limited by the status of the woman, and that the status must be that of a married woman. To this I think that the answer is to be found in a passage of Sir Guru Dass Banerjee's work already referred to at p. 389, where he points out that the succession to dancing girls is not a subject with which Hindu Law cared to concern itself, but that the modern codes of the country cannot act in the same way, which seems to me to show that though property held absolutely by a prostitute may not be *Stridhan* in the exact contemplation of the Dayabhaga, the operation of which is confined to married woman, modern Courts must treat it as though it was stridhan for purposes of succession." The above case was followed by a Full Bench of the Calcutta High Court in the recent case of *Hari Lal Singh* v. *Tripura Charan Roy*[1] and the Madras High Court in *Narumayya Chetty* v. *Tiruvangadathan Chetty*[2] apparently proceeded on the assumption that the gains of prostitution would be stridhanam.

Apart from this conflict as to the nature of property there is a further conflict as already stated as to the effect of degradation. The Madras and the Allahabad High Courts hold that degradation does not put an end to relationship. See *Narain Das* v. *Tirlok Tiwari*[3], *Subbaraya Pillai* v. *Ramasami Pillai*[4]. The Madras decisions seem to enunciate a further principle judging from the *dicta* in some of the cases that as between degraded and undegraded relations of a woman the degraded relations would have preference. This principle can hardly be regarded as satisfactory. If that principle be accepted the law punishes a person for leading a chaste life by excluding him and puts a premium on immorality by allowing persons leading an immoral life to take to the exclusion of those leading honest lives. We can hardly regard a system of jurisprudence which founds a preference on immorality as rational and we cannot conceive that there is anything in Hindu Law to countenance any such proposition. None is to be found in the texts of the Sages or in the words of the commentators. It is, therefore, necessary to see whether the cases really countenance any such proposition. The case of *SivaSangu* v. *Minal*[5] already referred to can hardly be regarded as a satisfactory decision. In the judgment calling for the finding no trace is to be found of any expression in support of the principle. On the finding it will be remem-

1. (1913) 17 C. L. J. 438 (448)
2. (1912) 24. M. L. J. R. 223.
3. (1906) I. L. R. 29 A. 4.
4. (1899) I.L.R. 23 M. 171 at pp. 177 & 178.
5. (1889) I. L. R. 12 M. 277.

bered that the Subordinate Judge held that the rule of succession applicable to ordinary Hindu property was not applicable but he added that the succession in the first instance would dêvolve not on the relations that remain undegraded in caste but on those of deceased's heirs after degradation or who were her associates in the degradation. There was a fourth issue remitted for finding viz., whether according to the usage of the caste to which the party belonged or otherwise there was a rule of preference in favor of the sister who was an associate with the deceased in her degraded condition. On this issue the Subordinate judge held that the sister was the preferential heir. Whether the Subordinate Judge decided it on the question of usage does not appear. The learned judges upheld the decision first upon the principle laid down in *Taramannee's case*[1] and secondly upon the analogy between the legal relation of two prostitute sisters living together in their degraded condition and that of their two brothers living in co-parcenary. The decision in *Taramani's case* has already been referred to. We fail to see any analogy between brothers living in co-parcenery and sisters living together in prostitution. In the case of brothers living in co-parcenary and governed by Mitakshara law the law lays down the rule of survivorship. In the case of sisters leading respectable lives living together no question of survivorship arises. No such question can arise in the case of sisters living together but leading lives not countenanced by law and stamped by law as immoral. The only question is one of succession and this question *viz.*, whether a sister or a brother can ever be a heir to their deceased sister has hardly been considered in this case. In the case of *Narasannah* v. *Ganju*[2] the parties were dancing girls and we do not desire now to consider the question as to the peculiar law applicable to them. In *Subbaroya Pillai* v. *Ramasami Pillai*[3] already referred to the learned judges made a statement which was not necessary for the decision. They observed[3] "We think that the decition itselfs when there is a competition between a degraded person and an undegraded person to the property of a degraded person the degraded person has the preferential right may be supported on equitable principles referred to above." The equitable principles referred to in a prior portion are stated by their Lordships as follows at p. 177: "As to the Hindu Law itself that does not, so far as we are aware, prescribe any special rule of succession to the property of an outcaste; nor does it expressly assert or deny the right of an undegraded person to succeed to the property of a degraded to whom the former might have been unquestionably the

1. (1846) S. D. A. 297. 2. (1889) I. L. R. 13 M. 133.
3. (1889) I. L. R. 23 M. 171. (178).

heir but for the degradation of the latter. In these circumstances where there is no usage regulating the devolution of the property of a degraded person who is within the pale of Hinduism as in the case of dancing girls, the only rules of inheritance that the courts can with propriety fall back upon are those of Hindu Law. And in applying so much thereof as without incongruity could be applied either with reference to those connected with the degraded person after his degradation or in the absence of those remaining undegraded the courts would at all events be administering those rules as rules of equity and good conscience which are guides in cases not otherwise provided for."

(*To be continued*).

THE MODES OF PARTITION AND THE RECENT PRIVY COUNCIL CASE.

We are glad to observe that the Privy Council in *Pandit Suraj Narain* v. *Pandit Ikbal Narain*[1] has taken a sound and progressive view of the Hindu Law relating to partition. Mr. Syed Ameer Ali delivering the judgment of the Judicial committee says: "A definite and unambiguous indication by one member of intention to separate himself and enjoy his share in severalty may amount to separation and he proceeds to lay down that to have that effect the intention must be unequivocally and unambiguously expressed. Till the decision of the Privy Council, the prevalent doctrine undoubtedly has been that in order to effect a separation in status there must be an agreement express or implied between all the co-parceners. This doctrine has especially in Madras been treated by learned judges as a legal fetish and the ridiculous length to which it logically led was illustrated in the case reported in *Appa Pillai* v. *Ranga Pillai*[2]. A member of an undivided family could not in the most solemn manner renounce his status in the joint family unless all the other members acquiesced in such renunciation and gave him "some trifle" out of the family property. The major premise was that every separation could only be effected by a valid agreement or contract. The minor premise was that every contract requires consideration. The conclusion was irresistible that there could be no separation of one member by renunciation pure and simple without consideration for such acts. And a man who had by registered document renounced his rights was held entitled to sue for partition. See *Appa Pillai* v. *Ranga Pillai*[2]. No less a judge than the late Sir *V. Bashyam Iyengar* in a judgment (see *Sudarsana Maistri* v.

1. (1912) I. L. R. 35 A. 80. 2. (1882) I. L. R. 6 M. 71.

Narasimhalu Maistri[1]) which dazzled the legal world of his day said that a renunciation must be followed by acquiescence by the other members and must be manifested by his taking some trifle out of the family property. The learned judge also differed from the opinion of *Garth* C. J. in *Radhachurn Doss* v. *Kripa Sindu Doss*[2] "that a mere declaration by one member that he was separate from the others, would seem to be sufficient to effect the separation." The stricter view has arisen from a confusion of ideas and a failure to distinguish separation in status from a partition amongst the co-parceners. The rules which were laid down for a division were made applicable equally to a separation in interest. Further passages in the books which were concerned with the Hindu lawyer's notions of evidence by which a partition may be held proved were confounded with the substantive elements required to effect a partition. The rule as to the giving of some trifle was only a rule of evidentiary value.

We cannot help thinking that the view taken by *Chief Justice Garth* is the sound and logical one that is conducive to the best interests of Hindu Society. It is clear that a Hindu co-parcener can enforce a division even against the will of others by suit. The court has no discretion in the case of adult co-parceners and must give him a decree. It is equally clear that while one may wish to be separated from the family others might wish to continue joint. It is the demand for a separation that is really the determining feature and not the compliance therewith by the other members. A man's own status as a separated or unseparated member ought to depend upon his expressed volition and not on the volition of others. The view that an unequivocal, express, unilateral declaration of his intention to treat himself as a separated member is sufficient avoids all anomalies and difficulties especially in regard to the time from which the cessation of the co-parcenery is to take effect. In as much as a co-parcener is entitled as of right to effect a separation, the Calcutta view now affirmed by the Privy Council that an unequivocal act by a co-parcener showing his intention to hold his shares separately effects a separation is perfectly sound and logical. [See 4 C. 425; 3 W. R. C. R. 41; 8 W. R. 82; 14 W. R. 339, 346; 25 W. R. C. R. 355.] We hope the Indian High Courts will in future give effect to this view instead of attempting to whittle it away.

S. SRINIVASA IYENGAR B.A. B.L.,
High Court Vakil.

1. (1901) I. L. R. 25 M. 149.
2. (1879) I. L. R. 5 C. 474.

NOTES OF INDIAN CASES.

Kanhaya Lal v. The National Bank of India.—25 M.L.J. 104.—Lord Moulton both in the Court of Appeal and in the Privy Council has been remarkable for his freedom from legal shibboleths. It is refreshing to notice the way in which he brushed aside the quibbling upon the meaning of the word "coercion" in S. 72 of the Indian Contract Act. The decision of the Privy Council in the above case is to the effect that a payment is not voluntary but is made under coercion even though the circumstances do not satisfy the definition of that word as defined in S. 15 of the Indian Contract Act. We cannot imagine how the Chief Court of the Punjab came to hold that when an owner of property attached by a decree holder as belonging to his judgment-debtor pays off the decree amount under protest, the payment is voluntary and no action to recover the same would lie. A somewhat similar view used to find favour with Mr. Justice *Shephard* (*Muthayya Chetti* v. *Secretary of State for India*[1]), though happily that view has since been exploded even in Madras. While Lord Moulton has all Lord Macnaughten's boldness and vigour, his judgments have in addition a convincing quality based as they are upon a sound exposition of legal principles and appealing as they do to the best legal instincts.

S. S.

Anant Das v. Udai Bhan Pargas:—I. L. R. 35 A. 187.—In this case there were several claimants to a certain mutt. Plaintiff brought a suit as against one claimant. On the same day he instituted another suit against the same person and another claimant. There was a single judgment though separate decrees were drawn in each case by which the plaintiff's claim was upheld. Appeals were filed in both the suits. In the second suit only one appealed i. e. the one other than the party to the first suit appealed. He died and his appeal abated. It was held by the Allahabad High Court in the other appeal that the judgment in the suit wherein the appeal abated was *res judicata*. Of course after the decision of the Full Bench of the Allahabad High Court in *Zaharia* v. *Debia*[2] the learned judges in this case could come to no other conclusion. It is, however, well to note that the decisions of the Calcutta and Bombay High Courts are different although no case was decided after the passing of the new Civil Procedure Code. The learned judges in this case seem also to rely upon Explanation 1 to S. 11 but we cannot see how that will cover the facts of the case under notice. It is a question also whether where

1. (1898) I. L R. 22 M. 100. 2. (1910) I. L. R. 33 A. 51.

an appeal abates the judgment in the suit has the effect stated in their Lordships' judgment. The effect of an abatement is stated in O. 22 r. 9. That relates to a suit. According to that rule no fresh suit can be brought on the same cause of action. Taking suit to mean an appeal according to O. 22 r. 11 the effect of the abatement of an appeal is to prevent a fresh appeal from being brought. That does not mean that an appeal already filed cannot be heard. However the question is open in other courts.

Dalip Singh *v.* Kundan Lal :—I. L. R. 35 A. 207.—It is surprising to notice that there has been no reported decision of the other High Courts upon the question raised in this case. The Allahabad High Court following an earlier case has held that a father cannot revive a time barred debt so as to bind the sons. No reasons are stated by the learned judges in this case. If we turn to the decision in *Indar Singh* v. *Sargu Singh*[1] we find the learned judges giving the following reasons for their judgment: "At the same time the fact remains that if the creditor had tried to sue for the debt at the time that the mortgage was entered into, or if the father had executed a mortgage on the basis of an acknowledgment of such time barred debt, the debt could not have been recovered or the mortgage lien enforced, in our courts." It is, however, difficult to see how the learned judges arrived at the conclusion that "if the father had executed a mortgage on the basis of an acknowledgment of such time barred-debt the debt would not have been recovered or the mortgage lien enforced.

We are afraid that the learned judges have not borne in mind the provision of clause 3 of S. 25 of the Contract Act which distinctly says that a promise to pay a time barred debt is a contract. A mortgage by which a father secures the joint or ancestral property for a debt which may have been barred at the time is enforceable. The father promises to pay the debt and as security gives the joint or ancestral property. S. 25 cl. 3 will therefore apply. It must also be remembered that a debt barred by limitation is not extinguished. Then there is also another fact to be borne in mind and that it is the pious duty of the son to discharge the father's debts and where the father promises to pay a barred debt such promise is enforceable against him and he is bound to pay it. There is a promise enforceable against the father and the son is bound by reason of his pious obligation to discharge the debt. We find from the report of the very same case in *The Allahabad Law*

1. (1911) 8 A. L. J. 1099.

Journal[1] that this argument was addressed on behalf of the appellant. But we find no notice of it in the judgment. Of course if according to their Lordships the father himself is not liable the argument can have no weight. The case of *Narayanasami Chetti* v. *Samidas Mudali*[2] noticed by the Allahabad High Court is an authority for the view that a promissory note executed by the father in respect of a debt which by a judgment of Court was held to be barred by limitation was a good debt which a son was bound to pay.

SUMMARY OF ENGLISH CASES.

Stubbs Ltd. *v.* Russel : [1913] A. C. 386 (Sc.)

Defamation—Erroneous statement—Imputation of Insolvency.

A statement in a trade journal mistakenly made, that a small cause decree was obtained against a trader in his absence is by itself not libellous ; and the case is not one to be left to a jury ; still less could it be libellous when the statement is headed by an explanation that such a statement of persons against whom such decrees were obtained does in no way imply inability to pay on the part of the person or persons named and that some of the decrees mentioned therein might have been paid or settled by the person or persons concerned. As all possible suggestion of insolvency was negatived by the explanation the case was not one which ought to be left to go before a jury even with an *innuendo* as to insolvency.

Scott *v.* Scott : [1913] A. C. 417. (E).

Divorce Proceedings—Order to hold in Camera—Jurisdiction to—Publication of such proceedings—No contempt of Court—Order punishing contempt—Appealability of, not being made in a criminal cause or matter.

The Probate, Divorce and Admiralty Court of England has no jurisdiction to order that proceedings in any case therein shall be held in *Camera.* Consequently publication of the proceedings is no contempt of court. An order punishing a party as for such contempt is not one made in a criminal cause or matter and is therefore appealable.

One of the cardinal rules of administration of Justice in English Courts is the due observance of publicity in regard to those proceedings and the only three exceptions to this rule are (1) cases of

1. (1913) 11 A. L. J. 1124. 2. (1883) I. L. R. 6 M 293.

infants (2) cases of Lunatics and (3) cases where secrecy as for instance, secrecy of a process of manufacture or discovery or invention—trade secrets—is of the essence of the cause. The first two are really no exceptions at all, the jurisdiction exercised over wards and lunatics being parental and domestic, involving private affairs and thus being more administrative than judicial. The third case is really an exception being founded upon necessity.

Per Lords *Haldane and Loreburn.* The general rule as to publicity must yield to the paramount duty of the court to see that justice is done and in cases where it is clearly proved that justice cannot be had unless the proceedings be held in *camera* a judge may order that proceedings may be had in *camera*; but to obtain such an order necessity in the particular case must clearly be shown.

In re **Whitting: Ormond** *v.* **De Lannay**: [1913] 2 Ch. 1.

Will—Construction—Grant to 46 people of residuary estate—Revocation as to two—Effect of—Precedents—On question of construction, not binding—Mischief of.

A testator gave his residuary estate to forty-six named persons to be distributed equally among them. By a subsequent codicil, he revoked the gift to two out of the forty-six but in all other respects he confirmed the will. The gift was not a gift to a class.

Held, nevertheless, that there was no intestacy as regards the shares of the two whose legacies had been revoked and the estate was to be distributed among the remaining people.

His Lordship Mr. Justice Joyce refused to follow the cases cited in support of the contrary view. When he was clear himself, on a question of construction he was not bound to follow precedents. As observed by *Jessel* M. R. in *Hack* v. *London Provident Building Society*[1] on a question of construction, even the decision of the court of appeal is not binding and that even if the words are identical.

His Lordship dwells on the mischief done by referring to authorities for the construction of documents. (See the observations of *Jessel* M. R. in *Aspoen* v. *Sedden*[2] and of *Lindley* L. J. in *In re Palmer*[3] which his Lordship cites).

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1. (1883) 23 Ch. D. 103, 111. 2. (1895) 3 Ch. 369.
3. (1875) L. R. 10 Ch. 394, 397.

Grierson *v.* National Provincial Bank of England, Ltd.:
[1913] 2 Ch. 18.

Mortgage—Priority—Notice by second mortgagee—Not essential—Failure to give, not negligence.

There was a first equitable mortgage by deposit of title deeds; then a second legal mortgage. The second mortgagee did not give notice of his mortgage to the first though he was aware of it his mortgage being expressly subject to it. Subsequently, the mortgagor paid off the first mortgage, secured the title deeds, and took money from a Bank depositing them as security. The Bank claimed priority contending that the second mortgagee was guilty of negligence. But Justice Joyce held that the facts did not disclose any negligence on the part of the second mortgagee. He was not bound to give notice of his mortgage to the first mortgagee. Though it is usual to do so, there was no duty cast upon him to do so.

In re **Pacific Coast Syndicate, Ltd.,** [1913] 2 Ch. 26.

Company—Winding up—Liquidator—Costs of—Costs of defendant in action by—Priority between.

When an action is brought by the liquidator after the commencement of a winding up action, and the action is dismissed with costs of the defendant, the defendant is entitled to be paid his costs out of the assets of the company in priority to the liquidator in respect of his costs in the winding up. This is the rule whether the order in the action is merely for costs, or costs to be paid out of the assets of the company or costs to be paid by the liquidator with liberty to recoup himself out of the assets.

In re **Birkbeck Permanent Benefit Building Society Official Receiver *v.* The License Insurance Corporation:**
[1913] 2 Ch. 34.

Alienation—Clause against—Exemption in favour of involuntary alienations—Extends to alienations by assignee by operation of law, when under obligation to convey—Construction.

The mortgagees of certain leasehold premises effected a policy insuring the payment of the mortgage. The policy contained a provision that it was to cease to be in force if the whole or any part of the interest of the insured in the mortgaged property should pass

from the insured otherwise than by will or by operatien of law unless notice thereof in writing was given to the corporation and the insurance was declared to be continued to a successor by a memorandum in the policy. The mortgagees were the trustees of a company. The company was ordered to be wound up by the court and the liquidator wanted to transfer the mortgage debt but the insurer said that he could not transfer without their consent and they would not consent. But *Neville* J. held, on the construction of the policy that the insurers were bound on notice to endorse the policy in favour of any assignee. He also held that the exemption in favour of assignees by operation of law saved also assignments by such assignees when they were persons who were bound under the law to assign it to somebody else and as such the liquidator's assignment did not need to be with the consent of the insurers.

In re **Whitehead : Whitehead** *v.* **Street** : [1913] 2 Ch. 56.

Will—Legacy on condition of releasing right in favour of third party—No priority for the legacy.

A testator gave a legacy on condition of the legatee releasing her life estate in some fund which was ultimately to go to a charity under a settlement by the testator. The question was whether the legatee was entitled to priority over other legatees or was only to rank *pari passu* with them. The rule is that a legatee is entitled to priority where the condition is the release of a debt or claim against the estate. *Farwell* L.J. (sitting as an additional Judge of the Chancery Division) declined to extend the priority to a case like the present where the advantage was to go not to the testator's estate but to a third party.

Gee *v.* **Liddell**: [1913] 2 Ch. 62.

Mortgage—Co-owners mortgaging—First mortgagee of one co-owner—Foreclosure action by—Other co-owners not made parties—Effect of.

Where three people each entitled to a third share in certain property executed a mortgage for a consolidated sum, *inter se* each being bound to pay only a definite portion of it, *held*: that a first mortgagee of the share of one was bound to make the other two mortgagees parties to his action for foreclosure or else he would lose his priority in respect of his debt and the only claim he could make on account of his foreclosure decree would be to the balance

remaining after the satisfaction of the quota due in respect of the *second* mortgage.

Stampford, Spaloing and Boston Banking Company v. Keeble: [1913] 2 Ch. 96.

In this case the mortgagees of a certain land applied to the Court to grant sanction to a mining lease proposed to be granted by the receiver appointed in their foreclosure action. *Sargant* J. held that it was not competent to the Court to sanction such a lease.

Attorney General v. Horner: [1913] 2 Ch. 140. (C. A.)

Presumption of lost grant—Origin known—Mistaken Assertion of title under grant—Effect of—Maps—Admissibility of—Dedication—Reservation of right to obstruct in future—Not competent—Easement—Benefit of dominant tenement, meaning of.

The Judgments in this case chiefly of *Buckley* and *Hamilton* L. JJ. contain a luminous exposition of the doctrine of lost grant, its scope and limitations.

The facts in this case were, that the defendant had a franchise of market under a Charter of Charles II on two of the week days but the defendant asserting that he had a right under the Charter to hold market on all the week days, had been for a long time collecting tolls. The market used to be held not only in his own land but also on the adjoining roads &c.

In an action by the Attorney General to restrain the defendant from holding the market on days other than those allowed by the Charter, the defendant asked the Court to presume a legal origin for his right to hold the market and collect tolls on days other than those permitted by the charter. As regards the obstruction of the highway, he asked the court to presume a qualified dedication *i e.*, a dedication subject to a right to obstruct the highway, if any portion of the land belonged to himself and his predecessor in title, and as far as the land belonged to others an easement in his and his licensees' favour to obstruct the highway.

Their Lordships refused to draw any such inference of legal origin.

So far as the right to collect tolls went, that could be justified only on a royal grant and their Lordships felt bound by the previous decision in 14 Q. B. D. 245 and unable to draw the inference of a lost Charter.

As regards the right to obstruct the streets, when the right to hold market was negatived, what remained was only a right to obstruct the highway. Their Lordships held that for several reasons they could not presume a legal origin for it.

First the right which he was asserting was a right of market, when that was negatived an incidental portion of the right, the right to obstruct the streets could not be established on the mere ground of usage.

In the second place, the right was being asserted as one derived from a charter and when the charter is found not to confer the right it was not open to the defendant to rely upon lost grant. As *Buckley* L. J. put it "A man cannot prescribe contrary to and in a manner inconsistent with the title which he produces and on which he relies. If his enjoyment originated in a mistake and he asserted the right to be grounded, say on an award which did not support it, then however adversely the right may have been exercised, it cannot for purposes of the presumption be referred to any other ground than what he himself insisted on at the time." Or as *Cozens Hardy* M. R. put it "the presumption is often made, although in truth nobody believes that the lost grant was in fact executed. But it is a wholly different proposition to assert that the court must disregard known facts and must deliberately shut its eyes to everything except the usage."

The right asserted was also one that was incapable of having a legal origin. There may be a dedication subject to an actual existing physical obstruction; it cannot be made subject to a future right to obstruct. Nor could the argument as to its being an easement be supported as the overflow of the market could not be considered as a benefit to the dominant tenement as such. Such a right would be a right connected not with the land but with the business on the land and the right claimed would be merely a license that would make an entry lawful which would otherwise be unlawful.

There was a further argument in the case that an injunction ought not to be granted as the wrong done was beneficial to a large section of the public. Their Lordships dismissed that contention holding that that was a matter for the Attorney General who took action or for the legislature and not for the courts to consider.

Although hearsay evidence of reputation is admissible to prove a public right of highway the preliminary fact that there is a way cannot be proved by hearsay.

Acting on this principle, their Lordships refused to admit in this case two maps produced from the British Museum to show the physical delineation of the property at the time the market was granted, and whether a way existed at the time, without some more proof then their mere production as to the competency of the draughtsman &c.

Maps do not become public documents by the mere fact that they come out of the custody of the Guildhall Librarian or the British Museum Librarian. These facts in themselves do not make them public documents, as documents belonging to one of the departments of the State would be.

In re **Raggi : Brass *v.* H. Young & Co. Limited :**
[1913] 2 Ch. 205.

Will—Direction to sell real and personal estate and to pay creditors—Charge on realty—Debts a charge to the full—Not merely for a proportionate part—Limitation.

Where a testator devised his real and personal estate to trustees for sale and for payment out of the proceeds of the debts of the testator;

Held that the creditors had a charge on the real estate and the fact that the direction to sell extends also to his personal estate does not make only a proportionate part of the debts chargeable on the realty. The creditors can recover the whole of their claim from the realty within 12 years of the death of the testator which is the time allowed for the realisation of the charge.

Amber Size and Chemical Company, Limited *v.* Menzel :
[1913] 2 Ch. 239.

Master and servant—Trade secret—Confidential employment—Implied obligation—Injunction to restrain improper use—In general terms—Details of the process, not known.

The court will restrain an ex-servant from publishing or divulging that which has been communicated to him in confidence or under a contract by him, express or implied, not to do so and generally from making an improper use of information obtained in the

course of confidential employment and further from using to his late master's detriment information and knowledge surreptitiously obtained from him during his, the servant's employment.

In applying these principles, four questions of fact arise:—

First, did the plaintiffs in fact possess and exercise a secret process?

Secondly, did the defendant during the course of employment know that the process was a secret process?

Thirdly, did the defendant acquire knowledge during his employment of that secret or a material part thereof.

Fourthly, has he since leaving the plaintiff's employ made an improper use of the knowledge so acquired by him?

The Court will grant the injunction when it is satisfied that there is a secret process and that the defendant is using information with respect to it which he got in the course of confidential employment to improper purposes though it does not know the details of the process which it might become necessary to know before the defendant is punished for disobedience of the order.

JOTTINGS AND CUTTINGS.

The Imperial Court of Appeal.—The expectation that the Appellate Jurisdiction Bill would be passed before the close of the Session has, happily, been fulfilled. In the House of Commons attempts were made to reduce the salaries of the additional Lords of Appeal from 6,000*l.* to 5,000*l.*, to restrict the increase in the strength of the Judicial Committee to the appointment of only one Lord of Appeal, instead of two, to provide that only retired judges or judges entitled to retire should be eligible for the new Lordships of Appeal and that the amount of their pensions should be deducted from their salaries as Lords of Appeal, and to limit the selection of the new Law Lords to qualified lawyers under fifty-five years of age. All these 'frivolous amendments—frivolous, that is, in view of the promise made by the Government at the Imperial Conference—obtained very little support in the Lower Chamber, and the Bill has now been passed by both Houses. We could have wished that a Colonial judge of acknowledged eminence was to be one of the new Law Lords. The appointment of a distinguished Colonial lawyer as a permanent member of the Supreme Court of Appeal would have strengthened considerably its Imperial character. But the Government have, it appears, decided that the selection of

the additional Lords of Appeal shall be limited to British judges. We can only hope that, recognising the preliminary nature of the present Bill, they will proceed next Session to carry out the larger scheme of amalgamating the House of Lords and the Judicial Committee, in name as well as in practise, into one supreme Imperial tribunal.—*Law Journal.*

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Homicide's Right to a Legacy.—The well-known rule that a murderer can take no benefit from his crime has recently been applied to the lesser felony of manslaughter by the president of the Probate, Divorce and Admiralty Division in *Hall* v. *Knight* and *Baxter*. The second defendant, Jennie Baxter, was convicted at the Old Bailey early this year and sentenced to three years' penal servitude on a charge of manslaughter; her victim was the testator whose will was before the Probate Court. In that will he had left her benefits amounting to 10,000*l.* in all. A series of cases has established the rule that a felon who is executed for his offence can derive no benefit from either the crime or the execution which follows it. He can derive no benefit from the crime—*i.e.*, if the death of his victim gives him a legal right to the latter's property he, and his legal personal representative, lose that right (*Crippen's Case* [1911]). He can derive no benefit from the execution which follows his crime—*i.e.*, if he has insured against death by suicide or by the hands of justice, and commits a crime for which he suffers death, the insurance is void on grounds of public policy (*Fauntleroy's Case*, 4 Bligh, N.S.). In this last case, we may note, the capital felony for which the assured suffered the extreme penalty was not murder, but forgery. The general principle which governs both rules has been well stated by Lord Justice Fry in *Cleaver's Case* [1891] in the following terms:—'The principle of public policy invoked,' he says, 'is, in my opinion, rightly asserted. It appears to me that no system of jurisprudence can in reason include among the rights which it enforces, rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour.' It would certainly seem, for the reason given by Lord Justice Fry, that it would be impolitic to permit a homicide, whether the crime be murder or manslaughter, to benefit by the death which he or she causes. And, as Sir Samuel Evans pointed out, all persons of experience are well aware that juries, in cases which would justify a graver verdict, frequently bring in a verdict of manslaughter when the accused is a woman.

Acting on this view, the President struck out the name of Jeannie Baxter from the list of defendants entitled to a *locus standi* in the Probate proceedings and this decision, we imagine, will be generally regarded as in accord with common sense.—*Ibid.*

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The Length of Trials.—That trials have become longer in recent years does not admit of doubt. The average number of actions tried by each King's Bench judge has fallen during the past ten years from 174 to 114. But why trials have become longer is a question that admits of plenty of discussion. Mr. Justice Ridley recently attributed the lengthening process to more talkativeness at the Bar, and Mr. Justice Darling, in the course of a trial over which he presided just before the Courts closed for the Long Vacation, found occasion to remark that 'those who criticised the way in which cases are allowed to run on hardly realised the extreme difficulty which a judge, presiding over a trial in which ill-feeling existed among the parties, had in inducing them or their legal advisers to adhere strictly to the limits of relevance.' Not long ago Lord Justice Vaughan Williams attributed the longer duration of trials to the abolition of the 'nice rules of pleading,' which defined the issues to be tried, and kept the speeches of counsel and the observation of judges—the learned Lord Justice was candid enough to admit that judges, as well as counsel, talked rather too much—within the strict limits of relevancy. Others, again, have ascribed the increasing length of trials to this spectacular methods which are necessary where jurymen have to be impressed. The increasing length of trials was one of the points which was discussed before the Joint Committee whose recommendations resulted in the appointment of an additional judge in 1910, and by none of the witnesses was it dealt with more effectively than by Mr. Justice Channell, who said:—

Litigants now know not only what communication was passed between themselves and their opponents, but they know also what has passed between their opponents and their opponents' agents and correspondents. These documents are not only frequently read at the trial and commented on at length, but when they are not they supply matter for investigation, which greatly lengthens trials. Another cause for increased length is the increased facility for appeal and the constitution and practice of the Courts of appeal. The Court of Appeal discourage all short cuts and seem to think it a judge's duty not only to decide his cases, and to do so in such a way that his decision, if wrong, can be reviewed, which everyone will agree to be right, but they also think that the judge has to give to the Court of Appeal the materials for deciding all questions which may become material although in his view, they are not so. The practice has grown up, in consequence of the views so often expressed in the Court of Appeal, of conducting all cases with a view to a possible appeal, and not merely with a view to their immediate decision.

This represents, no doubt, the sounder view. The disposition towards irrelevancy and the spectacular treatment of jurymen are much too old a feature of the Courts to account for the recent growth in the length of trials.—*Ibid.*

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CRIMINAL PROCEDURE IN INDIA.

The issue of an official Blue Book on the *Sitapur Case* has confirmed the views expressed in these columns as to the grave necessity for effecting a reform in Indian criminal procedure. Three Natives of the North-west Provinces were tried on a charge of murdering another native before a district judge sitting with two assessors. The judge and one assessor disbelieved the witnesses for the prosecution and acquitted the prisoners; the other assessor disagreed with this course. Five months later the prisoners were re-arrested and charged again before the High Court of the Province; technically the trial had been 're-opened' at the instance of the Governor, Sir John Hewitt, who believed that a miscarriage of justice had taken place. They did not receive a new trial; the judges of the High Court called no witnesses, but read the record of the trial below, including the evidence there given, heard counsel for the parties and registered a conviction. Two of the prisoners were sentenced to death and duly executed. All this took place although the High Court judges had not seen the witnesses for the prosecution, whom the Court below refused to believe, and so had no means for estimating their credibility. A telegram was sent to the Governor-General on behalf of the prisoners asking him to exercise the prerogative of mercy; he wired back that the petition must be sent to the Governor of the Province. The latter received the petition, refused to exercise the prerogative in favour of the prisoners, and, furthermore, refused to transmit the petition to the Governor-General. His reason for refusing to do this seems formally sufficient, since he would have had to respite the execution in order to give time for its consideration. But no similar justification can be found for his refusal to exercise his discretion in favour of the prisoners by himself granting a reprieve. In view of the difference of judicial opinion this ought to have been done. The whole system of re-trying acquitted persons, too, is repugnant to British notions of justice and fair play; there seems no valid reason for retaining it in India, except, perhaps, in the case of political offences, where the special circumstances may require a special rule. —*Ibid.*

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The Institut of International Law at Oxford.—This week the Institut of International Law, the most distinguished association of jurists in the world, is holding its annual meeting at Oxford. Its deliberations will be shorn of the presence of two men who in former years have taken a prominent part in them. The late Professor Westlake, who was the acknowledged leader of the English school of international lawyers, was at the time of his death honorary president of the Institut; and Professor Asser, who held the same place among the Dutch jurists, has done invaluable service in the cause of international arbitration, and likewise in the codification of the rules of private international law. But though some of the grand old men of international law are passing away the science is continually progressing in definiteness and influence; and the English contingent in the Institut, which numbers such men as Professors Holland, Dicey, and Oppenheim, and Lord Justice Kennedy, worthily represents the traditions of this country. The chief work before the Institut at the Conference is the formulation of a code of maritime warfare. The last Hague Conference, which had before it the same task, failed to complete it, and only produced a number of Conventions on separate portions of the subject. But the approaching Hague Conference, which is expected to assemble during the year after next, will resume the task and, it is hoped will achieve a more conclusive result. The Conference at London, which four years ago produced the famous Declaration, settled most of the disputed points in the relation, of belligerents and neutrals; and though the instrument is not yet ratified, it is likely to obtain the adherence of the Great Powers when a few amendments have been made. But the relations of naval belligerents *inter se* remain to be settled, in order that warfare at sea may be subject to law equally with warfare on land. And the Institut is recognised by statesmen and diplomatists as preparing the way for international Conventions. It was at Oxford that, some twenty years ago, it formulated many of the rules that have now passed into the Hague Code of the Laws of War on Land; and its meeting this year at the most ancient school of law, as of all higher learning in England, is of good augury for the fulfilment of the plan of a code of maritime warfare. The use of mines and aircraft in naval war, the right of maritime capture, the limits to the right of bombardment—these are among the matters which are still in dispute between nations, and for which the Institut will endeavour to find the just rule. The discussions of a body of distinguished jurists and judges, which considers the development of the *jus gentium* without national partnership and from a profound mastery of jurisprudence, are a factor of incalcu-

lable value in extending the reign of law and securing respect even in war for the principles of humanity—*Ibid.*

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The Cost of the High Court.—The niggardly way in which the Treasury is wont to regard the High Court receives no justification from the legal budget. During the past financial year, as a newly published Return shows, the receipts in respect of the High Court amounted to 483,799*l.*, and the expenditure to 692,675*l.* If, then, the administration of justice is one of the most important functions of the State, the High Court, which last year cost the country not more than 208,876*l.*, cannot be regarded as a costly institution. And be it remembered that this apparent deficit of 208,876*l.*, covers not only the annuities of retired judges and officials, but also the large amount of Crown and criminal work which the judicial staff is called upon to do, including that of the Court of Criminal Appeal. The expenditure recorded in the latest Return, notwithstanding the appointment of an additional judge, is 7,187*l.* less than in the previous year, while the receipts are 680*l.* more. Though the state does not make a profit out of the High Court—and it is wholly undesirable that the administration of justice should yield one—litigants may enjoy the satisfaction of knowing that, so far as the current expenses of the Supreme Court are concerned, they pay their way.—*Ibid.*

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A good story is told of the late Lord Ashbourne, who was at one time Lord Chancellor of Ireland. Occasionally, says the *Law Times*, in the Court of Appeal, Lord Ashbourne would make up his mind to bring a case to an end before the rising of the court, and it was highly instructive to watch the proceeding.

A junior, who was not conscious of his humour, stood up to open what appeared to be a short interlocutory appeal. Lord Ashbourne, after a sentence or two had been spoken, interjected, "Now, Mr. — why should we reverse the King's Bench on a point like this?"

"My Lord," rejoined counsel, "there are six reasons why the order should be reversed."

"Then," said the president of the court, "suppose we commence with your three best."

"No, my Lord," said counsel, "I could not consent to that because I have frequently succeeded in this court upon my bad points."

Lord Ashbourne collapsed, and for once was unable to have his own way in the Court of Appeal.— *Law Student's Journal.*

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COURTLY CHIVALRY.

When a verdict goes against you
And you feel a little blue,
And the clouds on life's horizon
Have a dark and dreary hue,—
Falter not—nor be discouraged,
Have a hopeful heart instead;
If you bravely keep a going
You'll see better days ahead.

Is your adversary beaten,
In an earnest, honest fight?
In his hour of misfortune
Have no boasting nor delight;
When you win a righteous verdict
Be a knight in manner true,
And sometime when he's the victor
He'll be courteous to you.

If the clients harbor hatred
In their heated battle lust,
Never yield to the temptation
To be wilfully unjust;
Though you've battled most sincerely
Clients' causes to maintain,
You have fought as lawyers merely,
Brothers still at heart remain.

What is he who plays the "braggart"
But a sounding false pretense,
Vainly striving for promotion
At his fellowman's expense?
Though they gather brightest laurels
From the lawyers' battle fields,
Bravest hearts abound in pity
When a gallant foeman yields.

Like the knights who battled bravely
In the bravest days of old,
Lawyers chivalrous and courtly
All the knightly graces hold;

And there's nothing more delightful
Than to be wherever are
Noblest men of God's creation
Loyal members of the bar.—*The Lawyers Magazine.*

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Surprisingly few cases have been reported involving kleptomania as a defence to burglary or larceny.

The Missouri case of State v. Riddle, 150 S. W. 1044, annotated in 43 L.R.A. (N.S.) 150, holds that an irresistible impulse to steal is no defense to an indictment for burglary, if accused knew the difference between right and wrong.—*Ibid.*

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Ethics of the Street. A law has been enacted in Prussia which makes it a prison offence for anyone to fail to answer a cry for help or to go to the rescue of a person in danger when it is possible to do so without endangering one's own life.

Such a law would not be amiss in Chicago, says the Chicago Tribune. Not only ethics, but ordinary decency and manliness, are too frequently forgotten here. Let a thug assault a person in the street, and the majority of men who happen along, instead of going to the assistance of the person assaulted, will scurry away so as not to be dragged into the affair. Let a person be injured by a street car, and half the people who witnessed the accident will refuse to give their names to be called upon as witnesses by the victim.

Whether all the ethics of citizenship can be enforced effectively through laws and ordinances may be doubted, yet the legal declaration of some primary duties would help to develop a conscience in such matters now apparently sadly lacking.—*Ibid.*

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RIGHT OF PARENT TO ATTEND FUNERAL OF CHILD.—A curious action came before the Supreme Court of Iowa in *Rader v. Davis*[1], viz., an action by a father for damages for refusing him permission to attend the funeral of his child. The defendant was the father of his former wife from whom he had been divorced, the decree having given the custody to her and she having gone to live with her parents. The question was, had plaintiff either an absolute or qualified right to attend the funeral of his child which was being held from defendant's house? He obtained no right, says the court, by reason of his former wife having taken up her domicile with her parents. They were as much strangers to each

1. 97. N. W. 849.

other as if they had never been married. True, the child was of his own blood, but by decree of court he had lost all right of custody or control of the child, and it was for the mother to say how the body should be controlled, where the funeral services were to be conducted, and where and how the child should be buried. By plaintiff's misconduct he had forfeited all rights to the custody and control of the child which he might otherwise have had. So he had neither an absolute nor a qualified right to control the disposition of the body of the child or the funeral arrangements. But it was contended that he had the right to attend the funeral which was being held at defendant's house; and that whether he tried or not, and conceding defendant's lawful right to say who should come upon his private premises for any purpose, even to attend a funeral, yet if he, defendant, although acting within the strict legal rights, maliciously denied plaintiff the right to enter the premises to see his child, or to attend the funeral services, an action will lie.—*American Law Review.*

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INTEREST AS DAMAGES IN PERSONAL INJURY CASES.—The Supreme Judicial Court of Massachusetts rules that in an action for personal injuries received by the plaintiff while a traveller from a defect in a highway, the plaintiff was not entitled to an instruction to the effect that in ascertaining damages the jury had a right to add to the fair compensation interest by reason of delay. *Cochran* v *Borton.*[1]

A personal injury, the court said, does not create a debt, and does not become a definite obligation until a verdict is entered; and interest, which is compensation for the use of money which is due, may not be considered in determining the amount of damages, which must be such as will fairly compensate the injured person for the loss of time, physical and mental suffering suffered and likely to be suffered, and money reasonably expended and to be expended in consequence of the injury. When there has been a definite injury to specific property interest is properly given, so when property is taken by eminent domain.—*Ibid.*

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CARRIERS OF PASSENGERS—REFUSAL TO STOP CAR TO RECOVER PASSENGERS' PROPERTY.—The Supreme Judicial Court of Massachusetts holds that where a passenger on a subway car, lost his violin because of a jerk of a car not due to the carrier's

1. 97. N. E. 1100.

negligence, the carrier was under no obligation to accede to plaintiff's request to stop the car that he might get the instrument, such a stop between stations being fraught with danger of collision with the following car.—*Ibid.*

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REGULATING THE CALLING OF THE BARBER—The Supreme Court of Missouri decides that a State statute requiring one to work for two years as a barber student before being allowed to carry on his calling, is constitutional. It is a proper police regulation affecting the public health and determining the time in which a student of barbering would have sufficient knowledge to prevent the spread of contagious diseases—which are proper subjects of legislative discretion.

But two provisions in the law the court held to be void, one which prohibited barber shops from advertising except putting out a sign "barber school" or "barber college" and the other prohibiting barber colleges and students therein from charging or receiving pay for their services.—*Ibid.*

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DEFAMATION—ACTION BY HUSBAND.—A husband may maintain an action for damages for the physical illness of his wife due to mental anguish caused by the publication of words reflecting upon her character which were libellous *per se. Garrison v. Sun Publishing Co.*, 135 N. Y. S. 721.—*Ibid.*

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Action by Wife for Loss of Consortium.—The Supreme Court of Ohio decides that one who with knowledge that a husband by the constant and continued use of morphine has become so weakened in body and mind that he is unable to resist his cravings for the drug, and who after the repeated protests of the wife continues to sell morphine to the husband until by the use thereof his mind becomes so impaired and destroyed that it is necessary to confine him in an insane asylum, is liable to the wife for damages for her loss of consortium. *Flandermeyer* v. *Cesper* [98 N.E. 10.2]

There is no case of the kind in the Ohio reports but two earlier cases in New York and North Carolina support its conclusion. In the New York decision it was laid down that an action can be maintained by a husband against a druggist to recover damages for selling to the plaintiff's wife, secretly, from day to day, large quantities of laudanum to be used by her as a beverage, and which

are so used by her to the defendant's knowledge, without the knowledge or consent of the husband, the defendant well knowing that the same was injuring and impairing her health, and concealing the fact of such sales and use thereof from the plaintiff, in consequence of which use by her the wife became sick and emaciated, and her mind was affected so that she was unable to perform her duties as such wife, and her affections became alienated from her husband, and he lost her society and was compell d to expend divers sums of money in medical and other attendance upon her. *Hoard* v. *Speck* [56 Barb. 202] Morgan J., dissented upon the ground that there was no precedent to be found and that the action was not sustainable upon any ground known to the common law. In North Carolina it was held that "the sale of laudanu mas a beverage to a married woman knowing that it is destroying her mind and body and causing loss to her husband, when continued after his repeated warnings aud protests, renders the seller liable to him for damages which he sustains on account of the loss of her services." *Holleman* v. *Harward* [119 N. C. 150]—*Ibid*.

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The Will of a Spirtualist.—In South Dakota, a testatrix left all her property to the National Spritualists' Association of the United States, which devise was contested on the ground of the testamentary incapacity. It was shown that she was possessed of the belief that she had frequent and continual communication with departed spirits, who gave her directions regarding all her actions in the ordinary affairs of life; that she was obliged to follow the directions given her by them and that she had been directed by such spirits to give and bequeath all her property to the Spiritualists' Association. The Supreme Court of South Dakota holds that a belief in spiritualism is not or itself evidence of insanity though an insane delusion may arise out of a religious belief, and to invalidate a will the insane delusion must be operative in the testamentary act. *Irwin* v. *Latten*[135 N. W. 759.]

The court quotes from a Michigan case where it is said:

"One accepts his religious faith on evidence that is satisfactory to his mind. A court of law will never inquire whether that faith is sound or unsound. It does not possess the machinery for executing such an undertaking. It will content itself with saying—and that is sufficient for the purposes of this case—that one's religious faith affords no evidence of insanity. It does not follow, however, that one may not have such a faith in spiritualism as to destroy his testamentary capacity. He may think so continually and persistently

upon this subject, as upon many other subjects, as to become a monomaniac, incapable of reasoning where this subject is concerned. In that case, it should be said that a will, made in consequence of such monomania, is void for lack of testamentary capacity. So, too, a believer in spiritualism may have such extraordinary confidence in spiritualistic communications—whether those communications reach him through mediums, or are received by him, as he believes, directly—that he is impelled to follow them blindly and implicitly, his free agency is destroyed, and he is constrained to do against his will what he is unable to resist. A will made under such circumstances is obviously not the will of the testator, and it is therefore not admissible to probate. We need not speculate as to the ground upon which the conclusion rests. It is utterly unimportant whether it rests upon the ground of absence of testamentary capacity, or as held by the trial court, upon the ground of undue influence. It is sufficient to say that a will brought about by an influence which the testator could not resist is not his will".

And also from a Nebraska case where the court said:

" Law 'is of the earth, earthy', and spirit wills are too celestial for cognizance by earthly tribunals—a proposition readily conceded. And yet the courts have not assumed to deny to spirits of the departed the privilege of holding communication with those of their friends who are still in the flesh, so long as theydo not interfere with vested rights, or by means of undue influence seek to prejudice the interest of persons still within our jurisdiction".

The conclusion of the court was that the testatrix was not of sound and disposing mind, and the execution of the will was not her free, voluntary, and conscious act; so probate of it was denied. *American Law Review.*

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Defamation—Publishing that one is Dead.—A new York newspaper published of a living person that he was dead. In an action against the journal it was objected that the article was not libellous, because, even if such a false notice to the public might subject the plaintiff to ridicule, yet, as death is common to all and is no disgrace, the mistake could in no way affect his character and reputation, and therefore could not be libellous without proof and allegation of special damage. The Supreme Court, however, holds otherwise, for to be the butt of a false story holding one up for public amusement and jibes is to lessen the comforts and enjoyments to which that person is entitled.

"Every joke which a man may be willing to relate about himself for the amusement of his acquaintances does not justify another in printing it. To publish of a living person that he is dead is not that sportive and thoughtless ridicule that may beget laughter, that leaves the temporary victim unaffected in his reputation and his business and is not necessarily libellous.' An amusing incident may be so harmless that the courts can easily determine that no injury has been done the person who may be the subject of it, but yet no one can be held up in a false print for the public amusement to his annoyance and embarrassment without having an action for libel, even though the damage be slight."—*Ibid.*

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Damages for Having to go to a Wedding in a Street Car.—In a recent Alabama case one Browning, who was about to be married, went to a livery stable and entered into a contract to furnish him, for the use of himself, friends and family, a carriage and team which was to be sent to his residence that evening to carry himself and his wedding party to the church where Browning was to be married. The charge was $5, which amount he paid, and informed the livery stable keeper of the purpose for which the carriage was to be used and the hour appointed for the ceremony. But the carriage did not come. "The plaintiff, on account of the defendants' breach of the contract, was compelled, in order to reach the church where his prospective bride and friends were awaiting his coming, to resort to a public street car, in which plaintiff and his family and friends, at the expenditure of 30 cents for street car fare, attended the wedding appareled in 'dress' or 'evening' clothes. The plaintiff and the lady members of his family, unsuitably attired for riding in a street car and for walking along the public streets, had to walk for several squares from the place necessary to leave the car line in going to the church, and the wedding ceremony was delayed for 45 to 50 minutes on account of the failure of the plaintiff to reach the church in time. During this period of delay, the bride, family, minister, and friends in attendance at the church were kept waiting upon the delayed arrival of the prospective groom." The jury in an action against the livery stable keeper were instructed by the court that they could only give the plaintiff the actual damage he suffered, viz., $5.30 and interest. But on appeal the judgment is reversed, the Supreme Court holding that he is entitled to recover for physical discomfort in consequence of being delayed and not having proper conveyance to meet the appointment,

and for mental anguish suffered in consequence of the physical inconvenience and delay.—*Ibid.*

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Property in Private Letters.—If the ordinary private letter were exactly on a par with the chattel which passes at common law by delivery, the recipient of the letter would, on his receiving it, become the absolute owner thereof, and would be able to exercise an absolute dominion over it, but although, as has been decided by the case of Percival v. Phibbs, the writer of a letter, in sending it, makes a gift to his correspondent of the actual paper on which the letter is written, yet the real value in the letter is certainly not the substance of the paper on which the letter is written, but the right to make use of the words which are to be found thereupon.—*Ibid.*

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It is Charles Summer, the great Massachusetts statesman and senator who as a young man under thirty, having only lately begun the practice of his profession in Boston, goes to England for a visit, with letters of introduction to members of the bench, and leaders of the bar in that country. He is warmly welcomed. He meets the great judges and lawyers of that day, at dinner, in court and in society, and he writes back to his old friend and teacher, Mr Justice Story, a most interesting description of the men he met.

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He writes first of the Court of Chancery:

"You know the reputation of the Chancellor (Lord Cottenham). It seems to grow daily and Tories, Whigs, and Radicals with one accord praise him. And this praise is a just tribute to the singleness and devotion with which he gives himself to the judicial functions of his office. I doubt if he adds in any way to the political strength of the ministry. He seems on the wool-sack, as on the bench, intent on some deep matter, silent, almost dull and ruminating. On the bench he hears with the greatest patience, never interrupting counsel except to interpose some pertinent, searching question—and this is done in the fewest words and most quiet way possible. He is said to be thinking of his law cases at all times. Of course, he has no time for society. I have seen him at one dinner only; and there he looked as if he were still hearing an argument. He is about fifty-eight, and had a seventh child a few weeks ago. I heard Langdale and some others laughing about it, saying it was the first child born to the great seal for more than a century. As a speaker in the Lords he is very dull. I have

already described the Vice-Chancellor (Shadwell) to you in former letters. He is sparkling, gay, and animated in conversation, with a fresh-looking countenance. He swims in cold water every morning, warm or cold though the weather be. Some barristers, who are not pleased with his judicial services, have hoped that he might some time get frozen or drowned. He is not regarded as a good judge. Lord Langdale (the Master of the Rolls) I should have mentioned, of course before the Vice-Chancellor. He is about fifty-five and of the size of Mr. Binney, with a bald head, and with a voice which in conversation reminds me of Webster's; in manner frank, open, and warm. He has disappointed the bar. I have communicated to several barristers the opinion you have expressed about him; but they all say he is a failure—and these, too, are some of his most intimate friends. I may mention Sutton Sharpe and John Romilly, both of whom in politics coincide with Langdale; but who said with regret that he had disappointed them as a judge. His decisions amount to nothing, they say, and he is irresolute in his judgment. His opposition to the Lord Chancellor's Bill, in 1836, which seemed so unaccountable to us in America, is accounted for here. It seems that he had submitted his own views to the Lord Chancellor, who, notwithstanding, introduced his own measure, which was defeated by the opposition of Langdale."

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Then the judges of the King's Bench are thus described:

"You know Lord Chief Justice Denman, intellectually, better than I; but you do not know his person, his voice, his manner, his tone—all every inch the judge. He sits the admired impersonation of the law. He is tall and well-made, with justice-like countenance: his voice and the gravity of his manner, and the generous feeling with which he castigates every thing departing from the strictest line of right conduct, remind me of Greenleaf more than of any other man I have ever known. I wish you could have listened to Lord D., as I did on the circuit, when he sentenced some of the vicious and profligate wretches brought before him. His noble indignation at crime showed itself so naturally and simply that all our bosoms were warmed by it; and I think his words must have gone like iron into even the stony hearts of the prisoners. And yet I have seen this constitutional warmth find went on occasions when it should have been restrained: it was directed against the Attorney-General, who was pressing for delay in a certain matter with a pertinacity rather peculiar to him. Lord D. has, to a remarkable degree, the respect of the bar; though they very generally agree that

he is quite an ordinary lawyer. He is honest as the stars, and is willing to be guided by the superior legal learning of Patteson. In conversation he is gentle and bland; I have never seen him excited. Mr. Justice Littledale is rather advanced in Life; I should call him seventy. He has the reputation of great book-learning; but he seems deficient in readiness or force, both on the bench and in society. I heard old Justice Alan Park say that Littledale could never get a conviction in a case where there was any appeal to the feelings. Mr. Justice Patteson is the ablest lawyer on the Queen's Bench—some say the first in all the courts. As I have already written you, he is unfortunately deaf, to such a degree as to impair his usefulness, though by no means to prevent his participating in the labors of the bench. He is deeply read and has his learning at command. His language is not smooth and easy, either in conversation or on the bench; but it is always significant, and to the purpose. In person he is rather short and stout, and with a countenance that seems to me heavy and gross; though I find that many of the bar think of it quite otherwise. I heard Warren—author of 'Diary of a Physician,' etc.—say that it was one of the loveliest faces he ever looked upon: perhaps he saw and admired the character of the man in his countenance. I dave heard many express themselves about him with the greatest fondness. He has a very handsome daughter. Williams—commonly called 'Johnny,' or 'Little Johnny' Williams—is short in person. He was the ancient associate of Brougham in the Queen's case, and was made a judge by his Lordship. He has the reputation of being a good classical scholar; though I do not remember ever observing either in his conversation or judgments, any particular marks of the attainments attributed to him. Indeed, I have always thought him dull: he certainly is an ordinary lawyer, and has very little legal talent. He seemed often in inextricable confusion on the circuit. He is famous for very early rising, and for falling asleep in company. I have seen him fall asleep at the head of his own table; and they tell a story that Brougham once made a dinner, in order to give Williams an opportunity of meeting some persons who would furnish him some valuable materials for a motion he was about to make in the House of Commons; but before they arrived at that stage of the dinner when the conversation was to be opened, Williams was nodding. I will, however, do him the justice to add that I once dined in company with him at Cresswell's, when he continued awake during all the time. Coleridge is the junior of the Queen's Bench; and a moderate Tory, who was appointed by Sir Robert Peel. He never had a large business at the bar, but has pleased

everybody on the bench. I believe him to be a man of learning, and of the highest honor—in personal appearance quite agreeable, and in accomplishments inferior to nobody on the bench. As the junior judge, it devolves upon him to read the reports of the evidence on all motions for a new trial. I have never met him in society—the only judge I have not."—*Ibid.*

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"Turn next to the Common Pleas: There is, first Lord Chief Justice Tindal. He sits bent over his desk in court, taking note constantly—occasionally interposing a question, but in the most quiet manner. His eyes are large and rolling; in stature he is rather short. His learning, patience, and fidelity are of the highest order. He is one of the few judges who study their causes on their return home. His manner is singularly bland and gentle, and is, perhaps, deficient in decision and occasional sternness. Serjeant Wilde is said to exercise a very great influence over him; indeed, scandal attributes to him some of 'the power behind the throne greater than the throne.' Upon Tindal devolves the decision of all interlocutory matters in his court—the other judges seldom interposing with regard to them, or, indeed, appearing to interest themselves about them. He is one of the kindest men that ever lived. Next to Tindal is old James Alan Park, the oldest judge on the bench, and who, it is reported, is now at the point of death. He has been some fifty eight years at the bar and on the bench; is a staunch Tory, and a believer in the divinity of wigs. He dislikes Campbell, the Attorney-General; interrupts counsel very much, and has some of the petulance of age. There are a thousand amusing stories about him, which the lawyers tell at dinner to illustrate his puritanical character. Then comes Vaughan. He became a serjeant some time in the last century, and was the youngest ever known. At one period his practice was greater, perhaps, than that of anybody ever known in the courts—his income was some fifteen thousand pounds. About 1820 his leg was broken very badly by a cartman, who ran against him as he was driving in a gig. After being confined to his bed for three months, he at length appeared in court on the shoulders of his servants; had a hole cut in the desk before him for his leg; and, by permission of the court, addressed the jury sitting. His business at once returned to him. In 1820 he was made a judge, it is said at the bar, by the direct command of George IV., who was moved to it by his favorite physician, Sir Henry Halford; which gave occasion to the saying in the bar-benches that 'Vaughan was made a judge by prescription.' He is reputed to

have the smallest possible allowance of law for a judge; but he abounds in native strength and sagacity, and in freedom in language. With him the labors of the judge cease the moment he quits the bench. I doubt if he ever looks into a cause at chambers. In his study he once showed me four guns, and told me with great glee that, by sending a note to Serjeant Wilde, he persuaded him not to make any motions on a certain day, and got the Court of Common Pleas adjourned at twelve o'clock; he at once went fifteen miles into the country, and before four o'clock had shot four braces of pheasants—the learned judge sitting on horseback when he fired, as from his lameness he was unable to walk. He is fond of Shakespeare, and often have we interchanged notes during a long argument from Follett or Wilde (while I was sitting by the side of the latter in the Serjeant's row), the burden of which has been some turn or expression from the great bard—the crowd supposing he was actively taking minutes of the argument, while he was inditing something pleasant for me, to which I never failed to reply. Bosanquet you well know as a reporter. As a judge he seems dry and reserved, sitting on the extreme left, and apparently taking so little interest in the causes, that his qualities as a judge seem to be all negative. You do not hear him talked of by the bar, nor meet him in society. Lord Denman told me that he went his first circuit as judge in company with Bosanquet, who taught his Lordship how to wea. robes, and which of the various robes to assume on certain days. Next is Coltman, whose appointment astonished everybody, and is said to have been a job of Brougham. He was of the Northern circuit, and a friend of Brougham. He is a dull man; but as honest and good-natured as the day. I have seen him perplexed in the extreme, both before a jury and in banc, by the arguments of counsel. He is truly amiable, and is much of a liberal."—*Ibid.*

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NEXT WE have the Judges of the Court of Exchequer:

"Abinger (the Chief Baron). You know his wonderful success at the bar—confessedly the greatest advocate of his time, yet never eloquent, and supposed by all to be the most competent person possible for the bench; and in this opinion all would have persevered, *nisi regnasset*. He is the great failure of Westminster Hall. To his own incompetency he added last term a jealousy of Barons Alderson and Parke. He wants the judicial capacity: he was so old before he reached the bench that he could not assume new habits. I should, however, do him injustice, if I did not tell you that Mr. Maule—one of the first lawyers in Westminster Hall—told me

that he was mending; that he had given up all idea of competing with Parke and Alderson in technical learning and subtlety, and seemed now to aim directly at the common sense of a case—a habit quite valuable in a judge supported by such learned associates. In person Lord Abinger is large and rather full, or round: he is the largest judge on the bench. He has become a thorough Tory; and in society, I think, is cold and reserved. Brougham says that Scarlett was once speaking of Laplace's 'Mecanique Celeste' at Holland House as a very easy matter; Brougham told him he could not read it, and doubted if he could do a sum in algebraical addition. One was put, and the future Lord Abinger failed; and, as Lord B. said, he did not know so much about it as a 'pot-house boy.' It was reported in Westminster Hall that arrangements were recently attempted to procure his retirement in favor of his son-in-law, the Attorney-General; but unsuccessfully. Baron Parke is the senior puisne judge. He is about fifty-six years old; is rather above the common size, quite erect, and with eyes the brightest I ever saw. He is always dressed with great care, and in the evening wears a blue coat and bright buttons—which is also the dress of Lord Abinger and several other judges. He is a man of society, and succeeds to a remarkable extent in uniting a devotion to this with great attention to his elevated judicial duties. He is also not a little conceited and vain. Lady Parke is a person of remarkable personal attractions for her years. They have a daughter who goes with them into society, who is quite pretty. All have the reputation of being very fond of the highest society. You know Baron Parke from the books as well as I. I think the profession place him at the head of the bench: the only to be compared with him are Alderson and Patterson. Alderson is hafty and crotchety. Parke is also open, in some degree, to the same objection. He is not what you would call fluent on the bench; though there is no particular want of words. I think he could not have been eloquent at the bar. He is evidently a well-read lawyer; and yet he is not a jurist. You will understand my meaning. Next is Baron Alderson. He and Baron Parke were both on the Northern Circuit, which has given more judges than any other to Westminster Hall. Abinger, Parke, Alderson, Tindal, Coltman, Williams, and the other—I forget which—were all of this circuit. I have written you so much and often about Alderson that I have little to add. Like Parke, he is a Tory; I have heard them both called "bitter Tories.' He has not the air and manner of Parke. Indeed, he is gauche, and abrupt and uneven in his voice. He is an excellent scholar; and when at Cambridge he carried away;

at the same time the highest classical and mathematical prizes of the University—a conjunction that has very rarely occurred. He is now about fifty, has light hair, and a high forehead. I have heard from him a higher display of the judicial talent than from any other judge in England. The bar, however, think him often unsafe. Some dislike him on account of his Toryism, others from pique and imagined personal coldness or insult, I heard that he has more enemies —or, rather, more who called him hard names—than any other judge in Westminster Hall. Lady Alderson is a modest, quiet person, with a young family; she is the sister of Lady Gifford—the dowager of the late Lord Gifford. It was to Baron Alderson that I was indebted for an introduction to the latter lady, and also to the Bishop of Durham. Leckhart seems to be quite a friend to Alderson. I have always met him when I have been at the Baron's. Alderson has a good deal of dry humour. It was he who said, on Brougham being made Lord Chancellor; " If his Lordship knew a little law, he would know a little of everything.' Baron Gurney is old, and appears infirm. I never meet him or hear of him in society. On the bench he is always silent, and indeed is dead weight."

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From the judges he passes to the leading members of the bar: Sir John Campbell, who was to become Chief Justice and Lord Chancellor; Follett, who was to die young, and Wilde, who was also to become a Lord Chancellor.

" Sir John Campbell, the Attorney-General. is a Scotchman by birth. He is now about fifty-eight. He has been a laborious, plodding man, and has succeeded by dint of industry and strong natural powers, unadorned by any of the graces. He has a marked Scotch accent still. He is a very powerful lawyer; but his manner is harsh and coarse, without delicacy or refinement. I think he is not much liked at the bar; though all bow to his powers. They call him 'Jack Campbell.' We pronounce his name wrong in America. All the letters, including b, are pronounced; thus, Campbell, and not Camell, as we say. He was astonished when I told him that his 'Reports' had been republished in America; and I thought he was not a little gratified. Sir William Follett is truly a loveable persons and one great secret of his early success has been his amiability. He is about forty-two, and is still youthful in manners and conduct. As a speaker he is fluent, clear, and distinct, with a beautiful and harmonious voice. He seems to have a genius for law: when it comes to the stating a law point out and its argument, he is at home and goes on without let or hindrance, or any apparent exertion.

His business is immense; and he receives many briefs which he hardly reads before he rises in court. His income is probably fifteen thousand pounds. Strange thing in his history of the bar, he is equally successful in the House of Commons, where I have heard them call for "Follett, Follett!" and here he shows a parliamentary eloquence of no common kind, and also wins by his attractive manner. He is the great favourite of the Tories, and, in the event of their return to power, would be Lord Chancellor—a leap wonderful to take, but which, all seem to agree, would be allowed to him. In the event of the death of Sir Robert Peel—such is the favor to him—I think he might become the leader of the Tories in the Commons, if he would consent, which is not at all probable. Serjeant Wilde is different from both of these. He commenced as an attorney; and Mr. Justice Vaughan has told me that he has held more than a hundred briefs from him. After his entrance to the profession, he was guilty of one of these moral delinquencies which are so severely visited in England. I have heard the story but have forgotten it. In some way, he took advantage of a trust relation, and purchased for himself. He was at once banished from the Circuit table. A long life of laborious industry attended by the greatest success, has not yet placed him in communion with the bar; and it is supposed that he can never hope for any of those offices by which talents and success like his are usually rewarded. I think it, however, not improbable that the Government, in their anxiety to avail themselves of his great powers, may forget the past but society will not. He does not mingle with the bar, or, if he does it is with downcast eyes, and with a look which seems to show that he feels himself out of place. He is the most industrious person at the English bar—being at his chambers often till two o'clock in the morning, and at work again by six o'clock. His arguments are all elaborated with the greatest care; and he comes to court with a minute of every case that can bear upon the matter in question. In the Common Pleas he is supreme, and is said to exercise a great influence over Lord Chief-Justice Tindal. He once explained to me the secret of his success: he said that he thoroughly examined all his cases, and, if he saw that a case was bad, in the strongest language he advised its adjustment; if it was good, he made himself a perfect master of it. He is engaged in every cause in the Common Pleas. In person he is short and stout, and has a vulgar face. His voice is not agreeable; but his manner is singularly energetic and intense—reminding me in this respect of Webster more than any other person at the English bar. If you take this into consideration in connection with his acknowledged talents and his persevering

industry, you will not be at a loss to account for his great success. I have been told that he was once far from being fluent; but now he expresses himself with the greatest ease. His language has none of the charms of literature; but it is correct, expressive, and to the purpose. In manners, to his friends he seems warm and affable. To me he has shown much volunteer kindness. I have conversed with him on some points of professional conduct, and found him entertaining very elevated views. He told me that he should never hesitate to cite a case that bore against him, if he thought the court and the opposite council were not aware of it at the moment."

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We pass from these to the letters wherein are given pen pictures of the great lawyers and judges of the United States during the first decade of the nineteenth century. It is Judge Story who writes of the judges of the Court that he was afterwards to adorn—the Supreme Court of the United States.

"The bench consists of Marshall, Chase, Cushing, Washington, Livingston, Johnson, and Todd. Marshall is of a tall, slender figure, not graceful nor imposing, but erect and steady. His hair is black, his eyes small and twinkling, his forehead rather low, but his features are in general harmonious. His manners are plain, yet dignified; and an unaffected modesty diffuses itself through all his actions. His dress is very simple, yet neat; his language chaste, but hardly elegant; but it does not flow rapidly, but it seldom wants precision. In conversation he is quite familiar, but is occasionally embarrassed by a hesitancy and drawling. His thoughts are always clear and ingenious, sometimes striking, and not often inconclusive; he possesses great subtility of mind, but it is only occasionally exhibited. I love his laugh, it is too hearty for an intriguer, and his temper and unwearied patience are equally agreeable on the bench and in the study. His genius is, in my opinion, vigorous and powerful, less rapid than discriminating, and less vivid than uniform in its light. He examines the intricacies of a subject with calm and persevering circumspection, and unravels the mysteries with irresistible acuteness. He has not the majesty and compactness of thought of Dr. Johnson; but in subtle logic he is no unworthy disciple of David Hume. Washington is of a very short stature, and quite boyish in his appearance. Nothing about him indicates greatness; he converses with simplicity and frankness. But he is highly esteemed as a profound lawyer, and I believe not without reason. His written opinions are composed with ability, and on the bench he exhibits great promptitude and firmness in decision. It requires

intimacy to value him as he deserves. Livingston has a fine Roman face; an aquiline nose, high forehead, bald head, and projecting chin, indicate deep research, strength, and quickness of mind. I have no hesitation in pronouncing him a very able and independent judge. He evidently thinks with great solidity, and seizes on the strong points of argument. He is luminous, decisive, earnest and impressive on the bench. In private society he is accessible and easy, and enjoys with great good humour the vivacities, if I may coin a word, of the wit and the moralist. Of Chase I have formerly written. Of a nearer view, I am satisfied that the elements of his mind are of the very first excellence; age and infirmity have in some degree impaired them. His manners are coarse, and in appearance harsh; but in reality he abounds with good humor. He loves to croak and grumble, and in the very same breath he amuses you extremely by his anecdotes and pleasantry. His first approach is formidable, but all difficulty vanishes when you once understand him. In person, in manners, in unwieldy strength, in severity of reproof, in real tenderness of heart, and above all in intellect, he is the living, I had almost said the exact, image of Samuel Johnson. To use a proverbial expression, I like him hugely. I ought not to pass by Judge Johnson, though I scarcely know how to exhibit him individually. He has a strong mathematical head, and considerable soundness of erudition. He reminds me of Mr. Lincoln, and in the character of his mind he seems to me not dissimilar. He has, however, less of metaphysics, and more of logic. This is the first time of Judge Todd's appearance on the bench, and as he is a modest, retired man, I cannot delineate him. He does not appear to want talents."

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And here is a picture from the same pen of a sitting of the Supreme Court of New York, which Story dropped in to see while on his way from Boston to Washington in June, 1807:

"Kent, the Chief-Justice, presided with his singular plainness and promptitude; the counsel seem in the habit of very long and elaborate arguments, and diffuse their thoughts over a length of surface which exceeds all reason and all good effect. We despatch business with quite as much celerity, and as much judicial skill; nor should we decline a contest with their ablest lawyers, in any causes which require eloquence or learning. The more I see and hear in respect, the more am I satisfied that Massachusetts has no reason to resign her legal rank. The court room is very small and inelegant. It resembles the bar-room of a tavern more than the Hall of Justice.

The jury, witnesses, and spectators are crowded into a narrow space, and it is difficult to say who are the one or the other. The counsel are not elevated, but stand on the level floor, and talk very much as you and I should, if we were addressing referees. On the whole, the appearance is wholly undignified. A prisoner was tried the other day for forgery, and though the crime is punished with imprisonment with hard labor for life, there was a little bustle as would be in a Justice Court, in deciding upon the petty larceny of a pewter spoon. Kent summed up to the jury in a very short and loose manner, and afterwards, in pronouncing sentence on the convict, stated the sentence with the celerity of a school boy repeating his task. I must, however, tell you, that he has the confidence of a great lawyer in all his actions, and is self-poised on his own resources."

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And with a picture of the great Massachusetts Chief Justice of the time, and of Mr. Justice Story himself from other pens the Docket puts his Common Place Book back again on the shelf for another year:

"The person of Chief Justice Parsons has frequently been well described. He was about five feet ten inches in height, somewhat corpulent, and of a heavy appearance. His forehead was high and smooth; he wore a reddish wig (for he was bald at an early age), which was rarely placed upon his head properly. His mind was well adjusted, his wig never. He generally wore a bandanna kerchief about his neck to protect it from cold winds. His eye was clear, sharp, keen, and deep set in his head; it looked at you through and through. It seems to me the embodiment of the eye of the law, piercing through you, and seeing and discovering every thing with astonishing penetration. It was a glance that few could bear to have steadily fixed upon them. He was not very grave. He had an abundant and inexhaustible wit and pleasantry, which he delighted to exhibit on proper occasions. His repartees were surprisingly ready, appropriate, and, if he chose, severe. The young members of the bar used to gather around him, like the disciples of Socrates, to enjoy his pleasant and highly valuable instruction. A kind word from him (and he had many of them for young men) went deep into the heart, and was never forgotten. Parsons was not merely a lawyer. He had every scholar in the classics. He was found of novels, and, like Chief Justice Marshall, would spend the night over a romance, and the next day would read metaphysics with equal delight. No lawyer in Westminster Hall was superior to

him, and had he lived in England, we should have seen him not only in the front rank of English lawyers, but Chief Justice of the Kingdom."

"The knowledge of law of Mr. Justice Story was almost boundless. He had traversed all his coast and inland. He knew the soundings of all its seas, from the black Sea of the Feudal Law, and the Red Sea of the Criminal Law, to the great Atlantic and Pacific of National Law and Equity. His reading was not merely professional; it extended into the pleasant regions of general literature. He was well versed in the classics of Greece and Rome, of whom his favorites were Aristotle and Cicero. He was a good historical scholar; and in the sciences and mechanic arts, he had attained to considerable proficiency. He was omnivorous of knowledge, and read everything he could obtain. No legal work appeared, that he did not examine. Every volume of Reports in England and America he studied, and he read, to a considerable extent, the new works of light literature. His rapidity of perception and comprehension enabled him easily to master all that fell in his way; and his mind grappled with hooks of steel to all that he acquired. His literary discourses will evidence the general scope of his studies. He used, pleasantly, to say, that he had only time to read with his thumb-nail, and so it would seem to one who observed the rapidity with which he turned over leaf after leaf. Yet, despite this rapidity, he never failed completely to absorb the essence of the book."

CONTEMPORARY LEGAL LITERATURE.

In the *Case and Comment* for July there is an interesting discussion anent the Californian land-laws restricting the rights of Orientals to acquire land as to the treaty-making power of the Federal Government when it should come into conflict with the reserved powers of the States. The writer thinks and the precedents are in favour of his view that the treaties entered into by the Federal Government override individual State legislation but that it is desirable to have legislation providing for a machinery to give effect to such treaties as none exists at present and the broadening scope of international relations would seem to more and more require it.

The "Evolution of annotation" of cases is traced by Mr. Henry P. Farnham who says that in America, a case that is not annotated is as rare now as one that was thirty-five years ago. The least useful kind of annotaton is that which merely gives references to places

where cases on the subject are found collected. The next class shows how the case has been cited criticised, followed, explained distinguished or overruled. Another class of annotation consists in a collection of the leading or impoi tant cases more or less in point with the case reported. Of slightly more value is the annotation which purports to be an exhaustive collection of the cases in point arranged in a few general groups with now and then a case set out fully to illustrate the general application of the principle involved. Much more useful than the above is the annotation prepared by a competent text writer with an elucidation of the principle involved in the decision under review. Such a work to be really good requires ability of a high order, incessant study and a judicial temperament which few annotators can present. The highest evolution in annotation consists in an absolutely exhaustive collection of cases bearing on the subject with an attempt to point out and elucidate the principle involved. The best reasoned cases are indicated so as to enable the practitioner to examine the fewest cases possible in the preparation of the brief.

It is gratifying to find another writer in the same journal saying that of all the countries in the world, the United States has most to be proud in regard to her laws, her Courts of Justice and her learned Bench and Bar, although shamefully maligned by a few though loud complaints are heard against her judges and her system of procedure from other quarters (*e.g.* see the article " Respect for the Law " by Mr. Fish in the same Journal).

With the promulgation of the French Code Civil in 1804, Austrian Code in 1811, Italian Code in 1864, Canadian Code in 1866, German Code in 1900, the Swiss Code in 1907 and the Code of Obligations in 1910, Roman Law has practically ceased to be the positive law of any portion of the civilised world. Nevertheless, the Roman Law has not ceased to form a part of the curriculam of studies in any of the continental states. Professor Paul Girard discusses the phenomenon and the causes of the phenomenon in an address delivered by him before the Society of Public Teachers of Law. (Published in the *Comparative Journal of Legislation*, July 1911). The reasons why it has not disappeared in the continent are just the reasons for which it is studied in England for its value historically as affording the best field for tracing the evolution of legal ideas its scientific value in the training of the judicial sense, a function analogous to the study of classics, in literary education and from the fact that it

is Roman Law that has furnished the technical language and juridical categories for what may be called the universal common law of to-day, in addition because most of the codifications come whether mediately or directly from the Roman Law. He says that there must hereafter be a change in the mode of study. More attention must be paid to the historical aspect of the Roman Law than its positive aspect. He points out how in the text of Justinian itself, there is room for further research in the way of collation of manuscripts and correction of errors &c.

It is curious that cheques have not been in general use in France until quite recently. Even now they are not quite as generally used as in England. Mr. Barclay tells us in the same issue of the Journal that they were first introduced into France by a law of June 1865 which was subsequently added to in 1874 and that the practice of crossing cheques is of very recent introduction, by a law of December 1911. The writer doubts if it is likely that France will derive as much benefit from the practice as England bank accounts not being as common a feature there as in England. In England crossed cheques are seldom cashed but are compensated at the clearing house. In France, on the other hand, a crossed cheque is only an order to pay to be presented by a banker for payment.

In an article Mr. Arthur Barratt discussing "the Reports of the Divorce Commission from an American standpoint", points out that most of the recommendations of the majority are law in America and have not led to any serious consequences such as the minority apprehend and subjects the report of the latter to very minute and elaborate criticism.

Another paper is by Professor Harrison Moore on "*Legal Education in the United States*." The system adopted in Harvard and Columbia is what is called the *case* system, and not lecture system as in England. The case system consists in the exclusive teaching of law through discussion in class of decided cases. For this purpose case books have been prepared, consisting of a careful selection of leading and illustrative cases upon the subject of each course. They are quite different from the English Leading Cases in that they contain no notes. The students are expected to be a—head of the class. The cases which the students are expected to read beforehand will be discussed in class. Some student will be called upon to state the facts of the case so as to bring out the *ratio decidendi* clearly. The statement is followed by close examination of the dicta and questions left undetermined by reference to other decided

cases and by criticism. The merit of this system is that the student from the outset studies law in the manner in which it is to be done for the work in court and by reference to the original authorities. The defects of the system are that a large number of students must necessarily be unable to take part in the discussion for want of time, that even as it is longer courses are necessary than in England, that it leads to exaggerate the logical side of the law and to over-emphasize the consistency and harmony of the law with the result that with the students thus instructed, law becomes less and less an instrument for accomplishing present social ends and more an institution to the needs of which social ends themselves must be adapted. We get to a point of view according to which law does not exist for society but society for law. This is recognised by the professors themselves and they try to neutralise it by recommending the study of political science and philosophy of law by the students. Among the jurists whose life is given in the journal are *Gaius* and *Pothier*, the Great Roman and French Jurists. "*Problems of Roman Criminal Law*" by W. D. Aston Esq., is another article of great interest to students of the history of Ctiminal Law.

Sir Courtney Ilbert writes an introductien to the review of the legislation for the year 1911 wherein he sets forth the prominent features in the legislation of the various civilised countries of the world. The chief English acts were the Parliamentary Act which has curtailed the power of the Lords and reduced the maximum duration of Parliament and the Insurance Act. The copyright Act which extends the time of copyright to a life and fifty years, the Perjury Act which compresses into 19 sections the substance of 260 enactments on the subject are the most important of the minor acts. In India, the Sedition Act and the Factory Act were the most important. The Australian legislature provided by the *Arbitration* (Public service) Act for submission to the Arbitration Court of disputes between the Government and its employees, by the Commonwealth Electorial Act for a system of compulsory enrolment of voters. New South Wales raised the limit of exemption from income-tax from £200 to £300 and provided for reduction for each child maintained by the parents. In South Australia, the Legislative Council admitted *women* to the Bar. The New Zealand Legislature passed a Mental Defectives Act and granted pensions to indigent widows with children dependant on them. Sweden adopted in the year under review the principle of proportional representation *i.e.*, the people give their votes for their candidates chosen to represent them in their constituency but the actual number of the different political members in the Parliament

is settled in proportion to the number of votes given. As a result, different political parties are represented in Parliament by members proportioned to the votes given in the whole country for the particular political programme. The commission system of Municipal Government appeared to be growing in popularity in America. Under this system, towns elect a limited number of commissioners and invest them with absolute authority in all Municipal matters. Iowa joined the large number of American states which provide for the sterilisation of certain classes of inmates of public institutions. Six American states made procuring a female inmate for a house of prostitution or inducing a female to become a prostitute or continue in the house of prostitution or getting a share of the earnings of prostitute, felonies. The ordinary limits of age for elementary education in Jamaica are between the completion of six and fourteen years. Provision was made during the year for grants to Kindergarten Schools where children may be received between four and nine. Another piece of legislation has made it an offence to sound or play upon any musical or noisy instrument or make any noise whatever between 11 P. M. and 6 A. M. after a request to desist provided the request is founded on the illness of some person or on the loudness of the nuisance viz., that it can be heard two chains off or any other reasonable ground. Hongkong made an interesting attempt to adapt the English law of partnership to Chinese custom. According to the Chinese custom, the liability of a partner is unlimited in respect of partnership assets in his possession but his further liability is limited to such proportion of the debts and obligations of the partnership as his interest in the partnership bears to the total interest of all the partners. The Chinese custom also recognises partners who are not liable for the debts but participate in the profits. Such persons are said to hold red shares. They subscribe no capital and get no interest. They contribute their labour and skill for which they get a share in the profits.

In the *American Law Review* for May—June a learned writer discusses the history and development of the motion for new trial and in arrest of judgment. The two are more or less allied; the former being an application for a new trial by jury the latter to the Court not to act upon the verdict delivered. Motion for new trial used to be of two kinds—venire facias de novo, and venire de novo. Venire facias was available only for defects appearing on the face of the record for instance where the verdict was so imperfect that judgment could not be rendered upon it or where it appeared that other facts should have been found differently. This was admittedly a very old

remedy available to suitors. Venire de novo is not quite so old, though old nough there being traces of their having been granted in Edward III's time. It is the writ available when the objection to the verdict appears de hors the record. It would seem that for a very long time, that the only remedy available for a suitor when no defect appeared on the face of the record was to take out a writ of attaint against the jury for delivering of a false verdict and if that was found by a jury of 24, they were liable to be outlawed and their goods confiscated. But soon courts came in and gave relief in such cases on motions for new trial, and even broadened the grounds on which relief would be granted when they saw that Equity Courts might otherwise interfere. The grounds for which new trials are now granted are want of notice of trial, misbehaviour of the successful party towards the jury, misbehaviour of the jury, verdict contrary to evidence or without evidence, exorbitant damages, misdirection to the jury. These do not exhaust the grounds. The power however is discretionary and will not be exercised when substantial justice has been done or where the irregularity complained of has been harmless or when objection has not been taken at the trial. The motion in arrest of judgment is not so comprehensive as the motion for new trial though the motion for new trial serves the purpose of the former in all cases except where the objection is one to the form of the verdict, which is taken to be waived when once judgment is given. Judgment will be arrested on the ground of want of jurisdiction or any other fatal defect on the pleadings or in the initiation of the action and proceedings. If the defect is formal and amendable or if it has been raised on demurrer and has been overruled, it cannot form a ground for arrest. Neither error in the admission of evidence nor the insufficiency or the evidence to sustain the verdict is a ground for arresting judgment.

Reports and some Reporters is another interesting article in the American Law Review for July—August by Mr. Henry Budd. Under the English system of jurisprudence judgments are the best evidence of law and Sir Mathew Hale gives 4 reasons for it. First because the persons who give their opinions are persons chosen by the king for their learning &c. Secondly because they are upon their oaths to administer the laws. Thirdly because they have the best helps to inform their judgments. Fourthly because they do federe pro tribunali and their judgments are strengthened and upheld by the laws of this kingdom till they are by the same law reversed or avoided. A judgment is authority only on the points necessarily involved in the case; a statement of opinion

on a point not arising is no authority being what is called obiter dictum. "An obiter dictum in the language of the law is a gratuitous opinion, an individual impertinence which whether it be wise or foolish, right or wrong bindeth none not even the lips that utter it." A good report of a law case must contain the statement of facts, argument of counsel and the judgment of the Court. The first common law Reports of which we have any account are the year books. For some time it was thought they were compiled by paid official reporters but this view does not seem to be sustainable. They were, what Sir Frederick calls students' notes. They run on from Edward I's time steadily to Richard III (except the reign of Richard II) and intermittently through the reigns of Henry VII and Henry VIII. The book of Henry VIII is regarded as inferior to those of former reigns. Overlapping the last part of the time of the year books come certain independent reports, those of Bendloe, Dalison, Keilway, Dyer and Brooke. Of these Dyer's (afterwards Lord Chief Justice Dyer) reports are the most meritorious performances. These are improvements on the *Year books* which generally present a confused mass of dialogue between the Counsel and the judges, the reader often being left in doubt whether the speaker stood at the bar or sat on the Bench. Next to these comes Plowden who is a model reporter and who prepared himself for reporting each case by a study of the record. His report of *Hales* v. *Petit* is suspected to have given material for Shakespeare's gravedigger's scene in Hamlet. The next reporter of note is Sir Edward Coke whose reports are sometimes cited simply as the Reports *per excellence*. Following Coke while reports came, they were of various and doubtful authority; some seeming to be mere specimens of book—making by persons who had become possessed of the notes and manuscripts of deceased lawyers or judges. They are called flying reports in the preface to Croke or Crook's reports which are the next authentic reports. Croke was appointed judge in James I's time. His report was published after his death. An example of a reporter of disputed authority is Barnadiston against whom Lord Mansfield had a particular spite though even he has had the support of great Judges for the authority of his reports. The "best abused" reporters are Keble, Siderfin and Moseley. Even they have some supporters. From the Year books to the time of George III with the exception of Hetley who seems to have been an official reporter during the time of Charles I the reporters were all volunteers, mere free lancers reporting when and as they pleased. After the accession of George III, reporting became more regular, certain men devoting themselves to regularly reporting

certain courts. Thus we find in each court a regular succession of reporters down to the organisation of the Incorporated Council for Law Reporting. The last Reporter of this class was Mr. Beavan who reported the Rolls Court from 1838 to 1866, thus overlapping by a few months the Law Reports. Latterly it became the habit to have an authorisation or license signed by one or more judges prefixed to each report. Judges have not always desired reports, for instance, Lord Stowell the great Admiralty judge at first objected to the proceedings in his court being reported. In the early reports, great importance is always attached to the opinion of the Chief, their reverence being shown even in cases in which the great man was overruled by his associates. The older reporters sometime give us information as to the manner of the judges so that we learn that they sometimes departed from the calm, impersonal bearing which becomes the judge. We learn that in ancient times Judges could become angry at counsel and manifest irritation against them by the spoken word, things which the writer says are beyond the memory of the lawyer of the present day. We learn something about the personal vanity of Judges. Sometimes we are told of the motives actuating the court for instance Saunders after reporting an argument upon an important question tells us that the case was decided solely upon a point of pleading by the Justices but adds: "I believe the principal reason was because they would not determine the matter of law." Sometimes the reporters allow us to perceive their own estimation of particular judges and their rulings. If the reporter's opinion of certain judges is sometimes slighting, we have, even in modern times cases in which the expressions of the judges themselves seem severe if not unkind, toward their brethren. We find that reporters have often endeavoured to preserve or enhance their professional reputations by the careful manner in which they have reported their own arguments. Sir John Bridgeman is an instance in point. In one case he reports a judgment in his favour, he not being heard but adds "my intended argument was as follows," the intended argument covering 19 pages. Judge reporters are not behind lawyer reporters in looking after themselves. Kirby's reports which appeared in 1789 are the first reports published in America. The reporting system in America was originally the voluntary or independent system as in England; but reporting has been for a long time now confined to a state official and has become purely mechanical the condition he says is due very largely to two reasons (1) because the reporter does not as a rule hear the cases argued (2) because of the desire to publish every judgment of the court of last resort. It were well the writer thinks that the reporter exercised some

discretion in reporting, provided of course the reporter is a good lawyer.

The Westminister Hall has inspired a writer in the *American Law Review* to write on the administration of justice in that hall from the earliest times till the transfer of Law courts to the new buildings in 1883. It joins together two great ages in the history of English law—the ancient and the modern. So different are the characteristics that they appear to be systems of two fundamentally different races, rather than a development of the law governing the same nation. When the Westminister Hall was first erected, we see lingering characteristics of the blood feud and weregild. The punishment of the criminal was left not to any Royal Court of Justice but to the victims' kindred or to the Hundred's court. There were no indictments, no presentments, no juries, no body of trained lawyers. If a man was caught red handed, he was punished. If he was not the only method of punishing him was by the results of an ordeal (an ordeal of fire or water.) The Latern Council in 1215 forbade the clergy to take part in these ordeals. As a result, ordeals disappeared from English Law as a mode of trial. If the accused got men of the neighbourhood to swear that he was not guilty, he would be let off and he had not to undergo the trial. With William the conqueror, another test, the trial by battle was introduced into England which after a chequered career was finally abolished in 1818. The first great impetus to the development of common law came in the reign of Henry II. The establishment of the *Curia Regis*,by the substitution of one national court for a dozen petty courts exercised a potent influence in developing the law. Glanville wrote his book on the practice of the King's Court. But the greatest book to the lawyer is Bracton's who was a clergyman and a judge under Henry III. Besides his treatise on the Law and Customs of England, we have also a note book of his wherein he recorded about 2000 cases decided by two Eminent Judges of his day.—Martin of Pateshull and William of Raleigh. Bracton died in 1268. Edward I's reign marks one of the most brilliant periods of English law. We now begin to get, for the first time, glimpses of a body of professional lawyers and reports of cases for the first time appear. An unknown lawyer set down on parchment matters of interest to the lawyer in the proceedings of the court such as statements of counsel and judges as they took place in the court before his eyes. This was in 1285 but the regular reports commence from 1293 and go on in almost unbroken sequence to 1532. These are the Year Books. For sometime it was thought that these reporters were official reporters

but judging from their contents, it seems impossible any longer to maintain this view. These Year Books though for the most part uninteresting, do contain human elements of interest. Therein are recorded the brutal remarks by judges to the bar, such delightful specimens as "leave off your noise, we forbid you to speak further of that averment on pain of suspension." "For shame" "you talk at random," wrangles between judges, exclamations of joy at the rulings a lawyer exclaiming "blessed is the womb that bare them," occasional sarcastic remarks from the bar also; not unusually of judges as litigants. To the student of the history of law, these Year Books are a mine of information. They show the law in the making, though the complicated procedure of the time makes them positively uninteresting. They show how at one time, the forms of action were all; in the absence of a form of action, there was no remedy in law—how the Chancery courts used to issue writs to remedy the defects, how if you adopted the wrong writ, you lost your case, how and when parol contracts came to be enforced, when the epoch-making writ of assumpsit was introduced. During the period covered by the Year Books, the two most famous law books compiled are those of Fortescue and Littleton. During this period, we have an instance of a highway man turning a new leaf, becoming Attorney-General and finally Chief Justice. Bacon and Coke were the next two great names. In point of interest, probably the greatest trial that took place in that hall was the famous Ship money case in the reign of Charles I; St. John's argument is said to have been the finest ever delivered in Westminister Hall. Passing hurriedly over the names of other judges and lawyers, *e. g.* Hale, the author of Pleas of the Crown, Nottingham who brought order out of chaos in the field of equity jurisprudence, Saunders who notwithstanding his drunkenness, was a great master of common law pleading, Jeffreys who in spite of his reputation, seems to have been good a lawyer, Pemberton who learnt law during his imprisonment, Somers, Holt the celebrated Chief Justice who decided *Coggs* v. *Bernard*, we come to the Earl of Mansfield who is reckoned as the greatest of Chief Justices. No bill of exceptions was ever tendered to his rulings during the thirty three years he sat on the Bench. But two of his judgments were reversed. His decisions were made generally at the conclusion of the arguments. He expanded the action of *indebitatus assumpsit* so that it embraced nearly every sort of pecuniary obligation. During this time, we see two great forces in motion which aimed at the reformation of law, represented by Bentham and Blackstone. Lord Eldon was against reform; nevertheless his contri-

butions to the development of equity jurisprudence are invaluable. Westminister Hall witnessed the trial of Warren Hastings. In 1825, it was the scene of another trial—viz. that of Queen Caroline. Then we have the great names of the 19th century. Jessel was once asked whom he regarded as the greatest Equity judge. He promptly replied that he placed Lord Hardwicke first, Lord Cairns second, himself the third and his conclusion seems right. As an illustration of the changes that the hall has witnessed may be cited the fact that Walter Map the celebrated writer and judge in the reign of Henry II insisted on excepting from his oath to do justice to all men "Jews and White Monks"and yet seven centuries after in the last days of Westminister Hall, we find Jessel himself a Jew holding the high position of Master of the Rolls and delivering those wonderfully luminous opinions which won from Gladstone the tribute that he possessed the greatest legal mind of the age.

Mr. Oswald Dylles makes a comparative study of the law of homicide according to the various systems of jurisprudence. The widest definition of murder is that given by the Scotch and the English Laws and the only punishment which can be inflicted for the offence under those systems is death. The result is that juries are always loath to convict a prisoner of murder. With the exception of Italy, Holland, Portugal and certain Swiss cantons, the States of Europe retain death penalty in their laws but they carefully narrow the definition of the offence, for which death penalty is to be inflicted. In the French Code, death penalty is to be inflicted in four aggravated forms of murder viz. "assassination" (murder upon design and premeditation), parricide *i. e.* murder of father, mother or other ascendants, infanticide and poisoning and in addition when the murder accompanies, precedes or follows another crime or is committed with a view to facilitate the perpetration of another crime as for the escape or harbouring of a criminal. Even in these cases it is open to the jury to find extenuating circumstances which will reduce death penalty to a life sentence. In other cases of intentional killing the penalty is penal servitude for life which also is liable to be reduced to a short term of imprisonment if extenuating circumstances are found by the jury.

The German Code 1872 distinguishes clearly among crimes of homicide according to the presence or absence of intention to kill, and if there is the intention to kill whether the offence is premeditated or not. It is only intentional killing with premeditation that is punishable with death. For un premeditated homicide the punishment is penal servitude which is liable to be reduced to a term of

imprisonment varying from 6 months to 5 years if the judge finds extenuating circumstances to exist. Unlike in the system unpremeditated homicide is aggravated by its being committed in the perpetration of a crime etc., and also by its being committed upon an ascendant; but these aggravating circumstances do not make the offence capital. Homicide in the course of duelling is only punishable by detention in a fortress, unless there is a premeditated violation of the rules of duelling. The principles of the classification of these codes run through all the other continental codes. The heaviest penalty is reserved for premeditated murder and for paricide in the laws of Hungary, Spain, Belgium and Denmark. Each State in the American Union has a penal code of its own. Some systems follow the English Law but most follow the continental model. They reserve extreme penalty for premeditated murder and murder in the perpetration of crimes etc. The existence of consanguinity between the slayer and the killed is not an element of aggravation. Homicide with intention to kill but not premeditated is murder in the second degree. Lesser forms of culpable homicide are called by the English term manslaughter and are carefully distinguished aud classified, one state recognising four different kinds of manslaughter. In Georgia which adopts the English definition nevertheless gives the Jury power to reduce the sentence.

A writer in *the Law student's journal* (August No. 1), while discussing the maxim *actio personalis moritur cumpersona* points out the distinction between cases where there is a cause of action independently of the wrong causing the death and cases where the wrong causing the death is the cause of action; in the former case, the damage arising from the death may be included as an element of damage. For instance in *Jackson* v. *Watson*[1], Vaughan *Williams* L. J. allowed a husband damages for funeral expenses and loss of services due to the death of his wife caused by her eating tinned salmon supplied by the defendant which was unfit for consumption; *Bradshaw* v. *The Lancashire and Yorkshire Railway Company*[2] is also to the same effect.

BOOK REVIEWS.

The Law Reports of British India, by M. Subrahmaniam B.A. B. L. and M. V. Krishnaswamy, B. A., B. L., High Court Vakils. I. L. R.) Calcutta Vol. I. (Vols. 1-3.

1. (1909) 2 K. B. 193.
2. 10 C. P. 189.

There are features about this reprint of the Indian Law Reports which must make it specially welcome to the profession. It was a happy idea of the Editors of the Indian Reports (Moore's Indian Appeals) to append notes to every case appearing therein indicating on what points the principal case has been followed, distinguished, or referred to. This tradition has been well kept up, for the matter of that has been improved upon in the present series. It is not much good giving pellmell cases in which a case has been followed, distinguished &c., without stating on what points it has been so followed or distinguished especially when the case is one that involves more than one point. The Editors of this series, we are glad to note, have carefully analysed the points each case decides and noted under each point the appropriate cases with a shortnote of the facts wherever necessary. Whenever a case has become obsolete either by reason of subsequent legislation, or by the decision of a higher authority, that circumstance has been clearly indicated. In cases where the decision turns upon the construction of any Act, or Regulation, the Section of the Act or Regulation is set out in full in the footnotes. This is a practice which has much to commend it and may well be adopted by reporters of all legal journals in this country. While retaining the text of the I L. R. Series in tact, whenever either the statement of facts, or the head note or the report of the case appeared inaccurate or not sufficiently full, the defect is made up in the notes. Comments on passages in the judgment the made in other cases are noted as footnotes. Authorities *in pari materia* are cited. Even passages from text books bearing on the points decided are given. With an annotated edition of the Law Reports like the present one may fairly dispense with digests and indexes. The index is full and notices points decided though not noted in the headnote. Altogether, this Edition supplies a real desideratum and if the Editors keep up to the expectations which the present volume legitimately raises, they shall have deserved well of the profession. The printing and binding leave little to be desired and the edition is free from printer's errors, an exceptional feature in Indian publications.

The Indian Decisions (*New Series*) Vol. II and III by. T. A. Venkasamy Rao and T. S. Krishnasawmy Row. With a diligence, much to be commended, the Editors have brought up their Series to 7 Calcutta and we are glad to note that the Volumes fully keep up to the standard of finish exhibited by the previous volumes.

All India Century Digest (*Civil*) 1811—1912 Vols. 1 to 9 by Mr. B. R. Desai, High Court Pleader, Baroda. Mr. Desai is not a person unknown to the profession. His Index of cases judicially noticed has already become an indispensable book to the profession. Although we have an objection to the method of Mr. Desai dispensing with the facts of cases which follow a case (involving as it does often times of looking up cases which have no bearing on the point as they follow the principal case only on other points) on the whole, the book is satisfactory. The arrangement and distribution of topics and the mode of indicating cross-references seem to be ideal. But one has always a feeling that all the cases that ought to have been brought under a particular heading have not been so brought. We are glad to say however, that except in a few instances, we have been able to get all the cases that a digest may reasonably be expected to give by using the cross references. It is of course too much to expect a digest maker to give references for points which the head note writer does not notice. The cases of 1912 have not all been digested; that of course is only natural and cannot be counted against the editor, We hope that the defect will be made up by a supplemental volume The vice of giving references only to non-official reports when the same cases are also reported in the official is not confined to digest makers and we need not hold Mr. Desai specially accountable for it. The volumes are handy, the printing is good and subject to the reservations we have indicated above we do not feel much hesitation in recommending these volumes to the profession.

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CRITICAL NOTE.

Gobardhan Das v. Hori Lal.—I. L. R. 35 A. 364.

We are not satisfied that the decision in this case enunciates correct law. The document in the suit was required by law to be attested. But the executants and the attesting witnesses were all dead: The question for consideration was whether admissions relating to the genuineness of the document contained in other deeds executed by the original executants or their representatives were sufficient proof of the document. The learned Judges answered the question in the negative. The Judgment is very meagre having regard to the importance of the question that was decided. The learned Judges are of opinion that Ss. 68 to 72 of the Evidence Act are exhaustive of the modes of proof in such cases. We must differ. These Sections are in the Chapter headed "Of Documentary Evidence." The scheme of the Chapter is to lay down that whenever possible primary evidence of a document should be given. In other words the first rule is to let in the best evidence. Ss. 61 to 66 deal with proof of the contents of documents; all the rules relating to primary and secondary evidence come under this head: Then the framers of the Code deal with proof of handwriting. This is dealt with by Ss. 67 to 72: The object aimed at apparently is to ensure that the genuineness of a document should be established by the best possible evidence, namely by the evidence of the attestors, of the writer etc. S. 70 lays down that the admissions of a party to an attested document of its execution shall be sufficient proof: This Section should be read along with the general principle as to admissions contained in S. 18 of the Evidence Act which puts admissions by persons having a pecuniary or proprietary interest in the subject matter of the proceeding on the same footing as admissions made by the party himself: In this view, we fail to see why the admission

as to genuineness referred to by the learned Judges as the second piece of evidence will not suffice. In our opinion Ss. 69 and 70 read along with S. 18 cl. (1) will enable the Courts to admit this second statement as evidence; nor are sufficient reasons given for not treating as proof "a deed of sale executed in 1902 by the representatives or some of the representatives of the executants of the deed in suit, which recognizes the genuineness of the usufructuary mortgage mentioned above." Then as regards the statement of Lalta Prasad who claimed to be acquainted with the handwriting of the two attesting witnesses, the learned Judges discarded this piece of evidence because the latter part of S. 69 was not complied with.

We have thus far endeavoured to show that the learned Judges have not correctly applied the principles contained in Ss. 68 to 72 of the Evidence Act. We go further and say that the rule of English law that if the proof referred to in Ss. 68 to 72 is not available a document of this nature can be proved *by presumptive or any other available evidence* is applicable to this country. Rules of evidence are intended to help the Court to arrive at the truth and not to deny justice. As has been said by the Privy Council, the scheme of the Evidence Act is to allow evidence to be let in, the burden being on the objecting party to show that a particular piece of evidence is excluded by the Act. Moreover as pointed out by *Edge* C. J. in *The Collector of Gorakpur* v. *Palakdari Singh*[1] we can rely upon the English law of Evidence on matters on which the Code is silent. In this particular matter, the Evidence Act lays down practically all the principal modes of proof. The residuary provision giving courts discretion to let in *any other available evidence* is not enacted as a section. But that is no reason why principles of evidence founded on justice should not be indented upon as supplemental to the rules contained in Ss. 68 to 72. We have indicated sufficient grounds to show that the decision cannot be accepted as correct. The question is one of very great importance; and while we are not prepared to say that the decision is entirely unsupportable, we are justified in saying that the matter deserves fuller consideration than has been given to it by the Judges of the Allahabad High Court.

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1. (1889) I. L. R. 12 A. 1 at p. 11.

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JOTTINGS AND CUTTINGS.

Law Dinner held on the 11th instant:—We are glad to say that notwithstanding the fears expressed in some quarters, the Law Dinner has turned out a big success. Some 200 Hindu gentlemen were present. Every precaution had been taken not to wound their orthodox susceptibilities. With a little more care in the selection of dishes, and a little more elasticity in the arrangements, it might have been possible to draw even a larger number. The dinner need not also have gone forth as being under the auspices of the Bar Association. But these are matters of detail which we have no doubt will receive due consideration when the dinner has to be organised again. Vakils' gatherings and Bar dinners there have been in the past. But as a Law dinner where all the various sections of the Bench and the Bar are brought together, this is the first of its kind and the whole credit of conceiving the idea and carrying it into execution successfully belongs to the Advocate-General and those who, with commendable loyalty assisted him in the work. To sink personal differences in a common feeling of unity, requires a considerable amount of mental detachment, and sympathetic imagination and to give effect to it in a country of differences such as ours is no less a feat. It is not too much to say that but for the genial and powerful personality of the Advocate-General the thing would have been absolutely impossible. Whatever the conflicting interests of the various sections of the Bar, there is enough in common between them to justify and necessitate united action. In their contests with the Bench, in their interest in maintaining the purity of the profession and in their anxiety to promote healthy legislation, the whole Bar is one and has no individual conflicting interests. Vested interests apart, one even doubts if the time is not come for some process by which the whole Bar may be unified. The High Court has taken the first step by abolishing the second grade. We hope a time may come when there will be only one grade of practitioners by whatever name called. Turning to the proceedings of the evening, we do not feel called upon to say much.

Surely we are not required to examine how far the compliments exchanged represent wishes rather than actualities. One thing we feel certain of is that the Bench has positively improved in courtesy and that the Bar is making a conscious attempt to live up to the traditions of the English Bar. There are one or two matters about which we should like to say something. One is the retirement of the Chief Justice to which he so feelingly referred in his speech. We have no doubt that this will be universally regretted. Good manners are never out of place and certainly not on the Bench. The Chief Justice has always been the pink of courtesy and good manners. A good example in the Chief is never lost. So long as these qualities and calm and patient hearing are appreciated, so long the Chief Justice is not likely to be forgotten. The other thing to which we wish to refer is what the Chief Justice had to say as to expeditious disposal. We heartily agree with the Chief Justice; only we wish the same standard were applied to the Mofussil Judges so that they were less victimised by returns and judged generally by the merit of their performance and not by the quantity of work turned out. We hope the Chief Justice's remarks about good English will also be laid to heart by the younger (for the matter of that even the older) members of the bar. It is never amiss to speak a language well when you speak at all, apart from the usefulness of speaking well before judges whose mother tongue it is. We are glad that the Law dinner has come out well. We hope it will become an annual function making for the greater solidarity of the profession and all that it represents.

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* PROFESSIONAL ETHICS.

THE ADVOCATE AND HIS CLIENT.—(*continued*).

I shall now deal with the subject of " The proper remuneration which an advocate should receive". You will have observed from the remarks made in the first lecture that the state has often tried to regulate the amount of the remuneration which lawyers should receive. We found that this was the case in Rome and in France and we also found that there was a provision of that sort in the old Hindu times, in the *Sukraniti* from which I made a citation to you. You are aware that the modern tendency is not to regulate the relationship between persons who deal with each other at arms length by any hard and fast rules. It is considered to be economically unsound to do so. It would not bring relief to the party intended to be benefited while it would lead to indirect action on the part of the person who is sought to be restrained. At the same time it has always been considered necessary to prevent the rapacity, if I may so call it, of lawyers, for there is no doubt that the leading lawyers would always be in a position of vantage with respect to their clients. Though it is no doubt true that the large numerical increase in those who practice the profession has a tendency to lower the remuneration which the *ordinary* members are likely to be able to receive, it must always be the case that those who have succeeded in obtaining a reputation for skill in advocacy would be likely to be able to command very heavy fees. At the same time, even those who have not established such a reputation are apt to take indirect advantage of their clients, and it is desirable at any rate to enunciate a standard of what should be regarded as fair remuneration even though it may not be expedient to lay down any rigid rules to regulate the amount.

In England and in this country also the remuneration that a solicitor is entitled to receive is more or less fixed and a scale of

* The Seventh of a series of addresses delivered by the Hon'ble Mr. Justice P. R. Sundara Aiyar one of his Majesty's Judges of the High Court of Judicature at Madras to the apprentices of the year 1910-1911 at the request of the High Court.

fees is laid down for every kind of work that a solicitor may do. The scale may not provide for all kinds of work possibly, but still there is no doubt that most of the work which ordinarily falls to a solicitor is provided for either by the rules or by the established practice of the profession. A solicitor is not entitled to get his fees from his client until his bill has been taxed, and it has been subjected to the scrutiny of an officer of the Court whose duty is to see that the return exacted for any particular piece of work is not excessive. No doubt a solicitor may enter into a contract providing for remuneration in lump for the whole amount of the work he may do in connection with a particular piece of work. But where there is no such contract, the amount he is entitled to receive is fixed, and as I told you, payment is not made ordinarily to a solicitor before-hand but only after the work has been done, and his bill has been taxed. A solicitor according to the practice in England and I believe in America also, is also entitled to advance money to his client for the conduct of the case while a barrister should not do so. Now the question would occur to you, what is the correct rule in that respect with regard to Vakils. Probably the Courts may not be prepared to condemn the advance of money by a Vakil during the progress of an original suit and it may be difficult to distinguish between original work and appellate work in this respect. As far as I am aware, the question has never been subjected to judicial decision with respect to the propriety of making advances. But you will remember, the rule we have adopted for our guidance in the course of these lectures, to adopt always the higher standard, and personally I would be inclined to advise that a vakil should abstain from advancing moneys for the purpose of litigation. If a client fails to put a solicitor in funds for the conduct of a case, that would be a good ground for the solicitor claiming a discharge, so that it is not to be supposed that there is any duty on the part of any attorney to finance to any extent the litigation of his client.

With respect to this question of remuneration the Legal Practitioner's Act contains 3 sections intended to restrain pleaders in the arrangements they enter into for fees with their clients, though they are *prima facie* at liberty to enter into any contract they like. The safeguards provided are these: S. 28 says: "No agreement entered into by any pleader with any person retaining or employing him, respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges or disbursements in respect of business done or to be done by such pleader, shall be valid unless it is made in writing, signed by such person,

and is within fifteen days from the day on which it is executed, filed in the District Court or in some Court in which some portion of the business in respect of which it has been executed has been or is to be done." The Court thus would obtain information of any special contract which may have been entered into; the object of it is laid down in the next section: "where a suit is brought to enforce any such agreement, if the agreement is not proved to be fair and reasonable, the Court may reduce the amount payable thereunder or order it to be cancelled, and the costs, fees, charges and disbursements in respect of the business done to be ascertained in the same manner as if no such agreement had been made." Thus, while no rules are laid down regulating the fees that may be received by a pleader, the Court possesses an equitable jurisdiction to modify any contract that may be entered into. The Court will not refuse any remuneration to a pleader on the ground that the stipulation between the parties provides for the payment of an excessive amount but the amount will be determined in the same manner as if no such agreement had been made. "Such an agreement," the next section provides, "shall exclude any further claim of the pleader beyond the terms of the agreement with respect to any services, fees, charges or disbursements in relation to the conduct and completion of the business in respect of which the agreement is made, except such services, fees, charges or disbursements, if any, as are expressly excepted by the agreement." The result therefore is that the pleader would not be entitled to claim more than he has agreed to receive, but the client would be entitled to the intervention of the Court if the pleader has taken undue advantage of his position and exacted an amount which appears to the Court unreasonable. Within these limits, liberty is left to the pleader to enter into any agreement that he considers proper. You will have understood, I take it, that an express agreement is not required to entitle a pleader to receive fair remuneration from his client. Every person is entitled to remuneration for work done and a pleader is no exception to the rule. If he does enter into a special contract, that contract ought to be reduced to writing and filed in Court so as to enable the Court to exercise its powers of supervision. Although there is no provision of law requiring any agreement to be entered into I think it is very desirable that in every case there should be a clear and definite understanding with the client as to the remuneration he has to pay. It may often happen that you appear for the same client in anumber of cases, that you acquire his confidence, and that he gives you all his work and sometimes the work may be very considerable and may consist of a large number of cases of all kinds. It is desirable that

there should be a definite arrangement with regard to every case separately. You may rest assured that if that is not done, it is very probable indeed that many a client would in course of time begin to believe, reasonably or unreasonably, that his vakil is having the advantage of him and that he is made to pay more than he should. This may not be the fact, but any such impression ought to be avoided and therefore there ought to be a record of the arrangement made with respect to every case. Such an arrangement should be made as soon as possible, and generally before the work is undertaken. This may not always be possible. But at any rate it should be done as early as possible and certainly before much progress has been made in the doing of the work. This is often neglected by vakils with the result that they unnecessarily suffer in the estimation of the client. Never put off this duty in the hope that you will be able to get better terms from your client if you allow time to elapse that you would get more control over him as the work advances and that then you can charge a higher remuneration than you would be able to do in the beginning—that is absolutely immoral and ought not to be tolerated. Sometimes it may happen that the client tries to put off any definite arrangement in the hope that by paying small sums from time to time he may succeed in not making the total amount large. But unless the advocate is particularly kind or lenient the chances are the sum total would in the end be found to be larger than the client will consider reasonable.

It is with reference to this question of remuneration that a successful lawyer often feels tempted to pick and choose between different clients. It is likely to happen to every successful man that his services are courted by many men and courted by both sides in a litigation. They may be prepared to pay absolutely exorbitant fees out of all proportion to what the services required are worth. They wish to get a certain individual on their side if that be possible, and sometimes they are determined to get several gentlemen on their own side, not merely to have the benefit of their services but also to deprive the opposite side of the services of the people who they believe have persuasive powers over the Court. Never yield to the temptation of taking advantage of this position. The rule is, as I told you, that the client who comes first is entitled to retain you. Some times no doubt the position may be difficult. The Vakil may have generally appeared for the opposite client and yet there may be no understanding that he is to appear for him in all his cases. Then the opponent comes and offers to engage the services of the Vakil in a particular case. There may be natural hesitation to

accept the brief, arising out of consideration for the man who has failed to come first. The English practice seems to be clear—that the person who first comes is entitled to the services of the advocate. There are very elaborate rules in England as to how to secure the right to the services of counsel. There are general retainers and special retainers and where there is a general retainer a special retainer has to be given at a certain stage. It is now unnecessary to trouble you with these rules. No such rules have been framed for the conduct either of barristers-advocates or vakils in this country—neither rules of the Court nor any rules of etiquette which guide the members of the Bar. At the same time advocates do feel bound in honor to accept the engagement which is first offered to them. But it must be confessed that this duty is often evaded. A client is put off on some ground or other to await the chance of the other side turning up. If I feel bound to caution you against putting up the right to your services to auction between the combatants, it is because unfortunately it is too true that there have been advocates who were guilty of that extremely wrong act. I am also acquainted on the other hand with others who after they had fixed a proper remuneration would never stoop to being tempted to prefer their client's opponent because he offered a higher remuneration. Whatever you may consider a proper value for your services—I need hardly say it should not be oppressive or exorbitant. There may sometimes arise difficulties in deciding as to which side a person is bound to appear for. One may feel unable to say whether a client has acquired a right to his services or not. One sends him a telegram retaining him, another sends a letter; the terms in one of them are not perhaps quite definite. In England any difficulty of this sort is solved by referring the question to the Attorney-General or to the Solicitor-General and his ruling is accepted. There is no etiquette here as to how the difficulty is to be solved, though there are instances where reference has been made to some other leading practitioner and his decision abided by. But practically, it must be confessed, it is left to the good sense and fairness of each individual advocate. These are difficulties that may not actually occur to many of you. But I am sure they will occur to some and may happen in the case of any one. It may not be that the advocate is particularly able, but it may happen that in individual cases, owing to his previous knowledge of the facts of the litigation or on some other ground both the litigants wish to claim his services. The instincts of an honourable man would probably be a sufficiently safe guide in many of such cases if it is remembered that a vakil is following what should be regarded

as a public profession and that his duty to serve all those who are in difficulties on account of litigation and that he ought not, in accordance with the dignity of his office, decline his services without good reason to any one. In England a barrister does not feel himself at liberty to charge different rates of fees in the case of different clients. It would make no difference to him whether a client is rich or poor. His remuneration depends upon the nature of the case. Generally there is a fee with a brief and then there would be fee for each day. The former would be for studying the case and getting ready to argue and probably for the argument—I am not quite sure of that—on the first day. And then there would be a refresher for each day. Sometimes no doubt Attorneys of their own free will and on the invitation probably of their own clients mark on the brief a much larger fee than the advocate would generally demand.

The Ontario Bar have stated what they consider to be right in rules 52 to 56 of their rules.

"(52) Satisfactory relations between attorney and client are best preserved by a frank and explicit understanding "at the outset of the amount of the attorney's compensation; and where it is possible, this should always be agreed upon in advance.

"(53) In general it is better to yield something to a client's dissatisfaction at the amount of the fee though the sum be reasonable, than to engage in a law suit to justify it, which ought always to be avoided, except as a last resort to prevent imposition or fraud.

"(54) Men as a rule over-estimate rather than undervalue the worth of their services, and attorneys in fixing their fees should avoid charges which unduly magnify the value of their advice and service, as well those which practically belittle them. A client's ability to pay can never justify a charge for more than the service is worth; though his poverty may require a less charge in many instances, and sometimes none at all.

"(55) An attorney may charge a regular client, who entrusts him with all his business, less for a particular service than he would charge a casual client for like services. The element of uncertainty of compensation where a contingent fee is agreed upon"—I shall have to deal with the question of contingent fees separately—"justifies higher charges than where compensation is assured.

"(56) In fixing fees the following elements should be considered: 1st. The time and labour required, the novelty and the difficulty of the question involved and the skill requisite to properly

conduct the cause ; 2nd. whether the particular case will debar the attorney's appearance for others in cases likely to arise out of the transaction and in which there is a reasonable expectation that the attorney would otherwise be employed; and herein of the loss of other business while employed in the particular case and the antagonism with other clients growing out of the employment; 3rd. the customary charges of the bar for similar services ; 4th. the real amount involved and the benefits resulting from the services; 5th. whether the compensation be contingent or assured ; 6th. is the client a regular one retaining the attorney in all his business ? No one of these considerations is in itself controlling. They are mere guides in ascertaining what the service is really worth and in fixing the amount. It should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade." I am not quite sure that an English barrister would agree in these rules altogether, for instance "the antagonism with other clients growing out of the employment"—he may well doubt whether that is an element which an advocate ought to be entitled to take into consideration. His duties indeed are such that he must be brought into antagonism with many litigants. Moreover a rule permitting him to take that into consideration is likely to give room for casuistical questions which a person may easily solve to his own advantage. But perhaps in practice most advocates would be inclined to take these matters into their consideration. In America the advocates have more freedom in this matter than in England. You know that the American view is that an advocate is at liberty to take up any case or to decline any case as he thinks proper with very little restraint on himself while the English rule is just the contrary. It is not then to be wondered at that an American attorney would in fixing his own remuneration take several things into consideration that an English barrister would not feel justified in doing. In England there are some rules with regard to remuneration that are based not really upon what is properly due to the client but upon considerations relating to the profession itself. The body of practitioners being large, in order to keep up the dignity of the profession which can only be done by rules which would secure at least some work for all; there are rules intended to prevent people from doing an excessive amount of work and thereby making it difficult for others to get on. Therefore the rule is that if a barrister takes up an engagement in a Court in which he ordinarily does not practice he should demand a higher fee. If he goes to a circuit which he has not joined as a regular adherent, he should demand a higher fee. Obviously this is not intended to protect the clients but to

protect the other members of the bar. In the Chancery Court the rule is that certain practitioners attach themselves to each judge's Court—a certain number of K. C's and a certain number of juniors, that is, ordinary counsel, who are not honoured with the distinction of counsel to the King, and they generally confine themselves to the court of that judge. If they go to another judge's court they are bound to demand a higher fee. There are several other rules based on this principle. In this country of course we have no such rules, and practically those who have got the choice are left to demand any fee that they like. The necessity therefore for a fair standard in the demand of remuneration is particularly required in this country. In Madras the practice now when leading gentlemen are called away to the mofussil is to demand a day fee and what is called a retainer, that is a sum of money, often very large, which is charged first and paid either altogether in advance or in 2 or 3 instalments. It is supposed to be for studying the case and taking the responsibility of the general management of it on one's own shoulders, a further payment being made for every day that the vakil is either out of Madras or actually engaged in the place which he goes to. In Calcutta I believe the system of retainers does not obtain but the fee charged for each day's service is larger than it is in this Presidency.

The exorbitant demands of the members of the profession have often been a ground for condemnation of the profession. Under the heading of 'solicitors plundering estates' we find these remarks in 23 Canadian Law Times 103 "Some very severe remarks were recently made by Mr. Edge, judge of the county courts, at the Clerkenwell County court—(in England)—in relation to the conduct of a solicitor, who in the opinion of the judge, had attempted to wreck an estate by running up and incurring unnecessary costs. What could any one think, asked the judge, of a solicitor who brought in a bill of costs for £102 against an estate of £180? And he disallowed the whole of the solicitor's profit costs, leaving him £44 disbursements, and made him pay £25 towards the costs of the other side. His Honour further expressed his intention of laying the facts of the case before the Law Society. A 'Windsor barrister' commenting on this writes: 'it strikes me very forcibly as being applicable to several cases in our own courts, and if our own judges would take the same drastic measures in similar cases, the results would be beneficial to the profession and the public at large'." Here is a somewhat interesting remark about some barristers who not only think it right to receive very heavy fees but pride themselves on

doing so. This is from the Law notes "Is it not time the Bar Council turned their attention to a little domestic subject? We refer to the growing practice of barristers bragging about the big fees they receive. We are sick of "pars" in the papers that in the recent great case *Wylie* v. *Lewis*, Mr. Parchment had 2,000 guineas and Mr. Quibble had 2,500 guineas and so on *ad nauseam*: Of course we are told it is the naughty clerks—those indiscreet persons. But a barrister always takes precious good care to place his brief in a conspicuous position when it has a good fee marked on it. Our dentist does not write to the papers and tell the world what he charged for—whatever nasty operation it was. Our friends the barristers, have nobbled the press and become the biggest advertisers on earth. The phrase "largest fee ever received" reminds us of Lipton's advertisement of the "largest cheque ever paid for duty on tea." Bah! the whole business is bad form. The Bar Council should see into it."

Now once the fee is settled no demand of any change should be made. No variation of the fees should be claimed because it afterwards happens that the work is more heavy than it was anticipated to be. This is a principle which perhaps is generally acted upon by all honourable members of the profession; but not only should nothing more be demanded but nothing more should be received, especially no gift should be received, because the result of the case has been in favour of the client. Would any one of us feel justified, if a visitor turned up and offered a thousand rupees as a present, in receiving it. Most people, I take it, would have no hesitation in declining to take any present. If that be so, if the advocate has fixed the proper remuneration for his services, what justification could he have as a man of self-respect for receiving money which a grateful client is willing to make a present of to him? Does the fact that he was a client or that the advocate did work for him for which he has received remuneration justify him in degrading his own sense of self-respect and honour and consenting to receive the present. There may be possible exceptions to this rule; it may be that on account of the poverty of the client, out of consideration for his helpless state an advocate might have consented to receive a small remuneration. It may have been excessively low in proportion to the work that had to be done. One might not be inclined to be severe with an advocate if in such a case he consents to receive a present. There is no law against it, I must say, but except in very exceptional cases indeed a present ought to be declined. Sometimes there are pauper cases where work is done out of charity. It may be that the pauper gets much property by

means of the litigation. It would perhaps be hard to say that in such a case the fee paid afterwards without any previous agreement should be declined. It is considered in England a great dishonour on the part of an advocate or any other lawyer to make any attempt to revise the agreement as to fees. For counsel to allow the fees to be altered after the litigation has ceased is against professional etiquette and to say that a barrister has allowed his fees to be altered in this way is a slander on him in the way of his profession and actionable *per se.* So counsel ought not to receive for professional work any sum of money except stated fees for particular matters. He ought not to receive moneys generally on account without specifying each item. It is sometimes the practice of unthinking practitioners in this country to receive fees generally on account of a standing client without a definite understanding as to its appropriation. This is not only not in keeping with the traditions of the bar but is likely to lead to future trouble.

I now come to the question of contingent fees, that is a barrister or an advocate entering into an agreement as to the fee payable, conditional on the client's succeeding or on the decree in his favour being for more than a certain amount. Sometimes the agreement is that a certain sum should be paid at all events, but a larger amount in case of success. On this question there is a difference in the view taken in England and in America. In America contingent fees are not regarded as absolutely improper. You would have observed that already in the passage I read from 28 Canadian Law Times. There the rule may be taken to be in accordance with this statement. " Contingent fees may be contracted for, but they lead to many abuses, and certain compensation is to be preferred" and it is said that if the fee is contingent and not assured the amount may be a little larger than where it is fixed. The rule in England is the contrary, that any arrangement for a contingent fee is improper. Marchant in his Barrister-at-Law referring to a case decided more than 200 years ago says this—"A promise to pay counsel according to the event of the case exposes the parties to the penalty of maintenance (i. e. maintaining litigation). A bargain securing to a barrister a share in the proceeds of litigation is void for champerty and any security given for the performance of such a bargain is liable to be set aside."

The trend of authority in India is against the allowance of contingent fees. You will find several cases dealing with the question. There is a very recent case reported in 3 Allahabad Law

Journal p. 151. In 4 Cal. Weekly Notes the same opinion was expressed by the Calcutta High Court and earlier cases in Calcutta are to the same effect, one of which is reported in 21 Weekly Reporter 297. In Madras it was decided in a case reported in 3 Mad. 138 that contingent fees were not proper. It would appear that there was a circular issued by the Sudder Court in 1853 that contingent fees should not be stipulated for. There is a recent case in Bombay reported in 5 Bom. Law Reporter 102. In the Bombay High Court, the earlier view was that contingent fees were not absolutely illegal. The cases that I have cited are to the effect that the arrangement is altogether illegal. It is not merely that it is not proper or is not in keeping with the dignity of the profession but the agreement is regarded as contrary to law. But assume it is not illegal. I think there ought to be no doubt that contingent fees ought still to be held to be improper. If a man's remuneration is to be dependant upon his success to what temptations may he not be exposed? He would indeed too closely identify himself with his client's success in the litigation. The temptation to suborn evidence, to lower the standard of fairness, to act fraudulently it may be, would indeed become very strong. In the interests of advocates themselves and in the interests of the public there ought to be no doubt that contingent fees ought to be discouraged as a rule. Should there be any exceptions to the rule? It may happen that the suitor is a pauper and cannot pay. Either he must go without the services of a counsel or he can agree to pay only on condition of his success. The litigation may be complicated and yet the amount the client can agree to pay at once might be disproportionately small to the amount of work involved. If legislation is to be attempted it may be possible to provide for such cases, by allowing such agreement subject to the sanction of the Court, so that strict watch might be kept on the conduct of those who make stipulations of that kind. Even then indeed it is doubtful whether the evils arising from such agreements could be effectively checked by judicial supervision. As the only proper course for assurring oneself against temptation is to adopt a general rule which will be a safe guide such arrangements should perhaps be altogether avoided.

NOTES OF INDIAN CASES.

Bai Ramkore *v.* Jamna Das Mulchand.—I. L. R. 37 B. 18.—In this case the Bombay High Court considered the nature of the right conferred by the text of Yagnawalkya upon certain relations to make the gift of a girl in marriage and agreed with the decision of the Madras High Court in *Namasivayam Pillai v. Annammai Ummal*[1]. It may be pointed out that in a later case, the Madras High Court has held that the text deals only with the religious rite of making a gift of the bride and has nothing to do whatever with the right of guardianship. See *Ranganaikammal* v. *Ramanuja Aiyangar*[2].

Mahomed Jusab Haji Adam Nurani *v.* Haji Adam Haji Usman Nurani.—I. L. R. 37 B. 71.—In this case the plaintiff a minor son of a Cutchi Memon sued his father for maintenance and prayed that the amount might be declared a charge on the ancestral property of the defendant. The judge on the Original Side held that the Mahomedan Law and not the Hindu Law applied. We are very doubtful about the correctness of this decision. No reference is made to the earlier cases of *Karim Nensey* v. *Heinrichs*[3], *Rahimatbai* v. *Hirbai*[4], and *Rashid Karmali* v. *Sherbanoo*[5]. It may be pointed out that Mr. Justice *Beaman* in *Hassanally Moledina* v. *Popattel Parbhudas*[6] doubts whether the decisions which state that in testamentary matters the Khojas should be governed by Hindu Law are authoritative and final.

Mahamad Ghaus *v.* Raja Baksha.—I. L. R. 37 B. 224.—In this case the Bombay High Court hold that the position of a Fakir of a Makhan or the holder of the office of Surguro resembles the position of a holder of ghatwali tenure so that each holder will be entitled to a life estate. An alienation of land by one holder cannot be adverse to his successor and the latter will have according to the decision in this case 12 years from the death of his predecessor.

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1. (1869) 4 M. H. C. R. 339. 2. (1911) 21 M. L. J. 600.
3. (1901) I. L. R. 25 B. 563 (571, 573) s. c. L. R. 28 I. A. 198 (200—202).
4. (1877) I. L. R. 3 B. 34, 41. 5. (1904) I. L. R. 29 B. 85 (89, 90).
6. (1912) I. L. R. 37 B. 211.

SUMMARY OF ENGLISH CASES.

In *re* Samuel [1913] A. C. 514 P. C.

Parliament—Disqualification to sit and vote in—Contract with Secretary of State for India in Council—Secretary, an Officer of British Government—Secretary, a person and not a body corporate—'Public Service' in 41, Geo. 3 C. 42, S. 1., includes Service in British India—Position of the Secretary of State for India—Construction of statutes.

The words " or any other person or persons whatever," occurring in S. 1 of 22 Geo. 3 C. 45, which section in conjunction with S. 41, Geo. 3 C. 42. S. 1., disqualifies a person from sitting and voting in Parliament if he makes any contract for or account of 'public service' with certain specified officers of His Majesty 'or any other person or persons whatsoever' are to be taken *ejusdem generis.* The Secretary of State for India is such an officer and is an officer of British Government in the fullest sense, and though practically he attends to Indian affairs mostly, he is entitled to do also the duties assigned to other Secretaries of State.

' Public Service' in the above Act, is not to be construed as ' Public Service of Great Britain.' It includes public service which need not be executed or requited within Great Britain or paid for out of any particular fund. It means any public service of the Crown anywhere.

The Secretary of State for India is a person within the meaning of the above statute and not a corporate body in spite of S. 65 of 21 and 22 Vic. C. 106, which allows suits to be brought by and against Secretary of State in Council as a body corporate and in spite of the fact that he has to obtain the concurrence of the other members of his Council before making tho contract. He and they have distinct functions prescribed by the Statute and his personality is not merged in any body corporate by the Statute nor is that of the Council. In some particulars they can check him or he can override them.

Obiter.—It is not a conclusive argument as to the construction of an earlier Act to say that unless it be construed in a particular way a later enactment would be a surplasage. The later Act may have been designed, Ex abundanti cautela, to remove possible doubts.

In re **Avenon's Charity: Attorney General *v.* Pelly**: [1913] 2 Ch. 261.

Charity—Endowment for a "Sermon" once a year—Increase in the income—Cypres—Religious purposes—Trustees—Scheme.

Where the income of an endowment largely exceeded the limits of the necessities of the endowment which was for a sermon once a year in a Parish Church and the income had to be applied *cypres.*

Held that the income could not properly be applied for the promotion of secular education and could only be applied for a religious purpose in the parish which attached to the church. At the time of the endowment, the parish limits were very much wider. Nevertheless it was held that the proper thing to do was to restrict the benefit to the parish attached to the church.

Pink *v.* J. A. Sharwood & Co., Limited: [1913] 2 Ch. 286.

Practice—Discovery—Person of unsound mind—Affidavit of documents—Rules of Supreme Court, Order 31 rr. 12, 29.

The next friend of a person of unsound mind cannot be ordered to file an affidavit of documents under order 31 r. 12, the next friend not being party to the action and there being no express provision in that behalf as in the case of infants.

Hope Brothers, Limited *v.* Cawan: [1913] 2 Ch. 312.

Landlord and Tenant—Demise of a floor, room or office—Both sides of the wall comprised within—Fixing of flower boxes outside window.

Unless there is an exception or a reservation or something in the context to exclude it prima facie where there is a demise of a floor or room or an office bounded in part by an outside wall, the premises demised comprise both sides of the wall and the lessee cannot be restrained for instance from fixing flower boxes outside the window.

Muir *v.* Jenks [1913] 2 K. B. 412.

Practice—Writ for Liquidated amount—Part-payment—Default in appearance—Judgment and Decree for sum in excess of amount actually due—Setting aside.

Where the plaintiff obtains judgment in default of appearance of defendant for a sum in excess of the amount actually due to him, the defendant is entitled to have the judgment set aside unless the plaintiff who obtained judgment applies to reduce the decree amount. Delay on the part of the debtor will not preclude the judgment from being set aside.

Ray *v.* **Wigand** [1913] 2 K. B. 419.

Practice—Disobedience of order of court—Personal service—Absence of—Going out of jurisdiction—Sequestration, writ of.

Where a person disobeyed the order of the Court of King's Bench to do a particular act with full knowledge of the order and went out of the jurisdiction before the order had been personally served on him the court following the practice of the Divorce Court dispensed with the personal service of the writ of sequestration to enforce the order and directed writ to issue.

Gelmini *v.* **Morigia** [1913] 2 K. B. 549.

Limitations, Statute of—Action commenced within six years after the cause of action arose—Inclusion of day on which cause of action arose—Six years expiring on Sunday—Issue of writ on following Monday—Limitation.

In this case the time for payment of a promissory note including days of grace expired on Sunday September 22 1906. The holder issued a writ on Monday the 23rd September 1912. It was held that as the last day for payment was 22nd September 1906, an action could have been brought on 23rd September 1906 and therefore the six years allowed by the Statute expired on Sunday 22nd September 1912 and the writ issued on Monday the 23rd September was too late.

Lofthouse Colliery Ltd. *v.* **Ogden** [1913] 3 K. B. 120.

Practice—Award—Ambiguity—Jurisdiction of court to declare meaning of—Order XXV rule 5.

Where an award is expressed in ambiguous terms and there is no right of appeal from the award the High Court has jurisdiction to determine what it means and declare the rights of the parties under it accordingly.

Phillips v. Batho [1913] 3 K. B. 287.

Foreign judgment—Court in British India—Decree for Divorce and damages against co-respondent—Domiciled in England—Recoverability in England.

Plaintiff a British subject domiciled and resident in British India, married in India and instituted a suit for divorce under the Indian Divorce Act 1869 making the defendant a co-respondent. The defendant who was a domiciled British subject had left India at the time of the institution of the suit leaving no property behind. He resided in England and the notice of the petition for divorce was duly served on him by registered letter in accordance with law. The court passed a decree and dissolving the marriage and awarding damages to the extent of £ 7000. Held that plaintiff was entitled to recover the damages awarded by the judgment of the Indian Court.

JOTTINGS AND CUTTINGS.

Trial Judges and Appellate Courts.—That veteran authority on all points of criminal law and procedure, Sir Harry Poland, has, we are glad to see, contributed to the *Times* a letter condemning the practice of judges sitting in the Court of Criminal Appeal to hear appeals from their own decisions or sentences. On the other hand, a judicial correspondent, who conceals his identity under the *nom de plume* of ' Judex Damnatus,' has contributed to the same journal a not very whole-hearted defence of the practice. Apart from the unconvincing argument from the supposed convenience of the practice, he adduces two reasons for suggesting that the Legislature has deliberately intended this practice to be adopted in criminal appeals. The Judicature Act 1875, he points out, forbids the practice in the case of the Civil Court of appeal; whereas the Criminal Appeal Act of 1907 is silent about it. Hence he draws the inference that in the latter case the silence of the Legislature means its endorsement of the system. Surely the simple explanation is that, in the year of grace 1907, Parliament never dreamed that any body of judges would think of reviving the old civil practice which prevailed before the judicature reforms of 1873. Again, when an amending Act was passed three years ago enabling all the judges of the King's Bench Division to sit in the Court of Criminal Appeal instead of only nine, as was the rule laid down in the Act of 1907,

no prohibition of the practice complained of is to be found. Hence, he argues, the Legislature desired it to continue! But everyone knows that one of the chief reasons for the amending Act, which increased the number of judges available for the Court, was to render unnecessary the presence of the trial judge as a member of the tribunal. That system we believe, was discontinued for some time afterwards and its recent revival has therefore occasioned surprise as well as criticism. While we cannot regard the pleas of 'Judex Damnatus' as at all convincing, we are glad to gather from a somewhat cryptic sentence at the commencement of his letter that the judges are not likely to resume an arrangement which public opinion has so emphatically condemned.—*Law Journal.*

* * *

Universal Malice.—A curious point arose last week in a Scottish murder trial at Glasgow, *The Lord Advocate* v. *Albert Wade French* (August 23). The prisoner, a trade union official, was accused of murdering a man named James Mart at Glasgow Harbour on June 18 by discharging a loaded pistol at him. It appears that during a trade dispute between two rival seamen's unions, French fired a pistol into a crowd, and the bullet chanced to kill Martin. Admittedly French had no ill-will against Martin and had not fired at him or with any special intention of killing him. In these circumstances Lord Guthrie, the presiding Judge, told the Jury that they could convict the prisoner of culpable homicide (the Scots name for manslaughter) but not of murder. There was no selection of a particular victim, he pointed out, and no evidence of any intention to kill; in fact, the evidence merely pointed to gross recklessness. The defence was 'misadventure' and the jury in fact acquitted the prisoner,

It is possible that Lord Guthrie's direction to the jury may be a correct statement of the Scots law as to the *mens rea* required in murder, but it would not have been a good direction had the trial taken place in England. It is defective, as a statement of English law in at least three different ways. In the first place the 'malice aforethought' which is a necessary ingredient of murder in our law need not involve any selection of a particular victim. There are, in fact, six different kinds of malice which are sufficient to constitute murder (see Clark's Criminal Liability pp, 85-90; Kenny's Criminal Law, pp. 133-137). First, intention to kill the particular person in fact killed. Secondly, intention to kill A, which results in unintentionally killing B (*Rejina* v. *Salisbury*, Plowden 100). In the old legal phrase, *malitia egreditur personam,* the *mens rea* is

transferred from the injury contemplated to the injury actually committed. Thirdly, intention to kill without selecting any particular victim. This is known as ' Universal Malice ' and is recognised by Blackstone (4 Commentaries 200). Fourthly, there is intention to hurt only but by means of an act intrinsically dangerous to life. The classic case is that of *Rex* v. *Holloway* (1628, K. S. C. 103); here a park-keeper tied a trespasser to the tail of a horse and proceeded to beat him—the horse ran off and killed the boy. Fifthly, intention to do an act intrinsically dangerous in sheer rashness, without intention either to hurt or to kill, but which in fact causes death *e. g.* firing a haystack on which a person is sleeping. Sixthly, intention to commit any felony which in fact results in killing someone by accident. Thus a man who shoots at a fowl intending to steal it, *i.e.*, intending to commit the felony of larceny, and who kills a bystander by accident, is guilty of murder (Foster's Crown Law, 258). But modern judges have doubted the correctness of the fifth and sixth rules, although well supported by old authorities, ever since Sir James Fitzjames Stephen's criticism of them in *Regina* v. *Leon Serne* (1887, 16 Cox 311).

It will be seen, in the first place that the third of these cases, that of ' Universal Malice ' covers the offence of firing into a crowd with a pistol. Again, evidence of an intention to kill is not in English law necessary, no such intention is necessary in case 4, which is certainly still law, or in cases 5 and 6 which are probably so. Lastly, ' gross recklessness ' in the firing of a pistol would, in English law, have constituted ' malice aforethought ' by virtue of the fifth rule. It would seem, then, that the English law—with its doctrine of constructive murder—is much harsher than the Scots.—*Ibid.*

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Mr. Justice Darling contributes to the September number of the *Cornhill Magazine* a poetical tribute to the memory of Mr. Alfred Lyttelton. The sonnet, which is entitled ' Alfred Lyttleton,' begins :—

Alfred, we erst as Summer Circuit came,
By idling Wye, or Severn's haunted shore,
Roamed with such rare forensic friends as more
Of leisure than of learning had.

It was to the same magazine that Mr. Justice Darling contributed his poem on the death of Mr. Justice Talfourd, called " On the Circuit Circuit.'—*Ibid.*

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Professor Ludwig Von Bar.—Professor Ludwig Von Bar the distinguished authority on international law, whose death is announced was born in Hanover in 1835, and after teaching for many years in the University of Gottingen published in 1859 his first book 'Zur Lehre von Versuch und Teilnahme an Verbrechen.' His famous text-book on international civil and penal law was published in 1892. The last twenty years of his life were devoted to two objects—the reform of the German penal and civil code, a subject on which he wrote many important books and the cause of international arbitration, with which his name is so closely associated. He was a member of the International Arbitration Court of The Hague and was for a long time president of the Institute de Droit International. He received from the Universities of Cambridge and Oxford the honorary degree of LL. D., and he was among the eminent jurists who attended the recent meeting of the International Law at Oxford.—*Ibid.*

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LORD HALDANE'S ADDRESS.

'A STUDY IN LAW AND ETHICS.'

The Lord Chancellor attended the meeting of the American Bar Association at Montreal on Monday, and delivered an address on 'Higher Nationality: a Study in Law and Ethics.' Chief Justice White, of the United States Supreme Court, occupied the chair, and among those present were Mr. Taft (ex-President of the United States); Mr. Joseph Choate (ex-Ambassadar to Great Britain); the Right Hon. Robert Borden (Prime Minister of Canada); His Excellency Sir Charles Fitzpatrick (Administrator of Canada in the absence of the Duke of Connaught); Maitre Labori, of the Paris Bar; the Hon. C.J. Doherty (Canadian Minister of Justice): Senator Elihu Root; and Mr. J. E. Martin (Batonnier of the Montreal Bar Association).

LORD HALDANE, after expressing the pleasure with which he found himself 'among his fellow-lawyers of the New World,' read the following message from the King:—'I have given my Lord Chancellor permission to cross the seas, so that he may address the meeting at Montreal. I have asked him to convey from me to that great meeting of the lawyers of the United States and of Canada my best wishes for its success. I entertain the hope that the deliberations of the distinguished men of both countries who are to assemble at Montreal may add yet further to the esteem and good-will which the people of the United States and of Canada and the United Kingdom have for each other.' The King's message (said the Lord

Chancellor) forms a text for what I have to say, and I propose in the first place to turn to the reasons which make me think that the class to which you and I belong has a peculiar and extensive responsibility as regards the future relations of the three countries. But these reasons turn on the position which Courts of Law hold in Anglo-Saxon constitutions, and before I enter on them I must recall to you the character of the tradition that tends to fashion a common mind in you and me as members of a profession that has exercised a profound influence on Anglo-Saxon society. It is not difficult in an assemblage of lawyers such as we are to realise the process by which our customary habits of thought have come into being and bind us together. The spirit of the jurisprudence which is ours, of the system which we apply to the regulation of human affairs in Canada, in the United States, and in Great Britain alike, is different from that which obtains in other countries. It is its very peculiarity that lends to it its potency.

JUDGE-MADE LAW.

I read the other day the reflections of a foreign thinker on what seemed to him the barbarism of the entire system of English jurisprudence, in its essence judge-made and not based on the scientific foundation of a code. I do not wonder at such reflections. There is a gulf fixed between the method of a code and such procedure as that of Chief Justice Holt in *Coggs* v. *Bernard*, of Chief Justice Pratt in *Armory* v. *Delamirie*, and of Lord Mansfield when he defined the count for money had and received. A stranger to the spirit of the law as it was evolved through centuries in England will always find its history a curious one. Looking first at the early English common law, its most striking feature is the enormous extent to which its founders concerned themselves with remedies before settling the substantive rules for breach of which the remedies were required. Nowhere else, unless perhaps in the law of ancient Rome, do we see such a spectacle of legal writs making legal rights. Of the system of the common law there is a saying of Mr. Justice Wendell Holmes which is profoundly true :—'The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intentions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.' As the distin-

guished writer whom I have quoted tells us, we cannot, without the closest application of the historical method, comprehend the genesis and evolution of the English common law. Its paradox is that in its beginnings the forms of action came before the substance. It is in the history of English remedies that we have to study the growth of rights. I recall a notable sentence in one of Sir Henry Maine's books. 'So great,' he declares, 'is the ascendency of the law of actions in the infancy of Courts of Justice that substantive law has at first the look of being gradually secreted in the interstices of procedure.' I will add to his observation this: that all our reforms notwithstanding, the dead hands of the old forms of action still rest firmly upon us. In logic the substantive conceptions ought of course to have preceded these forms. But the historical sequence has been different, for reasons with which every competent student of early English history is familiar. The phenomenon is no uncommon one. The Time Spirit and the Spirit of Logical Form do not always, in a world where the contingent is ever obtruding itself, travel hand in hand. The germs of substantive law were indeed present as potential forces from the beginning, but they did not grow into life until later on. And therefore forms of action have thrust themselves forward with undue prominence. That is why the understanding of our law is, even for the practitioner of to-day, inseparable from knowledge of its history. As with the common law so it is with equity. To know the principles of equity is to know the history of the Courts in which it has been administered, and especially the history of the office which at present I chance myself to hold. Between law and equity there is no other true line of demarcation. . . . It is by no accident that among Anglo-Saxon lawyers the law does not assume the form of codes, but is largely judge-made. We have statutory codes for portions of the field which we have to cover. But these statutory codes come not at the beginning but at the end. For the most part the law has already been made by those who practise it before the codes embody it. Such codes with us arrive only with the close of the day, after its heat and burden have been borne and when the journey is already near its end.

LAWYERS AND PUBLIC AFFAIRS.

I have spoken of a spirit and of traditions which have been apparent in English law. But they have made their influence felt elsewhere. My judicial colleagues in the province of Quebec administer a system which is partly embodied in a great modern code and partly depends on old French law of the period of Louis XIV. They apply, moreover, a good deal of the public and commercial law

of England. The relation of the code to these systems has given rise to some controversies. What I have gathered, however, when sitting in the Judicial Committee of the Privy Council, is that a spirit not very different from that of the English lawyers has prevailed in Quebec. The influence of the Judges in moulding the law, and of legal opinion in fashioning the shape which it should take, seem to me to have been hardly less apparent in Quebec than elsewhere in Canada. Indeed, the several systems of our group of nations, however these systems have originated, everywhere show a similar spirit and disclose the power of our lawyers in creating and developing the law as well as in changing it—a power which has been more exercised outside the Legislature than within it. It is surely because the lawyers of the New World have an influence so potent and so easily wielded that they have been able to use it copiously in a wider field of public affairs than that of mere jurisprudence. It is very striking to the observer to see how many of the names of those who have controlled the currents of public opinion in the United States and Canada alike have been the names of famous lawyers. I think this has been so partly because the tradition and spirit of the law were always what I have described and different from that on the Continent of Europe. But it has also been so because, in consequence of that tradition and spirit, the vocation of the lawyer has not, as on the Continent of Europe, been that of a segregated profession of interpreters, but a vocation which has placed him at the very heart of affairs. In the United Kingdom this has happened in the same fashion, yet hardly to so great an extent, because there has been competition of other and powerful classes whose tradition has been to devote their lives to a Parliamentary career. But in the case of all three nations it is profoundly true that, as was said by the present President of the United States in 1910, in an address delivered to this very association, 'the country must find lawyers of the right sort and the old spirit to advise it, or it must stumble through a very chaos of blind experiment.' 'It never,' he went on to add, 'needed lawyers who are also statesmen more than it needs them now—needs them in its Courts, in its Legislatures, in its seats of executive authority—lawyers who can think in the terms of society itself.' This at least is evident, that, if you and I belong to a great calling, it is a calling in which we have a great responsibility. We can do much to influence opinion, and the history of our law and the character of our tradition render it easy for us to attain to that unity in habit of thought and sentiment which is the first condition of combined action.

THE TRIBUNAL OF CONSCIENCE.

Besides the rules and sanctions which belong to law and legality there are other rules with a different kind of sanction which also influence conduct. The tribunal of conscience is a private one and its jurisdiction is limited to the individual whose conscience it is. The moral rules enjoined by the private conscience may be the very highest of all. But they are enforced only by an inward and private tribunal. Their sanction is subjective, and not binding in the same way on all men. The very loftiness of the motive which makes a man love his neighbour more than himself, or sell all his goods in order that he may obey a great and inward call, renders that motive in the highest cases incapable of being made a rule of universal application in any positive form. And so it was that the foundation on which one of the greatest of modern moralists, Immanuel Kant, sought to base his ethical system had to be revised by his successors. For it was found to reduce itself to little more than a negative and, therefore, barren obligation to act at all times from maxims fit for law universal, maxims which, because merely negative, turned out to be inadequate as guides through the field of daily conduct. In point of fact, that field is covered in the case of the citizen only to a small extent by law and legality on the one hand and by the dictates of the individual conscience on the other.

'SITTLICHKEIT.'

There is a more extensive system of guidance which regulates conduct, and which differs from both in its character and sanction. It applies, like law, to all the members of a society alike, without distinction of persons. It resembles the morality of conscience in that it is enforced by no legal compulsion. In the English language we have no name for it, and this is unfortunate, for the lack of a distinctive name has occasioned confusion both of thought and of expression. German writers have, however, marked out the system to which I refer and have given it the name of 'Sittlichkeit.' . . . 'Sittlichkeit' is the system of habitual or customary conduct, ethical rather than legal, which embraces all those obligations of the citizen which it is 'bad form' or 'not the thing' to disregard. Indeed, regard for these obligations is frequently enjoined merely by the social penalty of being 'cut' or looked on askance. And yet the system is so generally accepted and is held in so high regard that no one can venture to disregard it without in some way suffering at the hands of his neighbours for so doing. If a man maltreats his wife and children, or habitually jostles his fellow-citizen in the street, or does things flagrantly selfish or in bad taste, he is pretty sure to find

himself in a minority and the worse off in the end. But not only does it not pay to do these things, but the decent man does not wish to do them. A feeling analogous to what arises from the dictates of his more private and individual conscience restrains him. He finds himself so restrained in the ordinary affairs of daily life. But he is guided in his conduct by no mere inward feeling, as in the case of conscience. Conscience and, for that matter, law overlap parts of the sphere of social obligation about which I am speaking. A rule of conduct may, indeed, appear in more than one sphere, and may consequently have a two-fold sanction. But the guide to which the citizen mostly looks is just the standard recognized by the community—a community made up mainly of those fellow-citizens whose good opinion he respects and desires to have. He has everywhere round him an object-lesson in the conduct of decent people towards each other and towards the community to which they belong. Without such conduct and the restraint which it imposes there could be no tolerable social life, and real freedom from interference would not be enjoyed. It is the instinctive sense of what to do and what not to do in daily life and behaviour that is the source of liberty and ease. And it is this instinctive sense of obligation that is the chief foundation of society, Its reality takes objective shape and displays itself in family life and in our other civic and social institutions. . . .

The system of ethical habit in a community is of a dominating character, for the decision and influence of the whole community is embodied in that social habit. Because such conduct is systematic and covers the whole of the field of society, the individual will is closely related by it to the will and spirit of the community. And out of this relation arises the power of adequately controlling the conduct of the individual. If this power fails or becomes weak, the community degenerates and may fall to pieces. Different nations excel in their 'Sittlichkeit' in different fashions. The spirit of the community and its ideals may vary greatly. There may be a low level of 'Sittlichkeit,' and we have the spectacle of nations which have even degenerated in this respect. It may possibly conflict with law and morality, as in the case of the duel. But when its level is high in a nation we admire the system, for we see it not only guiding a people and binding them together for national effort, but affording the most real freedom of thought and action for those who in daily life habitually act in harmony with the general will. Thus we have in the case of a community, be it the city or be it the State, an illustration of a sanction which is sufficient to compel observance of a

rule without any question of the application of force. This kind of sanction may be of a highly-compelling quality, and it often extends so far as to make the individual prefer the good of the community to his own. The development of many of our social institutions, of our hospitals, of our universities, and of other establishments of the kind shows the extent to which it reaches and is powerful. . . . We find within the single State the evidence of a sanction which is less than legal but more than merely moral, and which is sufficient, in the vast majority of the events of daily life, to secure observance of general standards of conduct without any question of resort to force. If this is so within a nation, can it be so as between nations?

A GENERAL WILL.

Can nations form a group or community among themselves within which a habit of looking to common ideals may grow up sufficiently strong to develop a general will, and to make the binding power of these ideals a reliable sanction for their obligations to each other? There is, I think, nothing in the real nature of nationality that precludes such a possibility. A famous student of history has bequeathed to us a definition of nationality which is worth attention. I refer to Earnest Renan, of whom George Meredith once said to me, while the great French critic was still living, that there was more in his head than in any other head in Europe. Renan tells us that 'Man is enslaved neither by his race, nor by his language, nor by his religion, nor by the course of rivers, nor by the direction of mountain ranges. A great aggregation of men, sane of mind and warm of heart, creates a moral consciousness which is called a nation.' Another cute critic of life, Matthew Arnold, citing one still greater than himself, draws what is in effect a deduction from the same proposition. 'Let us,' he says, 'conceive of the whole group of civilised nations as being, for intellectual and spiritual purposes, one great confederation, bound to a joint action and working towards a common result; a confederation whose members have a due knowledge both of the past, out of which they all proceed, and of each other. This was the ideal of Goethe, and it is an ideal which will impose itself upon the thoughts of our modern societies more and more.' But while I admire the faith of Renan and Arnold and Goethe in what they all three believed to be the future of humanity, there is a long road yet to be travelled before what they hoped for can be fully accomplished. Grotius concludes his great book on War and Peace with a noble prayer:—'May God write,' he says, 'these lessons—He Who alone can—on the hearts of all those who have the affairs of Christendom in their hands. And may

He give to those persons a mind fitted to understand and to respect rights, human and divine, and lead them to recollect always that the ministration committed to them is no less than this, that they are the Governors of Man, a creature most dear to God.'

THE WORLD AND WAR.

The prayer of Grotius has not yet been fulfilled, nor do recent events point to the fulfilment as being near. The world is probably a long way off from the abolition of armaments and the peril of war. For habits of mind which can be sufficiently strong with a single people can hardly be as strong between nations. There does not exist the same extent of common interest, of common purpose, and of common tradition. And yet the tendency, even as between nations that stand in no special relation to each other, to develop such a habit of mind is in our time becoming recognisable. There are signs that the best people in the best nations are ceasing to wish to live in a world of mere claims and to proclaim on every occasion 'Our country, right or wrong.' There is growing up a disposition to believe that it is good, not only for all men but for all nations, to consider their neighbours' point of view as well as their own. There is apparent at least a tendency to seek for a higher standard of ideals in international relations. The barbarism which once looked to conquest and the waging of successful war as the main object of statesmanship seems as though it were passing away. There have been established rules of international law which already govern the conduct of war itself, and are generally observed as binding by all civilised people, with the result that the cruelties of war have been lessened. If practice fails short of theory, at least there is to-day little effective challenge of the broad principle that a nation has as regards its neighbours duties as well as rights. It is this spirit that may develop as time goes on into a full international 'Sittlichkeit.' But such development is certainly still easier and more hopeful in the case of nations with some special relation than it is within a mere aggregate of nations. At times a common interest among nations with special relations of the kind I am thinking of gives birth to a social habit of thought and action which, in the end crystallises into a treaty, a treaty which in its turn stimulates the process that gave it birth. We see this in the case of Germany and Austria and in that of France and Russia. Sometimes a friendly relationship grows up without crystallising into a general treaty. Such has been the case between my own country and France. We have no convention excepting one confined to the settlement of old controversies over

specific subjects—a convention which has nothing to do with war. None the less, since in that convention there was embodied the testimony of willingness to give as well as to take, and to be mutually understanding and helpful, there has arisen between France and England a new kind of feeling which forms a real tie. It is still young and it may stand still or diminish. But equally well it may advance and grow and it is earnestly to be hoped that it will do so. Recent events in Europe and the way in which the Great Powers have worked together to preserve the peace of Europe, as if forming one community, point to the ethical possibilities of the group system as deserving of close study by both statesmen and students. The 'Sittlichkeit' which can develop itself between the peoples of even a loosely connected group seems to promise a sanction for international obligation which has not hitherto so far as I know attracted attention in connection with international law. But if the group system deserves attention in the cases referred to how much more does it call for attention in another and far more striking case.

Anglo-American Peace.

In the year which is approaching a century will have passed since the United States and the people of Canada and Great Britain terminated a great war by the peace of Ghent. On both sides the combatants felt that war to be unnatural and one that should never have commenced. And now we have lived for nearly a hundred years, not only in peace, but also, I think, in process of coming to a deepening and yet more complete understanding of each other, and to the possession of common ends and ideals—ends and ideals which are natural to the Anglo-Saxon group and to that group alone. It seems to me that within our community there is growing an ethical feeling which has something approaching to the binding quality of which I have been speaking. Men may violate the obligations which that feeling suggests but by a vast number of our respective citizens it would not be accounted decent to do so. For the nations in such a group as ours to violate these obligations would be as if respectable neighbours should fall to blows because of a difference of opinion. We may disagree on specific points, and we probably shall, but the differences should be settled in the spirit and in the manner in which citizens usually settle their differences. The new attitude which is growing up has changed many things and made much that once happened no longer likely to recur. I am concerned when I come across things that were written about America by British novelists only 50 years ago, and I doubt not

that there are some things in the American literature of days gone past which many here would wish to have been without. But now that sort of writing is happily over, and we are realising more and more the significance of our joint tradition and of the common interests which are ours. It is a splendid example to the world that Canada and the United States should have nearly 4,000 miles of frontier practically unfortified. As an ex-War Minister who knows what a saving in unproductive expenditure this means, I fervently hope that it may never be otherwise. But it is not merely in external results that the pursuit of a growing common ideal shows itself when such an ideal is really in men's minds. It transforms the spirit in which we regard each other, and it gives us faith in each other :—

> Why, what but faith do we abhor
> And idolise each other for—
> Faith in our evil or our good,
> Which is or is not understood
> Aright by those we love or those
> We hate, thence called our friends or foes.

I think that for the future of the relations between the United States on the one hand and Canada and Great Britain on the other those who are assembled in this great meeting have their own special responsibility. We who are lawyers of the New World and of the Old Mother Country possess, as I have said to you, a tradition which is distinctive and peculiarly our own. We have been taught to look on our system of justice not as something that waits to be embodied in abstract codes before it can be said to exist, but as what we ourselves are progressively and co-operatively evolving. And our power of influence is not confined to the securing of municipal justice. We play a large part in public affairs and we influence our fellow-men in questions which go far beyond the province of the law, and which extend in the relations of society to that 'Sittlichkeit' of which I have spoken. In this region we exert much control. If then, there is to grow up among the nations of our group, and between that group and the rest of civilisation, a yet further development of 'Sittlichkeit' has not our profession special opportunities of influencing opinion which are coupled with a deep responsibility? To me, when I look to the history of our calling in the three countries, it seems that the answer to this question requires no argument and admits of no controversy. It is our very habit of regarding the law and the wider rules of conduct which lie beyond the law as something to be moulded afresh as society develops, and

to be moulded best if we co-operate steadily that gives us an influence perhaps greater than is strictly ours, an influence which may n affairs of the State be potently exercised for good or for evil.

THE ANGLO-SAXON GROUP.

This, then, is why as a lawyer speaking to lawyers, I have a strong sense of responsibility in being present here to-day, and why I believe that many of you share my feeling. A movement is in progress which we, by the character of our calling, as judges and as advocates, have special opportunities to further. The sphere of our action has its limits, but at least it is given to us as a body to be the counsellors of our fellow-citizens in public and in private life alike. I have before my mind the words which I have already quoted of the present President of the United States, when he spoke of 'lawyers who can think in the terms of society itself.' And I believe that if, in the language of yet another President, in the famous words of Lincoln, we as a body in our minds and hearts 'highly resolve' to work for the general recognition by society of the binding character of international duties and rights as they arise within the Anglo-Saxon group, we shall not resolve in vain. A mere common desire may seem an intangible instrument and yet, intangible as it is it may be enough to form the beginning of what in the end can make the whole difference. Ideas have hands and feet, and the ideas of a congress such as this may affect public opinion deeply. It is easy to fail to realise how much an occasion like the assemblage in Montreal of the American Bar Association, on the eve of a great international centenary, can be made to mean and it is easy to let such an occasion pass with a too timid modesty. Should we let it pass now I think a real opportunity for doing good will just thereby have been missed by you and me. We need say nothing; we need pass no cut-and-dried resolution. It is the spirit and not the letter that is the one thing needful.

NEW PRINCIPLES AND IDEALS.

I do not apologise for having trespassed on the time and attention of this remarkable meeting for so long or for urging what may seem to belong more to ethics than to law. We are bound to search after fresh principles if we desire to find firm foundations for a progressive practical life. It is the absence of a clear conception of principle that occasions some at least of the obscurities and perplexities that beset us in the giving of counsel and in following it. On the other hand, it is futile to delay action until reflection has cleared up all our difficulties. If we would learn to swim we must first enter the water. We must not refuse to begin our journey

until the whole of the road we may have to travel lies mapped out before us. A great thinker declared that it is not philosophy which first gives us the truth that lies to hand around us, and that mankind has not to wait for philosophy in order to be conscious of this truth. Plain John Locke put the same thing in more homely words when he said that 'God has not been so sparing to men to make them two-legged creatures, and left it to Aristotle to make them rational.' Yet the reflective spirit does help, not by furnishing us with dogmas or final conclusions, or even with lines of action, that are always definite, but by the insight which it gives, an insight that develops in us what Plato called the 'synoptic mind'—the mind that enables us to see things steadily as well as to see them whole. And now I have expressed what I had in my mind. Your welcome to me has been indeed a generous one, and I shall carry the memory of it back over the Atlantic. But the occasion has seemed to me significant of something beyond even its splendid hospitality. I have interpreted it, and I think not wrongly, as the symbol of a desire that extends beyond the limits of this assemblage. I mean the desire that we should steadily direct our thoughts to how we can draw into closest harmony the nations of a race in which all of us have a common pride. If that be now a far-spread inclination, then indeed may the people of three great countries say to Jerusalem, 'Thou shalt be built,' and to the Temple, 'Thy foundation shall be laid.'—*Ibid.*

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Judges and the Democracy.—No conference of trade unionists is unfortunately, now complete without an attack upon the judges, and the Trade Unions Congress which has just completed its deliberations at Manchester was no exception to the rule. Some of the members of the Congress complained that the summings-up of certain judges in trade-union cases have been biassed. Well, that is invariably the attitude of the litigant who is ill-tempered as well as unsuccessful, and the criticism which a disappointed suitor passes upon the Bench is usually as groundless as his cause of action. These attacks upon the Bench, however, raise a larger question. In what way would the Labour agitators who indulge in these flippant criticisms of our independent judges like to see our judicial system altered ? The address which Mr. Taft delivered before the American Bar Association at Montreal is scarcely calculated to make them desire the adoption in England of the American system of an elective judiciary. The ex-President of the United States, who can hardly be said to be wanting in democratic sympathies, boldly

'avowed himself an opponent of the American system of electing State judges and in favour of the British system of life tenure.' It is not merely that the system of election impairs the dignity and authority of the Bench. 'Appointed judges,' says Mr. Taft, who speaks both as a jurist and a statesman, 'are more discriminating and more responsive to the needs of the community than those chosen directly by the electorate, because the Executive is better qualified to select the greatest experts.' Do the critics of the Bench desire judges to be popular in the vulgar sense? It is quite true, as Mr. Taft says, that judges can be really popular without being appointed by popular election—popular, that is, in the sense of commanding, not the regard of any particular class, but the confidence of the community as a whole. 'Gentlemen, you will forgive me,' said Mr. Justice Cresswell when a murmur of applause came from the jury-box while he was addressing its occupants. 'I daresay you meant it very kindly; but, believe me, the administration of justice is in great danger when applause in Court becomes grateful to a judge's ears.' The administration of justice will probably be in even greater danger whenever the names of judges are acclaimed at the Trade Unions Congress. The way in which the Workmen's Compensation Act has been administered by every section of the Judiciary, from the County Court to the House of Lords, is sufficient to show that the judges have no bias against the working classes, while the way in which certain trade-union disputes have been dealt with merely indicates that the Bench recognises that its duty is to the whole community and not to a class.—*Ibid.*

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Law and Politics.—Lord Loreburn's pronouncement on the government of Ireland question, which his call for a conference of all parties to secure a settlement by consent, or failing that a clearing of the issues, will remain historic whether it achieves its immediate purpose or not. In the midst of the general groping and doubt, it reveals, as with a flash, the judicial mind in operation and the value of the lawyer in politics. It is a striking exemplification by the ex-Lord Chancellor of the lesson conveyed by his successor through the American Bar Association to the legal world beyond the seas, that 'it is our very habit of regarding the law as something to be moulded afresh as society develops, *and to be moulded best if we co-operate steadily,* that gives us an influence which may in affairs of the State be potently exercised for good or for evil.' As Lord Haldane characteristically observed, the reflective spirit which the vocation of the lawyer demands does help, by the insight which

it gives, to develope what Plato called the 'synoptic mind'—the mind that enables us to see things steadily and to see them whole. There is something more than this, too, in the vocation of the lawyer as practised in countries which have come under the English influence—it is no segregated profession of interpreters of the law, but a calling which has placed him at the very heart of affairs, one which compels him 'to think in the terms of society itself.' The present President of the United States, to whom we owe that phrase, saw clearly enough when he said to the same Association, 'the country must find lawyers of the right sort, and the old spirit to advise it, or it must stumble through a very chaos of blind experiment.' In Lord Loreburn we have one of those lawyers, and in the light he has thrown on a difficult situation he has shed lustre on the profession to which he belongs by the application to a natural crisis of those very qualities which the law developes.—*Ibid.*

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The International Law Association's Conference.—The International Law Association is holding its biennial conference at Madrid during the first week in October, and though there is something pathetic about the meeting because of the assassination of the Premier, Senor Canalejas, who was to have been its president, the proceedings promise to be more than usually interesting. Spain has shown herself anxious of recent years to further the study of international law by every means in her power. In 1911 the Institut de Droit International held its conference at Madrid; and on this occasion the late Minister for Foreign Affairs will preside over the gathering. Spanish America has already contributed several notable names to the annals of international law. Gallo, the author of one of the most famous foreign treatises on the subject, and Dr. Drago, who has played a prominent part in the Hague tribunal, both came from the Argentine Republic and the part which the Central and South American States have taken in the development of international relations is one of the most remarkable features of the world movement. This Conference has, therefore, a particular interest in drawing into the deliberations of the judges and lawyers of the chief European countries the representatives of Spain and the countries which derive their legal systems from her. Among the subjects of special interest which appear on the programme are 'The Effect of War on Private Contracts,' upon which Mr. Leslie Scott, among others, is to read a paper; 'The Law of Avitation' and 'Comparative Civil Procedure and Evidence,' on which respectively Mr. Perowne and Mr. Todd will present reports; 'Inter-

national Labour Laws,' to be dealt with by Mr. Scott-Duckers; and 'Jurisdiction in Divorce,' on which Mr. Justice Phillimore will speak with special authority. There are proposals on matters which have become hardy biennials at the conferences of the Association, such as 'General Average,' 'International Arbitration,' and 'Extradition.' Progress towards an international agreement on all these questions is slow; but the conferences of bodies such as the Institut and the Association do prepare the way for the action of Governments, and serve, therefore, a special purpose in the advancement of law and morality.—*Ibid.*

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The Defence of Poor Prisoners.—The legislation of New Zealand is generally so much in advance of that of the Mother Country that it is interesting to find that the defence of poor prisoners only received attention there at the end of last year. The regulations putting the Act into force were published recently in the *New Zealand Gazette.* In order to obtain the benefit of the Act the prisoner must show that he is not able to borrow the money for his defence, or to obtain such money from his relatives or friends, and that he is not able to procure such legal aid without prepayment of the costs. The inquiry into the means of the prisoner is to be made by the Magistrate in private. If the prisoner has been represented by counsel in the preliminary proceedings before the Magistrates that fact is *prima facie* evidence that the accused is not without means within the meaning of the statutory regulations. Before granting a certificate for legal aid the magistrate must be satisfied that the prisoner has a defence which may reasonably and properly be set up upon his trial. The counsel is to be chosen by the judge from a list kept for that purpose. The Registrar of every Registry of the Supreme Court is to request the Council of the Law Society of the district wherein the Registry is situated from time to time to ascertain and to forward to him the names of persons who, in the opinion of the Council, are fit and proper and who are qualified and willing to act as counsel for accused persons. The list is to be approved by the judge, who may remove or add names. The fees to be paid to counsel for the defence are to be the same as those allowed to the local Crown solicitor for the prosecution of the same person on the same charge. Provision is also made for the expenses of witnesses required by the defence. Whatever may be said of it from other points of view, here is, at all events, a simple and intelligible scheme which may be deserving of consideration on the amendment of our own inadequate rules.—*Ibid.*

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RESUMPTION OF COHABITATION

Two important points of Separation Law which are not usually known were acted upon by the Kingston Justices in the case of Alfred W. J. Pasely this week (September 15). A dissenting minister had been separated from his wife by a magisterial order which directed him to pay alimony. Subsequently, the spouses resumed cohabitation, but the husband did not apply to the Court to annul the separation order. He ceased, however, to pay the weekly contribution ordered, and some time later his wife became chargeable to the Union. Two summonses, one criminal and the other civil, were taken out against him. The criminal summons charged him under the Vagrancy Act, 1824, S. 3, with neglecting his family, so that it became chargeable on the Union; it was held recently in *Shaftesbury Union* v. *Brockway* (77 J. P. 120) that the existence of a separation order does not prevent a conviction for the non-maintenance of the wife under the Vagrancy Act. The civil summons was for arrears under the separation order. The question as to whether such an order is automatically discharged by resumption of cohabitation was considered by the Divisional Court in *Mathews* v. *Mathews* [1912] (3 K. B. 91); where Lord Alverstone and Mr. Justice Pickford were of opinion that it was not automatically discharged, whereas Mr. Justice Avory took the view that it was terminated by subsequent cohabitation without the necessity of an application to the Bench. These judicial opinions, however, are only *obiter dicta*, since that case was in fact decided on a different ground. Stone's Justices' Manual takes the view of Mr. Justice Avory and advises justices to exercise their discretion in favour of the husband in such a case. The Kingston Bench, however, elected to follow the *obiter dicta* expressed by the majority of the Court, and made an order of imprisonment in default of the arrears. Upon the criminal summons, also, they convicted the defendant.—*Ibid.*

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The New Supreme Court Rules.—We publish in another column the full text of the new Rules which are to come into force next month, indicating by italics as nearly as possible—some of the Rules are only the old ones re-drafted—the alterations in the existing practice. The Rules deal with three subjects: (1) Payment into Court (Order XXII); (2) Applications for new trial (Order XXXIX); and (3) Time for appealing (Order LVIII). Under the first head an omission to which we drew attention when the draft Rules were gazetted in July has been made good—the old Rules

1 to 11 of Order XXII. are formally annulled and the present Rules take their place. The only alterations are in Rules 6, 7, 9, and 11, with the addition of a new Rule (8A) The main effect of the alterations and additions is that (*a*) where money has been paid into Court with a denial of liability, there may be a set-off of the damages or costs allowed to either party before payment out is ordered; (*b*) a plaintiff who does not accept money paid in with a denial of liability but proceeds to trial and does not recover more than the sum paid in, is not, ordinarily, to be allowed his costs of the issue as to liability; (*c*) when there are joint defendants and money is paid in by one or some of them, if the plaintiff accepts it all further proceedings on the joint cause of action are to be stayed and the Court may make such order as may appear just as to the costs of the other defendants; and a similar discretion as to the costs of the co-defendants may be exercised if the plaintiff proceeds to trial and recovers less than the amount paid in. In the Rules as to applications for new trial under Order XXXIX, the alterations are mainly of a drafting character, but an important amendment is that contained in Rule 4, by which the time for service of the notice of motion for new trial is extended in all cases from eight days after the trial in London or Middlesex, or seven days after the last day of the sittings elsewhere, to six weeks after the trial or, where there has been an adjournment for further consideration, after the judgment. In practice the old rule, with its short terms for appeal notices, was applied only to motions for new trial of cases tried with a jury, and cases tried by a judge without a jury were treated as ordinary appeals under Order LVIII., Rule 15, which allows three months for all final appeals. This excessive period is reduced by the new Rules to the same term of six weeks which applies to the other cases, and so something more of consistency is introduced into the practice.—*Ibid.*

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Witnesses' Recognizances.—A lacuna in our law of procedure which causes much embarrassment in practice is strikingly illustrated by a point which arose at the Lancaster Petty Sessions last week. A prisoner accused of larceny and false pretences was committed for trial at Quarter Sessions, and in accordance with law the witnesses for the prosecution were bound over in their own recognizances to appear at the trial to give evidence. One of these, an American artisan temporarily in this country and about to return to America at once, declined at first to be bound over. He would lose his job in America as the result of the delay in returning, he said; and the

provision of lodging in the meantime by the Crown was not an equivalent. Ultimately, of course, he had to enter into the recognizances, since refusal to do so would have compelled the Bench to commit him to prison until the trial; for the commitment of a case to Quarter Sessions or Assizes involves two things: the prisoner is committed to prison unless he gives bail, and so are the witnesses unless they give their own bail by entering into recognizances. Indeed, until recently, the witnesses were compelled to find security for their appearance at the trial and in default were committed to prison. Ludicrous results often followed in practice: Serjeant Ballantine mentions one in his 'Experiences.' A Turk visiting London was robbed by a man in Farringdon Street; the magistrate committed both to prison pending trial, the Turk as prosecutor and witness, the robber as defendant. The latter found bail and promptly decamped; the unhappy Turk had no friends, could find no security, and so remained in prison until, after numerous adjournments, the Treasury gave up hopes of recapturing the robber and consented to the release of the prosecutor's recognizances. While abuses of this kind no longer occur, it is certainly a hardship that a witness about to go abroad should be detained in this country to appear at a trial for petty larceny. At present, however, this is necessary, since the depositions taken before the magistrate can only be used in lieu of the witness himself when the latter either dies, or is too ill to attend, or is induced by the prisoner to flee the country. In the case of all trials not involving capital punishment, it is suggested, any bench of justices should be empowered in a proper case, upon application by the witness, to certify that the latter has been compelled by urgent reasons of necessity to go abroad, in which case his deposition should be made available at the trial.—*Ibid.*

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Week-end Tickets.—A point of considerable importance to the travelling public, although the amount at stake was only one shilling and sixpence, came up on Tuesday in the City of London Court (*Cohen* v. *London, Brighton & South Coast Railway Company*). The plaintiff took a week-end ticket to Brighton from London Bridge on a Friday, and desired to return on Saturday, but was not allowed to do so without payment of the excess fare. He paid that sum under protest and now sued to recover it. The defence of the company was that the ticket was not available for return on Saturday; the inward half could only be sued on Sunday, Monday, or Tuesday. The condition, in fact, was actually printed on the face of the ticket; but the plaintiff contended that, as his attention

had not been called to the condition when he took his ticket, the condition was not binding upon him. He seems to have advanced two other arguments: First, that such a limitation of the user is inconsistent with the main purpose of the ticket, namely, its availability for week-enders, and is, therefore, void on the well-known principle that a condition repugnant to the essential object of a contract is invalid; secondly, that even if not inconsistent and void for repugnancy, nevertheless such a condition was 'unreasonable' and on that ground void. These two latter arguments do not seem very convincing; but the purely technical argument that notice of the conditions must be given to the ticket-holder in an unmistakeable manner has more to be said for it. It is quite clear, of course, that a person who takes a ticket with conditions upon it, of which clear notice is given him, is bound by them even if he does not read the document (per Stephen, J., in *Watkins* v. *Rymill* [1882].) But such notice must comply with certain rules. Either (1) the ticket-holder's attention must be expressly called to it; or (2) the condition must be on the face of the contract, or (3) it must be upon some document connected with the ticket to which attention is unmistakeably called upon the face of the ticket (*Henderson* v. *Stevenson* [1878].) Again, the sufficiency of the notice in the circumstances is a question of fact, whereas the reasonableness of the condition is a question of law (*Richardson* v. *Rowntre* [1904]). In the present case the deputy-Registrar held that the notice was not sufficient, and that, therefore, the condition was not binding upon the passenger—a conclusion which we think, is not entirely free from doubt.—*Ibid.*

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INTERNATIONAL LAW ASSOCIATION

Among the chief business of the International Law Association, which began its Congress in Madrid on Wednesday, is the consideration of the Reports of three Committees appointed at previous meetings to deal respectively with International Systems of Evidence and Procedure, the Law of Aviation, and Jurisdiction in Divorce. Below will be found the more important portions of the Reports dealing with the two first-named subjects :—

EVIDENCE AND PROCEDURE

The Committee on International Systems of Evidence and Procedure, whose Report is signed by Mr. Ernest Todd, states that in reply to a 'questionnaire' they sent out in November last they received communications from the United States of America, Austria, Belgium, Canada (Quebec), Denmark, France, Germany,

Holland, Italy, Norway, and Spain. The following are some of the questions put by the Committee with their comments upon the answers they received.

TRIAL BY JURY.

Are (*a*) civil cases, (*b*) criminal cases, or (*c*) correctional cases tried with a jury, and is the jury regarded with favour? Of what number is the jury composed, and how is it selected? Has the defendant any right of challenge?

The only country of those named in which all kinds of civil and criminal cases are tried by jury is the United States of America. In the province of Quebec, Canada, in civil and commercial cases where more than S400 is claimed, and in France in cases of compulsory purchase of land, where the amount to be paid to the person to be expropriated has to be assessed, a trial by jury may be had. In all the other eight cases juries may only be summoned in criminal cases, and in Spain this right is limited to very serious cases, *ex. gr.*, sedition, murder, arson, forgery, &c. In eight of the countries the jury consists of twelve persons (reducible in the U. S. A. to six where the matter to be tried is of trivial importance), in the cases of Denmark and Holland no cases are tried by jury, although in the case of Denmark the jury in criminal cases will be introduced by a law taking effect in 1916, whilst in Norway the criminal jury consists of ten. There is in all the nine countries referred to in which they have juries some right of challenge, and the panel is selected either by some public official (like a Sheriff), or by persons deputed for the purpose by the City of County Councils, and the jurymen are selected from residents in the different districts, either townsfolk, land-owners, or peasants. From the replies we have received we gather that the system of trial of criminal cases by jury is approved of in Austria, Belgium, Canada, and France, whilst in Germany it is disliked by lawyers but approved of by the people, and in Denmark and Holland it is looked upon with disfavour. Owing to the prevalence of written instead of verbal proof in most continental codes of civil procedure, the jury appears to us to be unsuitable as the tribunal for the trial of civil cases, and, indeed, its place is supplied to a certain extent by the number of judges who sit for the trial of causes; speaking generally it is only under systems framed upon the English model of civil procedure in which the jury can usefully find a place. Whether it is a desirable institution in all criminal cases must depend so largely upon the sentiments and traditions of the people that we feel we are not justified in expressing an opinion as to the desirability of its uni-

versal application. We wish, however, to point out that in Spain—as has been found to be the case in Ireland in cases with a political aspect—jurors are apt to take a perverted or over lenient view of the crime imputed to the prisoner or of the motives of the prosecution.

THE EXPENSES OF LITIGATION

What is the average cost of an action to recover a sum of money exceeding 50*l*? (1) on a bill of exchange, promissory note, cheque bond or simple contract; (2) on mortgage or (3) to recover possession of real property; (4) to prevent infringement of a patent or copyright; (5) to take or obtain mortgaged property; (6) to restrain the infringement of a right of water, light or air; (7) to recover damages for libel or slander; (8) to obtain a divorce; (9) to upset a will; (10) to recover a sum of 500*l*. on a contract to build a house or other structure; (11) to recover a sum of money exceeding 100*l*. for freight or on the charterparty of a vessel; or (12) for damages for a collision at sea; and state whether such costs would include the fees of the Court, of the *Avoue*, of the advocate, and all other necessary costs if any.

We have only received detailed answers to these questions from Austria and France. In the case of each of the other countries referred to above, our correspondents express a general opinion (except in the case of the U.S.A.) that the cost of litigation does not cause any appreciable dissatisfaction. In France, it will be noticed, that in important and heavy matters the expenses may run as high, in will disputes, as 800*l*., which, so far as our inquiries have enlightened us, is very high indeed for an action conducted on the lines generally ruling upon the Continent; although this figure fades into insignificance by the side of the thousands of pounds of expenses that may have to be incurred in a similar action in England. In all the countries with the exception of Austria and Germany, where the charges are fixed by an *ad valorem* tarift, the cost of litigation is low, a result contributed to largely by the procedure being written instead of oral, by the moderation of the Court fees, and by the extremely low rate of remuneration for their services paid to legal officials, bringing about as it does a low standard of expense in the administration of justice. We express no opinion as to the quality of the justice administered, but so far as our inquiries have enabled us to judge, there is no great complaint under head in any of the European countries with whose procedure this report deals.

THE FEES OF ADVOCATES.

What on an average would be the fee paid to an advocate to plead any of the above cases? (1) in the Court of First Instance; (2) in the Court of Appeal; giving a minimum and maximum. If two or more advocates are employed by the same party what proportional fees do they receive or do they all receive the same?

We have found it extremely difficult to obtain any answers to this question which throw useful light upon the subject. The amount of the fee in each case seems to depend upon a contract between the advocate and client direct, and the factors which go to determine what sum is likely to be fixed are: (1) the importance of the subject matter of the litigation; (2) the eminence of the advocate; and (3) the length and intricacy of the case. In America, France, and Belgium the scale of remuneration appears to be the highest, but in neither of these countries (except perhaps U.S.A.) do the fees in any degree approach the sums which are paid in England. In Austria, Denmark, Holland, Spain, and Norway the fees seem to be exceedingly moderate, whilst those paid in Germany and Italy are a percentage based upon an *ad valorem* charge upon the amount in dispute, a system which appears to give satisfaction.

THE EVIDENCE OF EXPERTS

How is expert or technical evidence given in civil and criminal cases?

England, U.S.A., and Canada appear to be the only countries amongst those which have given us answers to our Questionnaire where the experts are chosen freely by the parties and give their evidence *viva voce* in open court in civil cases. In each of the other nine cases, with the exception of Spain, the experts are appointed by and make their report to the Court, being paid by the Court and not directly by the parties. In Spain they are appointed by the parties, but make their report to the Court in writing. In each of the countries in which evidence is given *viva voce* by experts in civil cases, we find that the length of time consumed and expense involved is out of all proportion to any benefit which is derived from it, and we are of opinion that the simple and cheap method adopted in France and other Continental countries is quite as efficacious as the method whereby the parties appoint and the experts give their evidence *viva voce*, and is very much cheaper and more expeditious, but if the system is to work satisfactorily, the panel of experts must be a very large one, containing the names of

different experts in the multitudinous branches of the different trades or branches of expert work, and they must be chosen by the Court with complete impartiality, having full regard to their special qualifications.

INTERLOCUTORY PROCEEDINGS

How are interlocutory proceedings such as applications in regard to pleadings, taking accounts, injunctions, appointment of receivers, summary judgment in default of defence, &c., dealt with in your courts, and by what official are they dealt with?

In every country except England, it appears that interlocutory applications are dealt with by a judge, generally the judge dealing with and hearing the case. In view of our remarks under question 8, it is of interest to note that in Austria, where the occurrence of interlocutory proceedings is rare, the satisfaction with the working of civil procedure is the greatest. In England, owing to the nature and intricacy of its interlocutory procedure in civil cases, there is an enormous waste of time and money (special officers, called Masters of the Supreme Court, being appointed to deal with it), and if this were limited and what remained simplified, such a reform would go fairly far towards remedying the condition of things of which one hears so much complaint on all hands.

THE PAYMENT OF COSTS

What costs are payable by the losing to the winning party in an ordinary civil or commercial action?

In most of the countries referred to below we find that only bare necessaries, such as court fees, charges as per scale of the avoue, &c., are allowed to the successful litigant against his unsuccessful opponent, and that in each of the countries except Italy the cost incident to employing an advocate falls upon such advocate's own client. In England the burden of costs weighs very heavily on both the unsuccessful and the successful litigant, for although the former generally has to pay 'taxed costs' to the latter, these taxed costs do not cover all the expenses to which the parties are put, and very often by reason of these excess (or solicitor and client) costs the victory is a barren one to the victor and a financial death warrant to the vanquished, a result which ought not to be possible under any reasonable or logical form of procedure. On a review of all the systems which have come under our notice, it appears to us that the fairest and least objectionable is that ruling in Denmark, where in such cases as the Court awards costs to a successful litigant, it does so at the trial and by way of adding a lump sum to the judgment in favour of the successful party.

PROCEDURE IN ARBITRATION

Have you any procedure governing arbitration outside the civil and commercial tribunals? If so, what shortly are its provisions, and how are arbitral awards enforced by the Courts?

It strikes your Committee as very remarkable that in such highly organised commercial countries as U.S.A. and France, there should be no provision made by law for governing procedure in arbitration, and the enforcement of arbitral awards (this defect being shared by them with Denmark and Norway), although in Austria, Belgium, Canada, Germany, Holland, Italy, Spain, and England the fullest provision is made, both for regulating the procedure and enforcing the awards of arbitrators. In Spain, Germany, Austria, Holland, and Italy, the codes of civil procedure provide means whereby arbitral awards may be made as binding as judgments of the Courts, and enforced in the same manner, and this seems to your Committee to be the ideal method of dealing with the subject, provided that sufficient control is kept by the Court over the appointment of the arbitrators procedure followed by them in the course of their dealing with matters brought before them. Your Committee are of opinion that international commerce would be very greatly served if a treaty could be made between all the most important commercial nations of the world for enforcement of arbitral awards of other countries within their respective boundaries, and they are of opinion that inasmuch as there are methods of trial, not depending so much on local law, custom, and tradition as upon the practices of traders, that, if delegates were appointed for the purpose by each nation, that a mutually satisfactory basis of agreement could easily be reached.—*Ibid.*

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WHAT is the meaning of the word "month" was a point considered by Farwell, J., in Bruner v. Moore (1904) 73 L. J., Ch., 377. The general reply would probably be that it means a calendar month, but this is by no means correct. It is well settled that a common law the word month means a lunar month of 28 days only. But it may mean a calendar month, if the context shows that was meant, or if the surrounding circumstances at the time show such was the intention, or if the word is used in a sense peculiar to a trade or business or place—but the subsequent statements or conduct of the parties are not admissible evidence on these points, or if a statute so provides. Statute law declares the word month means a calendar month unless otherwise stated—in any Act of Parliament passed after 1850, and in bills of exchange and promis-

sory notes, and in contracts for sale of goods made since 1893, and in sentences for crime passed since 1888. Also, in any legal proceedings or any document which is part of legal procedure in the High Court (Order LXIV, rule 1), or County Court (Order LII). Also in any mercantile transaction in the City of London (Turner v. Barlow (1863), 3 F. & F., 946). Also the rule that a domestic servant may be discharged by a month's notice or a month's wages means a calendar month, and the wages are the money wages with nothing additional for board or lodging (Gordon v. Potter (1859), 1 F. & F., 644. Farwell, J., in Bruner v. Moore, held that the primary meaning of month in a document of any kind is lunar month, unless it comes under one of the foregoing exceptions, and that an option to buy an invention during six months in a contract between two commercial men was confined to six lunar months.—*The Law Students' Journal.*

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A NEW departure was taken by Sir Samuel Evans in D. v. D., on 31st July. It was an undefended suit for nullity of marriage brought by the husband. It appeared that the marriage had never been consummated though a year had elapsed, and the wife had stated she would never allow it to be consummated, and had refused to submit to any medical examination. The court was asked to draw an inference of the wife's physical incapacity; but the judge refused to do this, being of opinion there was in fact no incapacity. But the judge ruled that the contract of marriage implied the willingness, as well as the capacity, to consummate it, and granted a decree of nullity on the ground that the wife had wilfully and steadfastly refused to consummate it. Thus, the fiction of law by which physical incapacity has been presumed from such a refusal is abolished, and the desired result attained by a decision based on a common-sense ground in accord with modern ideas.—*Ibid.*

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THE highest tribunal in France has decided—on a prosecution for not having a light on a vehicle at night—that "night" in France means the interval between the hour of the sun setting and the sun rising. The law student who intends to cycle or motor in France should take note. In England, night has various meanings—*e. g.*, for burglary, from 9 p. m. to 6 a. m.; and for poaching, from the end of the hour after sunset to the beginning of the hour before sunrise.—*Ibid.*

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A FRENCH barrister, who defended three criminals executed some time ago, finds himself in a tight corner just now. It seems the accused with a view to notoriety told him the history of their lives, and the barrister in all good faith contracted to supply a publisher with the story for a book. But now the council of the order have decided the publication would be a breach of professional secrecy; and the publisher not having got his manuscript is suing for breach of contract, and will be met with the defence of *force majeure.—Ibid.*

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A MAN was up in the municipal court a few days ago charged with "Special intoxication."

"You look like a fairly decent fellow," said the judge, "and I hate to send you to the workhouse. Suppose I gave you a suspended sentence—what would you do to deserve it?"

"I'd sign the pledge, your honor!" cried the prisoner, eagerly.

"Indeed! And for how long?"

"Why, your honor, I usually sign it for life!"—*National Corporation Reporter.*

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Sir Robert Anderson, formerly head of the Criminal Investigation Department, and author of "Criminals and Crime" amongst other works, gave a *Daily News* representative last month an interview. Sir Robert was severe on the Humanitarian League. That league, he said "had far more influence than all his Majesty's judges. The latter were perfectly clear as to what should be done but the lobbying in the House of Commons had turned the Prevention of Crimes Act in such a manner as to make the way of the transgressor easier. At the present moment there was a perfect crusade of burglaries, but it would be found that the Humanitarian League would denounce the heavy sentences passed at the old Bailey on the Berkeley Hotel thieves as a scandalous thing."—*Law Notes.*

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"Towards the young and the weak" continued Sir Robert, "I think our present methods are quite unnecessarily cruel. But when you come to a man who deliberately with money (because he cannot do it otherwise) plans one of these elaborate crimes who has a bad record, and has been convicted time and again if I were not one of those men who believe in a future life I should say, 'Knock him over the head' 'Hang him to a lamp-post like a dog.'

What can we do ? He has proved that he is like a wild beast. Cage him. Is he never to be let out again ? I should let him out at any time in the future when he looked like being a better man but I should not take his word for it."—*Ibid.*

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Our Mr. Plowden does turn out some quite respectable witticisms. Many years ago he perpetrated one which should not be allowed to pass into oblivion. A witness in the celebrated Druce litigation said : " I knew the diary because it looked so very old—as if it had come out of the Ark." " Oh said Mr. Plowden " I suppose you knew it by the watermark."—*Ibid.*

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The " dailies " last month made comments on a case which has recently occupied the attention of the Berlin Courts. " King " Thyssen the iron-founder, began life in humble circumstances, but is now one of the five or six richest men in Germany. His son, after incurring heavy debts, was offered certain terms by the father on the condition that these were to settle definitely the share in the father's estate that should devolve to him at death. The son maintained that the offer was considerably smaller than he was entitled to, and here lay the origin of the law suit. The son has twice lost the case, and now has appealed. Already however, the costs of the case amount to 409,750*l.*, as estimated only at the rate fixed by the regulations of Prussian procedure and as sundry expenditures are to be added to this minimum, it is estimated that the total costs have amounted to very nearly half a million sterling. When the case has been disposed of for a third time (which will be the last) costs exacted by the Court to the extent of 90,000*l.* and counsels fees amounting to 20,800*l.* will have to be added, making a total outlay of 520,550*l.* estimated at the very lowest possible figure. The basis of reckoning for this exorbitant expenditure is the amount of money in dispute. The amount here was no less than 3,750,000*l.*

There was some years ago an agitation in this country that costs should vary with the amount involved. A case like this however gives furiously to think. Solicitors who act for rich corporations would make large incomes for the litigation of corporations and moneyed men involves generally large sums. The general body of lawyers would not, we fear, do well. Much litigation involves small sums. It is, apparently, an impossible task to devise a system for payment of costs which shall prove alike satisfactory to the winner and the loser and the legal advisers of both parties. We assume,

however that in this Thyssen litigation the legal advisers on both sides are fairly content.—*Ibid.*

* * *

Partnerships between barristers in this country are not permitted, but apparently in France, owing to the existence of lady barristers it is impossible to enforce a similar rule. Last month two barristers of the Court of Appeal, M. Gaston Straunn and Mlle. Helene Miropolsky, were married. Now assume that Madame Gaston Straunn continues to practice, practically she and her husband are in partnership. They will discuss their cases together and it may be safely assumed all fees, earned by both will go into one common fund.—*Ibid.*

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There is a celebrated counsel in practice who cannot understand figures. If he finds himself unfortunately involved in a case which makes some demands on his mathematical powers, he has invented a very pretty device for slipping out of the situation. If a judge ever asks a question on figures he replies: " My Lord I don't think it will be convenient to go into the figures; I propose therefore, to put Mr. Jones the accountant into the box at once". Name—can our readers put a name to this story ?—*Ibid.*

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Once upon a time there was a well-known Serjeant of the name of Cockle. He asked a witness, " Do you like fish " To which the witness promptly answered " Yes but not with Cockle sauce."—*Ibid.*

* * *

Counsel (examining a witness): " You say you saw the shots fired?" Witness "Yes sir". " How near were you to the scene of the affray?" When the first shot was fired I was about ten feet from the shooter." Ten feet. Well now, tell the Court where you were when the second shot was fired. "I didn't measure the distance" Speaking approximately how far should you say?" " Well it approximated to half a mile"—*Ibid.*

* * *

In " Anecdotes of Bench and Bar " Mr. Arthur Engelbach tells the story of a carpenter who was subpœnæd as a witness on a trial for assault. One of the counsel who was much given to browbeating

the witnesses asked him what distance he was from the parties when he saw the prisoner strike the prosecutor. The carpenter answered "Just four feet five inches and a half." "Pray tell me," said the counsel, "how is it possible you can be so very exact as to the distance?" "Why, to tell you the truth," replied the carpenter, "I thought perhaps that some fool or other might ask me, and so I measured it."—*Ibid.*

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In a lengthy judgment, the Court of Cassation at Rome has just dismissed the appeal of Professor Theresa Labriola against a decision of the Court of Appeal, which refused to enrol her among barristers authorised to practise in the law Court of Italy. The Court of Cassation has affirmed the decision of the lower Court on the grounds that the argument from the silence of the laws is untenable; that no express prohibition was necessary, but rather an express admission, to permit women to practise at the Bar; and that since the consent of the husband would be required before a wife could exercise the function of advocate, a married woman did not possess the necessary independent and free status. The husband's consent might be revoked at his will and pleasure, and it would be a strange kind of advocate (says the judgment) who, by the exercise of the husband's veto, might be silenced in the middle of her pleadings.—*Ibid.*

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It is interesting to find that Italian law requires the assent of the husband. The newspaper report does not state the reason for the necessity for this assent.—*Ibid.*

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An old story of Lord Russell is revived. In the Dublin Law Courts a little Irish boy was once to be examined as a witness. His evidence was feared by Sir Charles Russell to be damaging, so he asked the judge if the lad was not too young to be relied upon, for he might not know the nature of an oath. "Well, my boy," said the judge, "do you know what an oath is?" "Yes, your honour," replied the stripling. "Examine him further, my Lord," said Sir Charles "What is an oath?" asked the judge. "You be dammed!" said the boy.—*Ibid.*

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Lord Haldane's speech to the American Bar is one more instance of his great ability. His Lordship's knowledge is as vast

and much more accurate than any encyclopædia. His knowledge of German literature has influenced his modes of thought. He possesses a remarkable brain—by birth Anglo-Saxon, by training Teutonic. We question if any other man could have evolved the idea that "Sittlichkeit" will in the future rule nations as it rules individuals. The day will come, in his Lordship's opinion, when it will not be "good form" for nations to fight. It is now not "good form" for gentlemen to fight. In some distant future civilized nations will follow this example. His Lordship has sown the seed, it remains to be seen whether that seed will germinate. The appeal is wisely made primarily to the Anglo-Saxon nations, whose social god is "Good Form."—*Ibid.*

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The International Congress on Criminal Laws held its first meeting at Copenhagen last month, and discussed the precautionary measures which should be taken against habitual criminals. The argument became rather heated, and the chairman, Professor Garcon, of Paris, had some difficulty in keeping order. A Russian delegate, Professor Wladimir Nabokoff, proposed both the punishment and the taking into custody of such criminals; while the Danish Professor Torp only proposed taking them into custody. The delegates from fifteen countries disagreed, about half agreeing with Professor Nabokoff's proposal and the other half with Professor Torp's. It was finally decided that an international committee should be appointed to settle the matter. Curious that learned professors should almost fight over a debate as to what we are to do with our habitual criminals.—*Ibid.*

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All our readers do not see the *Pall Mall*. With apologies, we lift the following yarn.' A Bernese Swiss hotel keeper, who had recently concluded a lawsuit lasting for years, and who received at the close an exceedingly lengthy bill of costs, took a neat revenge upon his lawyer. The bill of costs, it should be said, was paid without demur on presentation.—*Ibid.*

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The other day the lawyer had occasion to lunch at his client's hotel, and at the close of the meal the following bill of costs was presented to him :—

	Francs.
Preparing Luncheon	... 2.50
Perusing Bill of Fare	... 4
Two Consultations with the Greengrocer	... 1
Carrying up the soup	... 1
Blowing on the Soup	... .50
Taking Fly out of Soup	... .50
Herbs for Soup	... 1
Soup	... 2.50
Waiter bowing and scraping	... .50
Two Consultations with the Cook	... 2
Six kinds of Meat and Vegetables	... 12.50
Saying "I hope you'll enjoy your luncheon"	... .50
Ten Visits to the Cellar	... 10
Sundry Acts of Courtesy, &c.	... 2
Matches	... .50
Wine and Cigars	... 8
Reading Bill of Fare aloud	... .50
Serving Dessert	... 1
Dessert	... 7.80
Clearing the Table	... 1.50
Satisfaction of Hunger	... .50
Wear and Tear and Breakages	... 3.50
Letting down Window shuttters	... 2
Clearing away remains of Luncheon	... 4
Salt and Touching Saltspoon	... .50
Verifying present Bill of Costs	... 2
Surprise on receiving it	... 2
Acceptance of Bill	... .50
Receipting same	... .50
Wishing good-bye	... 2.70
Total	... 78.00
10 per cent. discount	... 7.80
	70.20

The lawyer, as his client had done, paid the bill without demur.
—*Ibid.*

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The *Daily Mail* last month reported a case of great interest to "flat landlords," which occurred at Berlin. The Supreme Court at Leipzig decided that a woman has a right to receive men visitors in her own apartments. The woman in question was an actress who

rented rooms from the tenant of a flat. The owner of the flats demanded that the tenant should forbid the actress from receiving male callers on the ground that it was disagreeable to the other tenants. The Supreme Court held that the prohibition of visits by men to the actress amounted to an illegal restriction on her personal liberty; that it must be left to one's own conscience to decide how far the reception of visitors offends against the laws of morality; and that the landlord cannot interfere with such visits so long as the peace and repute of the building are not flagrantly affected. It was not within the landlord's privilege to concern himself with the object of the visits to persons living in his building. Will London "flat landlords" now put a new clause in their agreements—"No male visitors allowed"?—*Ibid.*

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In Norway a woman judge, Mrs. Ruth Sorenson, of Hammerfest, has for the first time been appointed. She holds office temporarily, in the absence on leave of the town judge. Her appointment was the act of the superior magistrate of Finmarken. Mrs. Sorenson is an attorney. She is the daughter of a clergyman, was educated at the University, passed her juridical degree examination in 1900, and in 1907 established herself as an attorney in Christiania, whence she went to live at Hammerfest.—*Ibid.*

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"Should lawyers lie?" said Brown to Smith in the train one morning. "I don't know, but they do," said Smith. "No," said Brown, "it isn't a conundrum; it's a heading in the *Daily Mail.*" It was the subject of a debate at the annual congress of the German Barristers' Association at Breslau, when a resolution was adopted that "It is inadmissible to set up deliberately untruthful contentions or to deny truthful contentions."—*Ibid.*

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One of Wisconsin's new laws passed by the last Legislature commonly known as the "gossip law," was first applied last month, when a warrant was issued for the arrest of Mr. Peter Kesoski, of Niagara, the *Telegraph* states. The law provides that gossip shall be subject to legal penalties under the same conditions as slander, though with milder punishment, the amount of malice in the conversation being the distinguishing point between slander and gossip. The arrest follows the charge that Kesoski called Rosa Burney, of Niagara, an unsavoury name in conversation with friends in a bar-room.—*Ibid.*

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What damages should a man get for the loss of his moustache? Truly a difficult question. Some girls like them, some don't and then a man without a moustache saves money on table-napkins. An ex-flunkey has brought an action against the Chinese Legation at Paris for 4*l.* damages for the loss of his moustache. Some time ago, the *Telegraph* says, M. X., who boasted a splendid moustache, sacrificed it that he might enter the service of the Chinese Legation as valet at 8*l.* a month. M. X. would have accepted the sacrifice as an unfortunate necessity in this present ill-organised world had his position been permanent. But when in a week he got his marching orders, and was left *sans* moustache and *sans* situation, he sought legal satisfaction. He means to plead, among the injuries done him by his shaven state, the loss of the affections of a comfortably dowered *fiancee.* The lady evidently doted on the "militaire." The Court will also be invited to study the photograph of M. X. when moustached like a dragoon, looking first on this picture and then on that, presented by the denuded plaintiff, to appraise the æsthetic prejudice sustained by him. The jury may brutally remember that he can grow another, but female jurors would know and appreciate that a man's second moustache is never truly "silky."—*Ibid.*

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The Law Dinner.—At the dinner given by the Madras Bar Association on 11th October 1913, all the Judges of the High Court except Mr. Justice Sankaran Nair Mr. Justice Sundara Aiyar and Mr. Justice Bakewell, Dewan Bahadur C. Krishnan, Chief Judge of the 'Small Cause Court, Mr. C. R. Tiruvenkatachariar, City Civil Judge, The Advocate General, about 25 Barristers and advocates and over 150 Vakils and attorneys were present. After the loyal toasts were proposed by the Chairman, Dewan Bahadur M. O. Parthasarathi Iyengar in proposing the toast to His Majesty's Judges said:—

Mr. Chairman, Lord Chief Justice, my Lords and Gentlemen.—This occasion is unprecedented. For the first time it has brought together in friendly fraternity the various branches directly employed in the administration of justice. It cannot but rouse in our minds very vigorously the feeling that every one of us is but a part of the machinery designed to carry out the administration of Justice in the name of our King-Emperor. To me has been assigned the important duty of proposing the Health of His Majesty's Judges of the High Court of Judicature Madras, (cheers) and in selecting me for the task, our worthy Chairman had probably regarded the fact of my being the senior Advocate (cheers) and of my having at one

stage or other of my life been a Vakil, an advocate and a Judge, though in the subordinate judiciary and again an Advocate (Cheers). But the consideration of my being totally unused to functions of this sort had been ignored and it is possible that I may completely fail to do justice to the Judges. (Hear, Hear). The toast that I have the honour to propose and that I do propose with great pleasure is, fortunately, one that would meet with a very warm and enthusiastic response (Cheers), for the Bench unlike many another institution has always stood high and deservedly so in the esteem, regard, and I had almost said, the affection of all creeds and classes in this country. It has commanded in the past, commands at present, and I hope it (Cheers) will command, in the future, implicit confidence in its Judgments and unquestioned loyalty to its decisions (cheers). The integrity and independence of our Judges is being regarded day by day with greater and greater reverence and constitutes the real bulwark of liberty, (Cheers), liberty of every kind, personal civil or religious. That day will be an evil day for India, the Indians and the Government itself when our Judges cease to command that confidence, and I am sure that evil day will never arrive as long as we continue to have Judges of the kind that now adorn the Bench (cheers loud and continued.) Sir Arthur Collins said to His Excellency the Governor when accepting the charge of the present High Court Buildings which, by the way, I may say, are much more ornamental and much less useful than the old High Court Buildings (Laughter), "I fervently hope that long after you and I have passed away to that undiscovered country of which we know so little, there may always continue to be men of ability and courage who will administer the law without distinction of class creed, or race." (Cheers) That hope has up to this again and again been fully realized. May it be realized for ever is my pious hope and prayer in which I am sure you will all join. Socrates said "Four things belong to a Judge—to hear courteously, to answer wisely, to consider soberly and to give Judgment without partiality" (Cheers). And Bacon would require a Judge to be more learned than witty, more reverent than plausible, and more advised than confident. Above all, integrity is their personal and proper virtue. Do we not find these characteristics in a large measure in every one of our Judges ? (Hear, Hear.) It is a satisfaction to find that our Judges give a patient hearing even in these hard days of bombs and bullets, on one side, with Weekly Notes, Indian Cases, Law Journals and the like on the other, with a heap of arrears in front. It is also a satisfaction to find that none of our Judges has any favourite; for to have a favourite is to give occasion to a multiplication of evils and suspicion of byways. Thus

I yield to none in my esteem and regard for the Bench as at present constituted. (Cheers.) And there is proof positive of the sincerity of my expressions in the standing testimony of myself having, by persuasion of pleasure and interest, not constrained to any extent by poverty, rejoined the Bar to practise before them. (Cheers.) I can boldly assert that our Judges are administering justice without fear of any but God and without hate of any but the wicked. Perhaps some of you, my Lords, in your extreme modesty may think I have been too lavish of praise in one direction or other. But even there I can justify myself in the words of Lord Bacon in whose eyes I have justified you. "Some praises come of good wishes and respects. It is a form due in civility to Kings and great persons. *Laud ando precipere* (entreat by praising them) when by telling them what they are they represent to them what they should be." (Laughter and cheers). My Lords, I assure you that I am sincere in my expressions. With these words I give you the toast of the Judges of His Majesty's High Court of Judicature Madras coupling it with the revered name of Sir Arnold White, our Chief Justice.

Much enthusiasm prevailed when this toast was responded to.

CHIEF JUSTICE'S REPLY.

The Hon'ble Sir Arnold White, the Chief Justice, who on rising was loudly cheered, responding on behalf of the Bench said :—

Mr. Advocate General and Gentlemen.—On behalf of the High Court Bench I desire to thank Mr. Parthasarathy Aiyangar for the toast which he has just proposed. I can assure him that we appreciate the kindly and generous terms in which he has proposed the health of the Judges of the High Court. In his closing observations he suggested that we do not altogether realise the absolute ideal. (Mr. Parthaṣarathy Aiyangar No.! No.!). That perhaps is a little more than any of you should expect. I desire also to thank you, Gentlemen, for the friendly and cordial reception which you have given to this toast. I can assure you, we appreciate the compliment which has been paid to us. It may be that on other occasions, and in another place, a certain divergence of view may sometimes manifest itself amongst the Judges of the High Court. But on this occasion in expressing our appreciation of the compliment which has been paid to us, the Judges are absolutely unanimous. (Cheers).

Gentlemen, I suppose the proposal of the health of the Judges of the High Court is more or less an invitation to us to talk about ourselves (Hear, hear). To talk about one's self is a somewhat

difficult task to approach. It is a task which has to be undertaken with considerable discretion. It is a task which is not altogether easy to fulfil gracefully. However, I think with regard to the Judges of the High Court I can make one observation which is entirely of a noncommittal character, and which is beyond the bounds of controversy, and that is we are ten (Laughter). A few years ago we were only able to say "we are seven." Well, there was no particular merit about that statement, or about that number, excepting possibly the poetic associations which it might evoke. We are ten now; and, Gentlemen, in my opinion, we are none too many. It may be that we are not enough as some of you think. With regard to that, with all reserve and as at present advised, a saving clause is always safe on these occasions—I am inclined to think that we are enough. There is one thing which is very satisfactory to note and that is, the powers that be, the authorities who hold the purse strings, are always ready to give sympathetic consideration to any proposals, which may come from the High Court with regard to the increase of the number of the High Court Judges or the strengthening of the Judiciary generally throughout this Presidency. This is so now, Gentlemen, without a doubt. It was not always so. I do not mean to suggest that every proposal which emanates from the High Court, for instance, that a particular officer deserves a higher scale of remuneration than that which he is at present receiving is received with acclamation by the powers who hold the purse strings. But still, speaking generally, we may rely upon the local Government affording a sympathetic consideration to any proposal which we may make and so far as practicable giving effect to it.

Gentlemen, I have noted with considerable interest that the criticisms which one reads of and hears in England with reference to the Administration of Justice in England are not unlike the criticisms of which one hears in this country. In England apparently at the present moment with reference to the High Court of Judicature, one cause of complaint is the insufficiency of Judges. In that respect I am not at all sure that we are not more fortunate here than are the Judges at Home.

Another matter is with reference to the protracted hearing of cases. We have heard something very like that in this country. But it is interesting to note that complaints of similar character are not unknown in England. With regard to the prolixity of advocates, I am afraid that, to a very considerable extent, we must plead guilty. It is not altogether easy in this matter, or in other matters,

to hit the happy medium. I fully recognise the desirability of despatch and expedition with reference to judicial business. But there is a higher consideration than that with regard to the disposal of cases (Hear, Hear); and that is that the defeated litigant, when he leaves the Court although he knows he has been beaten, may have the conciousness that his case has been given a full and fair consideration. (Hear, Hear). There is a phrase which one hears sometimes in this country *viz.*, "Getting rid of cases." I strongly object to that phrase. (Hear, Hear). Judges are not here to get rid of cases. They are here to adjudicate upon them.

Many of you are familiar with the story I have told before. On a certain occasion Mr. Justice Wright was sitting as a vacation Judge. He met Lord Bowen at luncheon after having done his morning work. He said to Lord Bowen; "You know I had some hundred applications in Chambers this morning and I disposed of them all in an hour and three-quarters." On that Lord Bowen said; "My dear Wright, Don't you think you had better go back and hear the other side" (Laughter.) It was once said of a Judge in England that he combined all the qualities of a bad Judge. His critics said; he was slow, he was courteous and he was wrong. I am not prepared to admit that courtesy is one of the characteristics of a bad Judge. If I am to find an antithesis for this description of a bad Judge, as a man who is slow and courteous and wrong, I would rather say a good Judge is a man who is quick, courteous and right. Again, I desire to make a non-committal statement and I think I may say that it is not universally true that all three of these admirable qualities, these excellent characteristics are to be found embodied in one and the same Judge, though I am not altogether sure that every judicial officer present here to-night does not in the bottom of his heart think, though he would not say so for worlds, that he probably embodies in his person all these three qualities (Laughter and Cheers). What other people may think is, probably, a different matter.

Gentlemen, during my fourteen years of office, I have seen a good many changes, and I think no change is more significant than that to be found in the fact that such a very large number of Hindu Gentlemen should have assembled at this evening's dinner (Cheers.) I sincerely trust that none of us will suffer any inconvenience, gastronomic or otherwise, as the result of this evening's feast. As I have said I have seen many changes. I have seen many changes in the personnel of the High Court Bench. I am the only survivor of the Judges who held office in 1899, when I was appointed Chief

Justice. Of the men who have been my colleagues Davies, Moore, Boddam, Bashyam Aiyangar and Krishnaswami Aiyar are dead. Shephard, Subramania Aiyar, Munro and Benson are happily still alive though they are no longer with us as Judges.

If I turn to the Bar there also I find great changes. Speaking for the moment of the Vakil Bar, at one time Bhashyam Iyengar, Krishnaswami Aiyar, Sankaran Nair, Sundara Aiyar and Sivasami Aiyar were all practising at the same time. There were giants on the earth in those days. Since then of course the work of these great leaders has become widely distributed. I do not suggest for a moment that that is any cause for complaint. Probably those who participate in the distribution will agree in that sentiment.

Turning for a moment to the European Bar, I mean the European Barristers. Fourteen years ago, I recall Eardley Norton, Kenworthy Brown, Robert Grant and two or three others who are still with us. Gentlemen, as regards the quality of English Barristers who now practise in the Madras High Court I say nothing. As regards the quantity, there has undoubtedly been a very sad falling off. I admit that personally, I greatly regret it. I wish it were not so.

Then I turn for the moment to the Indian Barristers. If there has been a falling off in point of numbers as regards English Barristers, there has certainly been no falling off in point of numbers as regards the Indian Barristers who are enrolled as advocates of the High Court of Madras. (Cheers). They have been arriving in increasing numbers and they still continue to arrive. I am afraid with regard to a considerable number of them, it will be a question of waiting, of patient waiting. But I should like to say to them, as I believe, I said on another occasion. Whatever you do, do not simply wait for briefs. Do something, report, write law books,—even though they are bad law books best, of all probably, attach yourself to somebody who is on the upward flight. Take hold of his coat tails and stick to them. Or if the professional gentleman to whom the young Indian Barrister attaches himself does not wear coat tails take hold of whatever be the appropriate portion of the corresponding garment. In any case stick to him, make yourself necessary and if possible indispensable. You will find in time that you will get crumbs from the rich man's tables and those crumbs will increase in magnitude and power of sustenance as time goes on. Whatever you do, don't wait doing nothing.

Gentlemen, in an after-dinner speech one, of course, is not in a spirit of criticism. But it has sometimes occurred to me that if I

were to offer any criticisms with regard to the method of advocacy employed by younger Vakils and younger Barristers, it is that they do not always exercise a due sense of proportion with reference to the relative importance of their bad points and their good points. Now, if a man has half a dozen bad points and one good point, it is not, as a rule, desirable that he should present his six bad points first and keep the one good point for the last; because, it may happen, that, by the time that the good point is reached, the Judicial mind may be a little tired, possibly a little irritated, and not altogether able to appreciate the excellence of the good point. I hope you will take this criticism in the spirit in which it is offered. (Cheers). Gentlemen, at the same time I am not altogether sure that it is always a good thing to press even all your good points. You may possibly have read in Lord Campbell's Lives of the Lord Chancellors how an eminent Counsel, speaking of an eminent Judge, said "Whenever I appear before him, I always keep back one good point, because I know he will probably find that out for himself and he will be so pleased at his own acumen in doing so that he will probably decide in my favour." I doubt if I ought to have told that story but you will find it in Lord Campbell's Lives of the Lord Chancellors. There is this risk about it. If you keep back the good point and the Judge is not sharp enough to take it the result may be disastrous.

With regard to the question of waiting for work, I have a little anecdote which will appeal specially to Indian Barristers. The Indian Barristers, at any rate know that in the Chambers of Inns of Court, there is to be found outside every set of Chambers a long list of names of Barristers, in many cases, most of them recently called and waiting for work. I recollect one set of Chambers not of very conspicuous magnitude in which the list of names outside the door was of portentous length. Probably as regards a great majority of these newly called Barristers the average of briefs they got a month would be something fractional. There came along a rude solicitor's clerk. He studied this portentous list of names and wrote underneath it in pencil. "How in the world do the poor devils all live"? I do not tell this story to the Indian Barristers, in any way to damp their ardour. I certainly do not tell it to them with a view of applying to them the epithet which the rude solicitor's clerk made use of, but it may probably be some encouragement to them to reflect that it is not only in Madras there is to be found an undue proportion between the number of men seeking work and the amount of work which there is to go round.

May I say one word with regard to another matter which really does not come within the province of your professional duties but still, is I think a matter of some importance. I do think that advocates ought to be the custodians of the King's English and upholders of the purity and dignity of the English Language. I may possibly offend you with regard to what I am going to say; but as this is an after-dinner speech and, probably you are all in a benevolent frame of mind, I propose to say it. I remember when I first came to this country, I was rather struck by the constant use of certain forms of abbreviations in forensic language which seemed to me to be unnecessary and which I cannot help describing as vulgar. One constantly hears of reference to 'M.P.' Now what is an 'M.P.'? I am credibly informed, it is a miscellaneous petition. But it may just as well be a Member of Parliament. I recall one occasion, an occasion on which I was much in the same position as the young Indian Barristers to whom I was referring. I was sitting in Court having nothing particular to do. A friend of mine was arguing a case. It was in the Court of the Lord Chief Justice, Lord Coleridge, and my friend said "I desire to refer your Lordship to a case reported in 14 Q.B.D." Lord Coleridge leaned forward and said "Mr., What is Q.B.D? Q.E.D. I know, but what is Q.B.D?" That is an instance which impressed itself very firmly on my memory. It seems to me Queen's Bench Division is more consonant with the dignity of the occasion in which it is used than 'Q.B.D.'

We know that pleadings and judgment are divided into paragraphs. We very seldom hear of paragraphs in this country. It is "para," Gentlemen. why "para"? "Para is a meaningless abbreviation. It might mean paralytic or parasite or parallellogram. I quite admit paragraph is a word of 3 syllables and para is a word of 2 syllables. But affidavit is a word of 4 syllables, and no one talks about an "affit. I am perfectly aware that we lawyers are not the only or the chief sinners in this respect. I believe I have heard the word para from the mouth of a member of Council and I am not sure that I have not heard it from the mouth of a Viceroy. But nevertheless I protest against it. There is another word which is not quite as bad. We do not hear of promissory notes but of "pro-notes." Pro is a meaningless abbreviation. It means nothing. I admit that "pro note" is not as bad as para. I think that the Advocates of Madras would do well to set a good example to the rest of India in this respect. I have gone a considerable distance from the subject of this toast. However I hope you will forgive me.

Now, to come back to the toast. I have nothing more to say except that we thoroughly appreciate the honor which you have done to the Judges to-night. I have struck no serious note this evening because it seems to me that a dinner is not the occasion for the discussion of serious matters. I do not know whether this evening's feast is to be the first of a series. But if it is to be the first of a series and if there be another one next year, I cannot forget that it is not in the least likely that I shall be present at that feast. I have been fourteen years doing Judicial work in Madras and my work as a Judge in Madras is very nearly done. Looking back over these fourteen years I am conscious that many things were done which had better not have been done and I am still more painfully conscious of many things not having been done which had better have been done. Still I think I can say honestly that during these fourteen years I have striven to do my best (Hear, hear). I believe all stages of the profession as regards standing are represented here to-night. There are I doubt not here many men who can look back upon a record of work well done. There are other men who are half way through their professional career. There are many others, possibly the majority, whose professional life mainly lies in front of them. You, younger men, before I sit down may I say one word to you. On you, rests the responsibility. You are the trustees for posterity. I would urge upon you to do your best to preserve the best traditions of the great profession to which you belong. (Cheers). I thank Mr. Parthasarathy Aiyangar for the toast and I thank you Gentlemen for the way in which you have received it (Cheers).

The Hon'ble Mr. T. Richmond next proposed the toast to the other Judges, Dewan Bahadur C. Krishnan responding.

Mr. Justice Miller next proposed the toast to *the Legal Profession.* His Lordship in a felicitous speech, referred to the great difference between the estimate of the legal profession by the profession itself and by the laymen. " But " his Lordship said "as a body, the legal minds are doing all they can for their fellowmen and as long as they continue to do so whether you persuade the layman to change his opinion or not, you will be at any rate worthy of the toast which I have the honor to propose."

Dr. Swaminathan responded to the toast on behalf of the Advocates.

Mr. T. R. Ramachandra Aiyar, responding on behalf of the Vakils, said that nothing made it so clear that the layman's view of the profession was wrong as the fact that lawyers when they became judges made good judges which it should have been

impossible if the profession was really so bad. A gathering of the kind, he said, enabled them to feel the unity of the purpose of the legal profession and the Bench.

CONTEMPORARY LEGAL LITERATURE.

Mr. Longsford's article in the Case and Comment for August on "The Common Laws' debt to Annotations" is the second of the series of which the first was Mr. Fernham's noticed in the last issue of our journal which try to appraise the value of annotation in the making of the law. Three classes of lawyers have made the English law, he says, the advocates, the judges and the writers. It is the writers that have prevented the law from being unscientific and chaotic in the overwhelming mass of precedents of varying worth and authority. Of the writers, there are three prime classes *viz.*, reporters, digesters and the commentators whose work is now done by the annotators. First came the reporters and commentators though even now there are occasionally good commentaries like that of Wigmore. Then as the reports grew digests like Comyn's digest came in. Now, cases have become so numerous that something more critical than mere digests, something more exhaustive than commentaries have become necessary and as the final step in the evolutionary process have appeared annotations. Annotations are of two kinds, the critical and the "extra" as they are called. The former take up some of the leading cases and under each case all the cognate cases are carefully analysed, systematised and the principle which they elucidate is explained. In a system of law like the English and American, one cannot have too many cases. It is the duty of the annotator to classify them and show how each case illustrates a different phase of the same underlying principle. The function of extra annotations is to show by case law how the law has developed and has come to be what it is now.

BOOK REVIEWS.

All India Century Digest by Mr. B. R. Desai, Vol. X. This brings us up to Symbolical Possession. With another volume, the Digest shall have been complete. The work has been pushed forward with commendable diligence and we are glad to be able to affirm that it is none the worse for it. Far from showing any deterioration the work has been steadily improving in quality and the present volume seems to be really very good.

Indian Decisions (New series) Allahabad Vol. 8 (I. L. R. 16 to 18), Madras Vol. 1 (I. L. R. 1 to 4) Published by T. A. Venkasamy Rao and T. S. Krishnasamy Rao. The energy with which the enterprising Editors of this series have set about their work is really phenomenal. We are glad that we are at the same time able to testify that they are maintaining the same level of perfection as well.

All India Civil Court Manual. Vol. II by the Lawyer's companion office. This volume is the companion volume to the one already noticed by us. All the acts have been revised and brought up-to-date. We see that even Acts of 1913 have been included. The get up is excellent.

The Specific Relief Act with commentaries by Mr. Mahim Chandra Sarkar: (1913). Mr. Mahim Chandra Sarkar has acquired a reputation for producing useful commentaries. The present volume does not belie that reputation. As a digest of the case law bearing on the Specific Relief Act, the work leaves little to be desired. We have looked through the book somewhat carefully; we have throughout found it up-to-date and exhaustive. It is set in most agreeable types. The notes are full and clear. We heartily commend the book to the profession.

The Negotiable Instruments Act (1913) by Mr. Desai Narottam. This book is prepared on the same plan as the author's Registration Act and is likely to be as popular. The distinctive feature of the work is its paragraph headings which enable the practitioner to take in the whole contents without much effort. The notes seem to be full and fairly exhaustive. The book is up-to-date. The appendices which contain the Bills of Exchange Act, the relevant portions of the Companies Act, Limitation Act and Stamp Act, and the rules and notifications under the Act form a valuable supplement to the Act.

The Coronation Durbar and its consequences; a second supplementary chapter to the Government of India by Sir Courtenay Ilbert, G. C. B. K. C. S. I. Clerk of the House of commons and some time Law Member of the Council of the Governor-General of India in Council published by the Clarendan Press, Oxford 1913 Price 2 s. 6 d.

It is a good idea of the author to issue a Supplement to his Government of India in regard to the changes in the constitution effected by his Majesty's proclamation at the recent Coronation Durbar and the statutes and Acts passed with reference to that. The author also gives the Correspondence between the Government of India and the Secretary of State previous to the Coronation Durbar which led to the announcements made at the Durbar. This is a second supplement issued after the publication of the last Edition.

Psychology applied to legal evidence and other constructions of law: by G. F. Arnold I. C. S. C. I. E. 2nd Edition, 1913. Published by Messrs. Thacker Spink & Co.

Mr. Arnold has an aversion for lawyers and makes no secret of it. The lawyer of Mr. Arnold is a person very dense and quite incapable of appreciating good psychology. Apart from the question as to validity of the assumption that good phychology is necessarily good law (the author does not seem for a moment to realise the possibility of law by being over refined becoming unintelligible and thus defeating its own object), one must confess one feels wholly unconvinced by Mr. Arnold's book that law is even bad psychology. How, on earth, rules of evidence enacted in the Evidence Act require a Judge to take human nature in parts passes one's comprehension. One thing that constantly struck us during the reading of the book was the assumption of the author that his conclusion as to the psychological correctness of the statement of a rule was a conclusive test of its wisdom. For instance, the writer says a deal about the incorrectness of the interpretation by the Privy Council of the word "intentionally" in S. 115. We have striven hard to find what the author has to say against the propriety of the rule as enunciated by the Privy Council but there is not a word about it. After all in a matter so eminently practical as law, is not substance all and mere form nothing provided the meaning is clear or has been made clear. The author's attack on the view of the Penal Code as to insanity is not wholly unmerited but there is nothing novel in it. In this Edition, the author has attempted to answer his critics with regard to his attack on the lawyer's view as to intention, will &c., but we are not at all sure he has really met them. Many of the objections are phantoms of his own raising and law is not responsible for it. The author's remarks about racial characteristics savour too much of the commonplace in so far as they are just but where they strive to be

original they generally ignore the fundamental identity of the human nature which no amount of pigment can ever destroy. The criticisms of the author on rules of evidence and the authority of precedents betray belief in the capacity of individual judges to an extent which having regard to our knowledge of the average judicial capacity it is utterly impossible to accept as in the least justified. The book while shewing signs of wide reading and considerable thought, betray all the defects of the work of a mere theorist who never looks to the practical consequences of the theories he propounds.

Sanjiva Rao's Digest of Privy Council Rulings up to the end of 1912. Third Edition (1913) Vol. I. A to H. by C. S. Somanatha Sastri B.A, B.L. First Grade Pleader, Trichinopoly, published by the Law Printing Honse, Mount Road, Madras.

Nearly ten years have elapsed since the publication of the last edition and the necessity for publishing a third edition of the Digest of the Privy Council rulings can hardly be denied. The Allahabad Law Journal, the Calcutta Law Journal and some of the publications in Madras came into existence after the issue of the 2nd Edition. Apart from this appeals to the Judicial Committee are more frequent now than in former days. The number of rulings now published has therefore considerably increased. In the present edition an attempt has been made to digest the Privy Council cases prior to 1836. The labour involved in digesting these rulings and giving them under appropriate headings is no doubt enormous. The value of a digest to a practitioner is in proportion to the facility afforded therein of finding out cases on points he has to consider. Digest writers should remember that their aim should be to enable the practitioner to find out the case they want on a given point easily though the case is quite unknown to them. If the digest only enables the practitioner to find out a case when the case is known to him, it is hardly much use having it. Very often various points are decided in the same case and there are also obiter dicta which being those of the Judicial committee will have a high value and be useful to the practitioner. Cases should be digested with reference to these different points. We hope the Editor will bear this in mind when bringing out the 2nd volume. There can be no doubt about the pains taken by the Editor in arran-

ging different headings and sub-headings. Owing to the large increase in the Notes which will be much appreciated by the profession one finds it difficult to distinguish Privy Council decision digested from other matter. The number of the decisions may be given in antique instead of the year. We hope the book will be found useful by the profession.

A Digest of English Civil Law B. K. III Ss. III to XII Edited by Edward Jenks M. A. B. C. L. Published by Butterworth and Co. The Digest of Civil Law by Jenks is too well known to the profession to require any special introduction from us and the name of Jenks is sufficient guarantee for the excellence of the work. The present volume deals with restrictions on the user alienation of land (conditions and covenants running with the land) Voluntary alienation of land, Involuntary alienation of land, Overriding powers affecting land, Incapacity to hold and alienate land, Possession, ownership and acquisition of ownership of chattels, Involuntary alienation of chattels and incapacity to hold chattels.

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THE MALABAR MARRIAGE AND INHERITANCE BILL.

The Malabar Marriage Act (Madras Act IV of 1896) has almost been a dead letter. The reason assigned for this by the framer of the new Bill now before the Legislative Council is that registration is foreign to the instincts of the people of Malabar—we may say in fact of Hindus generally. A stronger reason however in our opinion is the resentment felt by the people in Malabar at the stigma impliedly cast upon them by the Act not recognising the customary unions prevailing in the country as valid marriages. The report of the Commission whose labors resulted in this Act only had the effect of a exasperating the state of feeling of the people. It is therefore not at all surprising to find the people not availing themselves of the provisions of such an Act and one is surprised only at the confidence felt by the Commissioners that the Act would become popular in course of time.

We are constrained to state that it is also surprising to find the Commissioners adopting the view that Marumakkatayam does not recognize the institution of marriage and that the customary forms prevailing among the people *viz.*, the Sambandam, Podamuri etc. referred to by them are not such forms as the law ought to recognise as forms of marriage. The Talikattu Kalyanam is referred to by them as a fictitious marriage. It is not necessary for us to inquire into the origin of this ceremony and whether it had any real significance at any time. At any rate such a ceremony without the legal incidents flowing from marriage is not unknown. Among the Kudwa Kunbi caste in Bombay a custom by which a marriage performed with the usual religious ceremonies was regarded as incomplete and only as a conditional marriage was held valid. See *Bai Ugri* v. *Patel Purushotham Bhudar*[1]. *Sargent* C. J. in delivering the judgment of the Division Court observed: "The Hindu Law leaves it entirely to the parents to marry their daughters, and although, according to strict

1. (1892) I. L. R. 17 B. 410.

Brahmanical law a marriage is complete when the religious ceremony has been performed, there would seem to be no sufficient reason for refusing to recognise a custom at any rate amongst the lower castes, by which such transactions rendered necessary by the paucity of women in the caste, although performed with religious ceremonies are still regarded by the parents on both sides as incomplete and conditional marriages. In the case of *Boolchand Kollita* v. *Janokee*[1] which was a suit like the present for the restitution of conjugal rights, the Calcutta High Court gave effect to a caste custom by which the usual ceremony of marriage was not regarded as binding unless a second ceremony was performed prior to the woman coming to maturity and cohabiting with her husband and by which in, default of such ceremony, the woman might after puberty as the defendant in that case had done, marry another man." The fact therefore that the Talikattu ceremony is performed by every Nair woman can be no bar to the recognition of it as a marriage when it is followed by co-habitation either by the person who takes part in the Talikattu ceremony or by another person co-habitation with whom is followed by a further ceremony. It might be that in times beyond memory polyandry was prevailing in Malabar or the people there did not recognise the institution of marriage as such was the case before Swataketu's time (See the Puranic story referred to in the Mahabharatha and Sacred Books Vol. II pp. xli to xlii) and when the Aryan civilization progressed in the West Coast the Talikattu ceremony was introduced among them by the Aryans to familiarize the people with the institution of marriage as such. That, however, is not relevant for our present purpose as already stated.

The Commission regarded the customary forms of marriage prevailing in the country as no marriage apparently on the ground that the connection is dissoluble at the will of either party. Although the principle of Eugenics might not have found acceptance at the time—the science of Eugenics having been only of a comparatively recent growth—a connection which can be dissolved with the consent of the parties or of one party thereto was and is still recognised as marriage among certain classes of people and the Courts have upheld the same as valid marriages. Thus there are marriages called Putt or Natra recognised in Bombay. A wife can marry according to these forms on getting a *chhorchithi* or writing evidencing a divorce by the first husband or with the concurrence of the caste; See *Rahi* v. *Govind*[2]. The fact that in the commu-

1. (1876) 25 W. R. 386. 2. (1875) I.L.R. 1 B. 97 at pp 114 to 117.

nity to which the parties belong divorce is mutual i. e. at the will of either party can be no disqualification for recognising Sambandhum as a marriage. According to the science of Eugenics there should be no obstacles to the dissolution of a marriage if its continuance will be prejudicial to either or both. We have therefore no hesitation in welcoming the new Bill as its object is to recognise the customary forms prevailing in the country as valid marriages.

Coming to the provisions of the Bill itself we find that S. 1 rightly repeals the old Act. Clause (b) of the section declares the local extent and the persons to whom it will apply. The word 'domicile' used in this connection is ambiguous and unscientific although the word is to be found in the old Act. When it is said that the Bill is intended to apply to the whole of the Madras Presidency we think that all that is meant is to extend the provisions to the Marumakkattayam or Aliyasanthana Hindus *i.e.*, to the followers of such systems and not to others. In the case of those who being such followers reside elsewhere *i e.*, outside the Madras Presidency but within British India we take it that the object of the author is to make the Act applicable there also. In the case of those who reside outside British India and have not changed their domicile the Bill expressly makes the provisions applicable. If by 'elsewhere' is only meant some place in British India outside Madras Presidency the subsequent word 'domicile' may be changed to new residence. In that case, however, it must be observed that even in the case of persons governed by Malabar Law settling within a place in Madras Presidency outside Malabar it is open to such persons to adopt the law prevailing in the place of their new residence. To such persons the Act can have no application and apparently the intention of the author is to exclude such persons from the operation of the Bill. S. 3 declares that Sambandham shall be deemed a valid legal marriage for all legal purposes. At first sight it may be thought that a mere declaratory provision declaring customary forms of marriage as legal marriages would have been sufficient but in view of the provisions of the old Act it is better that the Bill is more specific as regards the subject matter. While the Act declares Sambandham to be a valid legal marriage we think that the Act should also declare the particular effects or consequences flowing from it.

Now as regards the restrictions proviso (*a*) relates to prohibited degrees of consanguinity or affinity. Proviso (*c*) relates to the prohibition as regards the class or community from which a choice

can be made. It declares that if the parties are such as belong to different communities between the members of which co-habitation is not permitted to such community according to custom or usage no valid Sambandham can arise. Proviso (*b*) relates to restrictions as regards persons having already valid subsisting Sambandhams. We think there is no reason for confining the restriction only to valid Sambandhams. If either party is already married whether such marriage be a Sambandham or one regarded as valid marriage under other systems of law such party should be held to be disqualified. If a person subject to another personal law is validly married and he can otherwise validly contract a Sambandham under the customary law of Malabar—we should think that should be a disqualification for him to contract a Sambhandam under the Act. The proviso again only refers to a Sambhandham which would be a valid marriage under the Act and does not refer to a Sambandham under the repealed Act. We think the proviso should also cover Sambandhams under the repealed Act and they should be deemed valid marriages for the purpose of prohibiting persons to contract fresh Sambandhams while the former Sambandham should be in force. Cl. (c) of S. 3 of the old Act covers the above cases and we fail to see why it should be cut down in the new Bill.

NOTES OF INDIAN CASES.

Hira v. Hanji Puma.—I. L. R. 37 B. 295.—We think the learned judges in this case proceeded upon considerations entirely irrelevant and that the real principle has not been correctly appreciated in this as in most other cases. The question whether the marriage is approved or unapproved is not the test laid down by Yagnavalkaya for the succession to the Stridhanam property of a woman devolving upon her husband and his heirs or her father and his heirs. Verse 145 of Yagnavalka's text in Vyvahara Adhyaya says that the Stridhanam of a woman who has no issue goes to her husband in the four forms beginning with Brahma and in the remaining forms it goes to her parents. If she leaves issue it goes to her daughters. Now there are many customary forms of marriage not coming within the eight forms mentioned in the Sanskrit Books and the ceremonies differ variously according to the custom of the locality. All such customary forms and celebrations are valid. The husband and his heirs will take only when the marriage is in one of the four forms beginning with Brahma. The word four is expressly stated in the beginning of the text when the forms of marriage beginning with Brahma are referred to but when the text refers to the devolution

of parents in the remaining forms no emphasis is placed on the word 'four'. It is, therefore, not necessary in order that the Sridhanam may go to the parents that the marriage should be in one of the four unapproved marriages as they are called. The blameworthiness or otherwise of marriage is nowhere indicated either in the text or in any part of the Mitakshara dealing with this question as the test for succession devolving upon the parents or the husband as the case may be. In order that the succession should go to her husband and his heirs the marriage should be in one of the four forms *viz.*, Brahma, Daiva, Prajapathya and Arsha. In the Brahma form of marriage it is essential that the girl should be a maiden or a virgin maiden as it is termed and where a marriage is celebrated according to a form which approaches the Brahma form but the girl does not comply with the requisite of a maiden essential for the Brahma form it will not entitle the marriage thus celebrated to be regarded as one of the four forms beginning with Brahma. It may also be that the marriage thus celebrated cannot be regarded as an Asura form but that does not mean that the husband is entitled to succeed. We cannot, therefore, appreciate the reasoning of the learned judges that the husband and his heirs are entitled. The learned judges seem to admit that it is essential to the Brahma form according to the texts of the Hindu Law that the girl should be a Kanya and that the woman in the particular case they were dealing with was outside that text. It may be that there is something special in Bombay which however has not been referred to by the judges. We need not therefore consider the question whether the reliance on the text of Manu (IX § 196 199) by Nilakanta in the Vyavahara Mayukha leads to a different result. (See Vyavahara Mayukha Sec. X § 29 and 30).

Iswhar Lingo Desai *v.* Dattu Gopal Desai.—I. L. R. 37 B. 427.—This is an instance too often common in this country of the troubles which await a decree-holder in reaping the fruits of his decree. In a suit of 1898 a decree for redemption was obtained. In consequence of a delay in the payment it took nearly five years for the decree-holder to establish his right to execute the decree. When he attempted to execute his decree the right to execute which had been established after his appeal went to the High Court fresh difficulties were thrown in his way at the instance of a person who alleged herself to be the representative of one of the defendants in the litigation which went up to the High Court. Four years elapsed when the decree-holder was relegated to a fresh suit which he brought

in 1907 and it took six years to establish his right to execute the decree again. The only satisfactory feature after all these years and after all these litigations is that the High Court has been able to render justice to him. There can be no doubt about the conclusion. We refer to the case only for the purpose of noting the difficulties in the way of decree-holders realizing the fruits of their decrees and showing to what amount of expense they are put not even a tenth of which can be recovered from their opponents.

Shankar Visvanath Vag *v.* **Umabhai.**—I. L. R. 37 B. 471.—In this case the Bombay High Court held that the Married Women's Property Act III of 1874 would not apply to Hindus. Although the Subordinate Judge held that the principle of the Act applied to the policy, it was apparently not contested before the High Court that the Act would apply. The Bombay High Court also held in this case that apart from the Act no trust was created. We would only refer to the article in July No. 3 of our journal where the recent decision of the Full Bench of the Madras High Court was discussed—vide page 1 of Journal portion.

Zuleka Bai *v.* **Ebrahim Haji Vyedina.**—I. L. R. 37 B. 494.—We are not satisfied with the reasoning of the learned judge in this case. The suit is for the recovery of title deeds to land lying in a foreign country. The fact that the plaintiff is also entitled to claim possesion of the land and a suit for that purpose will not lie in British Courts is no reason to deal with the suit as brought as one for land. If the learned judge had held that the suit for the recovery of the title deeds was a suit relating to the land substantially or otherwise that might be a different question. The learned judge relied upon the defendant's denial of the plaintiff's title to the land with reference to the title deeds of which the suit was brought and upon the defendant's denial of the plaintiff's right to possession of land both of which claims could only be enforced in the Foreign Court as a circumstance in favor of the view that the suit was one relating to land. What the learned judge had to determine was whether the title deeds of lands were or were not moveable property within meaning of cl. 12 of the Letters Patent determining the original civil jurisdiction of the High Court. It has been definitely settled that the fact that the land is situate outside the original jurisdiction of the High Court is no bar to taking cognisance under S. 12 of the Letters Patent if the relief is one not relating to land but is one which can be claimed

from the defendant personally. Upon that ground the Judicial Committee upheld the view of the Calcutta High Court that leases of immoveable property situate outside the jurisdiction of the High Court can be set aside when the suit is brought under the original jurisdiction of the High Court. See *Benodhe Behary Bose* v. *Nistarini Dasi*[1].

SUMMARY OF ENGLISH CASES.

In re **Bennett: Greenwood** *v.* **Bennett**: [1913] 2 Ch. 318.

Lunacy—Order to pay surplus profits to daughters of lunatic—Death of lunatic before payment—Effect of—Nature of the jurisdiction in lunacy to make disposition.

Under orders in lunacy, the surplus of the profits of a lunatic's estate used to be paid to the daughters of the lunatic. At the death of the lunatic, the committee had certain sums in his hands which had accumulated since the last payment to the daughters. The daughters claimed them. *Held*: they were not entitled. As soon as the lunatic died, there was an end of the jurisdiction in lunacy and the orders in lunacy had no further operation.

The court in lunacy in distributing the funds of the lunatic does what he, if sane, could have been expected to do. Allowances made to daughters etc. are on the same footing as voluntary allowances made by parents. Just as it could not be argued that the children have got a right to any portion of the allowance in arrear or a proportionate part of the allowance to fall due later, the daughters in the case had no right against the administratrix for any portion of the accumulated funds.

In re **Magrath: Histed** *v.* **Queen's University of Belfast**: [1913] 2 Ch. 331.

Will—Construction—Legacy—To "Queen's College, Belfast"—Dissolution of, before will—"Queen's University of Belfast" instead, doing some work—Misdescription.

A testatrix gave by her will 3000£ to the "Queen's College, Belfast" to found a scholarship open to the fourth year Medical Students. The will was dated February 16, 1910. But in 1909 the "Queen's College, Belfast" had been dissolved and in its stead Queen's University of Belfast had been incorporated. The new

1. (1905) I. L. R. 33 C. 180 at pp. 191, 192.

University was doing the same sort of work as the former and in the same place. *Held* under the circumstances, the case was only one of misdescription of the legatee. The legacy was intended to go to the institution at Belfast whatever its name and the Queen's University was entitled to the legacy.

In re **West : Westhead** *v.* **Aspland** : [1913] 2 Ch. 345.

Will—Legacy—Contingent on attaining 21 years—Power to apply for maintenance—Other provision for maintenance—Effect of—Interest not payable till legacy becomes vested.

Can the intention that a legacy should carry interest which is presumed where a testator merely gives a future legacy with a power to the executors to maintain the legatee out of the legacy, also be presumed in a case where the testator in addition to such a future legacy makes provision for the maintenance of the legatee out of some other fund? *Warrington* J. held, it could not be presumed.

Hope *v.* **Osborne** : [1913] 2 Ch. 349.

Right of common—Nuisance—Abatement of—Right to—Not, when exclusion not complete—Resort to Courts necessary.

The commoners of a manor have the right to abate a nuisance which wholly prevents them from exercising their right of common. But where the exclusion is not complete and their complaint is only that they cannot enjoy their rights as beneficially as they could otherwise have enjoyed, their proper remedy is to resort to the courts and not to take the law into their own hands.

In re **Hanbury's Settled Estates** : [1913] 2 Ch. 357.

Tenant in fee simple with executory gift over—Waste—Not impeachable for—Right to mining rents and profits.

A tenant in fee simple in possession of real estates with executory gifts over is not impeachable for waste. The question in this case was as to whether a lady to whom her late husband had devised his real and personal estate absolutely "in full confidence that she will make such use of it as he should have made himself and that at her death she will devise it to such one or more of his nieces as she may think fit" in default of such appointment the property to go

to his surviving nieces was entitled to the whole of the rents and royalties under mining leases granted under the Settled Estates Act. His Lordship *Eve* J. held that as she was entitled to the estate in fee simple subject to executory gift over at her death, she was not impeachable for waste and could therefore wholly utilise the rents for herself.

Birchall *v*. Birch, Crisp and Co.: [1913] 2 Ch. 375.

Discovery—Co-defendants—Action by assignee of commission—Defendant's assignor and party liable—Right inter se.

Plaintiff-assignee of a portion of the commission due from the 1st defendant to the 2nd defendant, sued the 1st for the same, making the other party defendant. 1st defendant contended that nothing was due to the plaintiff as damages were due to the 1st defendant owing to mis-representation by the second in the making of the contract. There was no counter claim by the 1st against the 2nd. The question was whether the 1st defendant could have an inspection against the 2nd defendant of the documents admitted by him to be in his possession. *Warrington* J. and the majority in the Court of Appeal held he could not. *Swinfen Eady* L. J. held the other way.

Hewson *v*. Shalley: [1913] 2 Ch. 384.

Will appointing executors—Administration granted in ignorance of—Void ab initio—Alienation—Absolutely void—Subrogation only in respect of payments testator bound to make.

An administration granted in ignorance of a will of the deceased appointing executors is void ab initio and no title passes to any purchaser from such administrator. The only claim that the purchaser might make is in respect of payments that the testator could have been compelled to make, on the principle of subrogation. The case is different where no executors are appointed by the will.

Douglass *v*. Rhyl Urban District Council:
[1913] 2 Ch. 407.

Corporation—Corporate seal—Necessity for—When no statutory requirement—Duty to pay after receiving benefit—Rule as to—Quantum meruit.

Although there may have been a difference of opinion and conflicting authorities, it is now settled that in the absence of an express statutory provision requiring a contract under seal, the requirement of the corporate seal at common law is subject to this exception. Whenever the purposes for which the corporation is created render it necessary that work shall be done or goods supplied to carry such purposes into effect and orders are given at a corporate meeting regularly constituted and having power to make the contracts authorised and the work is done or goods supplied and accepted by the corporation and the whole consideration for the payment is executed, there is a contract to pay implied from the acts of the corporation and the corporation cannot keep the goods or the benefit and refuse to pay on the ground of mere absence of formality or that the fixing of the seal was wanting. The authority for this is *Lawford* v. *Billericay Rural Council*[1].

In this case, the defendants (a corporation) employed the plaintiff an engineer and expert in pier and harbour work to make certain valuation and estimates required by the Local Government Board to whom the defendants under powers in their Special Acts, had applied for sanction to borrow the money required for a proposed scheme of improvement. There was no contract under seal but the plaintiff made the valuation and estimates which the defendants made use of. The scheme was not however proceeded with. There was no statutory provision requiring a contract under seal. *Joyce* J. held applying the rule set forth above, that the plaintiff was entitled to the sum claimed on the principle of *quantum meruit.*

King *v.* Brown, Durant and Co.: [1913] 2 Ch. 416.

Right of common—Right of suit for interference—Destruction of subject matter—Growth of legal right—Prevention of.

A mere commoner i. e. (a person having a right of common) cannot maintain an action against another person having a right of common over the same ground or even against a stranger, for a simple trespass such as walking over the grass of the common but anything by which a commoner's right of common is disturbed by any unlawful consumption or taking away or destruction of the herbage is actionable even when done by one of the persons having an equal right of common over the same waste. A commoner cannot justify any encroachment which really interferes with or prejudices any right of common of his fellow commoner. It is a

1. (1903) I. K. B. 772.

JOTTINGS AND CUTTINGS.

Legal Insanity.—Recent cases have drawn renewed attention to an old anomaly in our system of criminal jurisprudence, namely, the wide divergence between the tests of insanity as understood by medical men and lawyers respectively. The Court of Criminal Appeal has again and again tacitly recognised the inadequacy of legal views on the matter by expressing an opinion that the Home Secretary should investigate separately, with expert aid, cases where the Court itself cannot legally interfere with a verdict imputing legal 'sanity' to a prisoner. The whole difficulty arises, of course, from the simple fact that judges are bound by the legal decisions and precedents of less enlightened days until the Legislature is pleased to alter the law, whereas medical opinion has recently undergone a revolution upon physiological and psychological phenomena. The result is that the judge must uphold in his summing up the now antiquated views held seventy years ago by Law and Medicine alike. For the legal test of insanity is still that enunciated by all the judges when invited to the House of Lords to express their considered opinion in *Macnaghten's case* (1843). Five questions were there submitted to them, and upon the answers given by all the judges, except Mr. Justice Maule, are based the present day formulas, used by judges when directing juries in criminal trials. In substance, their answers came to this. If a prisoner capable of appreciating right and wrong, commits a crime he is criminally responsible for it, however diseased his mental condition. Even if the acts under the influence of a delusion as to the facts, he is still criminally liable if, supposing the facts to have been as he imagined them to be, his act would have been criminal. No one nowadays defends this principle as good science, and the time has come to eliminate so untenable a theory from our jurisprudence. In practice, every medical expert called as a witness admittedly acts on a totally different theory. Even judges although they must give to juries the correct technical direction in the old formula, often quietly assume in their summing up altogether different principles. The common-sense change which should be made by Parliament is one authorizing juries to act upon their own view of the evidence before them in deciding whether or not the prisoner is really a responsible being.—*Law Journal* 11th October 1913 p. 568.

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INTERNATIONAL LAW ASSOCIATION.

THE CONFERENCE AT MADRID.

After its conference at Paris in May, 1912, the International Law Association has allowed eighteen months to elapse before again assembling. For the first time in the forty years of its history it has visited the country of Spain, which bulks so largely in the early history of the Law of Nations. The names of Francis a Vitoria and Suarez D'Ayala were referred to by more than one speaker at the opening session; and from the many treatises presented to the Congress by Spanish jurists, displaying profound research and critical acumen, it is evident that the Law of Nations is still successfully studied in the Peninsula, though there are two accidental causes for its not being a subject which particularly commends itself to Spanish jurists. One is the difficulty of language: an English, French, or German student is in immediate touch with international developments; to a Spaniard they percolate at second hand. Then Spaniards found International Law of little use against United States aggression in 1898, and do not always pause to reflect that because a knife is not a bayonet it may, nevertheless, be a very serviceable article. Nevertheless, it is evident that if the study of the Law of Nations is not exactly popular in Spain, it is still pursued by the elect with distinguished ability and success.

Dr. Darby took occasion to criticise a proposal which had been put forwad by Dr. T. Baty earlier in the year that, in view of the obvious reluctance of States to submit any and every question in dispute to one and the same sort of tribunal, some means should be devised of meeting the case by providing more august concillators for more important cases. Dr. Darby in pessimistic strain, thought that no sort of areopagus would content nations in these matters, and that the real fact was that they would not at present accept universal arbitration at all of any kind or description. As regarded the question of military compulsion to enforce the carrying out of arbitral awards, he regarded such a proposal as essentially inconsistent with peace principles. The analogy of the suppression of private war by a central authority is delusive.

An exceedingly brilliant and suggestive paper was read by Dr. Hartzfeld (Amsterdam) on the tendency of the Hague Tribunal to compromise instead of rendering a judgment in favour of one side or the other. Thus in the Dogger-bank Commission of Inquiry it

was found that the Russians were not justified, but not to blame, in the *Carthage* and *Manomba* cases, that Italy was wrong, but that she need make no substantial amends: in the *Savarkar* case, that Savarkar should not have been taken, but need not be given up. It is well known that, if an arbitrator obviously exceeds his functions and compromises where he ought to decide, the award may be repudiated. Thus the King of Holland's decision in the *Maine Boundary* case was disregarded, for it set out a boundary which was one not claimed by either party. But an arbitral decision may well be essentially of the nature of a compromise, without seeming formally to be so. Dr. Hartzfeld propounded the novel suggestion that such a decision is of a higher judicial order than a decision crudely declaring one party to be right and the other wrong. The old Roman law according to which it was fatal to claim 105*l*. if one's sustainable claim were for 100*l*, only was surely less accurate and scientific than the latter law which admitted a compromise decision recognising the plaintiff's right to the 100*l*. It will be observed, however that the tendency of the Hague Court is not, as in such a case, to balance two legal contentions, but to oppose to legal rights on the one hand claims of a purely moral nature on the other. In the discussion which ensued this consideration was hardly sufficiently kept in mind by the speakers.

On the second day (October 2) a paper by Mr. George Whitelock (Baltimore), explaining the terms of the American model law on Bills of Lading was laid on the table. The effect of this statute—and it is adopted in Alaska, Connecticut, Illinois, Iowa, Louisiana, New York, New Jersey, Maryland, Massachusetts, Ohio, and Pennsylvania—is to make bills of lading negotiable on the same footing as bills of exchange, independently of all questions regarding the goods. Mr. R. Timperley (Newcastle) then reported the satisfactory results of the year's work of the committee charged with securing the passage of legislation by European and American states on the lines which obtain in England regarding the carriage of heavy timber as deck load in the winter months. Mr. Sansy Castano who read a paper on the same subject expressed the wish that until the various States should come to some common understanding upon the subject, Great Britain and Spain should suspend their legislative restrictions; but the conference thought this much too drastic a means of pressure. The report of the committee shows that there is a good prospect of legislation being promoted which will result in a general increase of safety for mariners engaged in this trade. Mr. Sydney Buxton has expressed the favourable senti-

ments of his Board. The American and German underwriters are, as was observed by Dr. Bruders (Secretary of the International Association of Marine Underwriters, Berlin) well disposed; and the present state of affairs, in which deck-cargo, prohibited in Britain simply goes to Antwerp or Amsterdam, is (assuming the danger of these cargoes) really absurd. It by no means follows that the British regulations are ideal.

The subject of 'The Effect of War on Private Contracts' was next introduced in four papers, of which that of Prof. Van Eysinga (Leyden) dealt with the subject quite generally, remarking that the Hague Conventions dealt only with the military aspect of war, and that its civil consequences had largely been neglected. The other three dealt with the question of the insurance of belligerent vessels in war time. Mr. Leslie Scott. K.C., M.P., explained the English cases on the point; Dr. Sieveking (Hamburg) elaborately supported the logical basis of the English interdiction of contracts with the enemy; and Dr. Bruders opposed to the modern German view that attacks on commerce are not necessary for success in war, and not justified. As Mahan has shown, the objective of the navy should be the enemy's navy, not his merchantmen. Yet Mahan thinks that commerce-destruction may be necessary afterwards, to bring the defeated state to terms. This seems a lame conclusion for most states can carry on their commerce overland, and at all events, in neutral ships. Dr. Niemeyer and Dr. Lind supported the views of Dr. Bruders; and it was finally agreed, after an animated discussion to adjourn the question to a future Conference.

Two papers were read on 'Extradition' One, by Professor Van Hamel (Amsterdam) provoked some dissent. It more and more frequently happens that States extradite alleged criminals without going through the formalities prescribed by treaty, and to facilitate matters they obtain from the accused a formal waiver of his rights (if any) under the treaty. Sometimes, again as in *Rex* v. *Governor of Brixton Prison* [(1911) 2 K. B 82] extradition is accorded without the observance of treaty exigencies, and without any waiver Is this legal? It was unfortunate that Professor van Hamel was not present in person to answer the objection raised on the grounds of practical convenience; but there is the obvious answer that law is not an affair of practical convenience. Any sort of injustice could be covered—*letters de cachet* were covered—by that plea. A kindred subject was the 'International Treatment of Anarchists,' as to whom (if they ceased to be academic and took to violence) Senor Peman (Dean of the College of Advocates, Cadiz) was of opinion

that mutual extradition ought to be granted, and that it should extend even to the subjects of the State from which it is demanded. —*Ibid.*

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JURISDICTION IN DIVORCE.

The final report of the Committee on Jurisdiction in Divorce which, signed by Mr. Justice Phillimore, was presented at the Madrid meeting of the International Law Association contains the further replies which the commitee have received to the *questionnaire* from Brazil, Finland, Nicaragua, Spain, Sweden, and Servia, and a second, reply from Norway.

BRAZIL.

In case of marriage under the legal age nullity can be demanded by the parties within six months after the celebration or by their legal representatives, and can be opposed by the natural ascendants or descendants or relatives by affinity up to the second degree, or at the instance of the Public Minister. In actions for separation the guardian of orphans must be cited; for nullity a special guardian is necessary. The courts have jurisdiction to divorce foreigners after two year's residence. Appearance by defendant is equivalent to personal service and if absent a curator must be appointed to represent him.

FINLAND.

Divorce for causes other than adultery and malicious desertion are not granted by the Courts, but by special dispensations of the Sovereign through the Department of Justice or Imperial Senate. It is not settled whether the Courts have jurisdiction to divorce domiciled foreigners. There are no legal stipulations determining how a foreigner may acquire domicile, and the law does not recognise legal domicile. The legal position of Finns domiciled and divorced in a foreign country seems to be unsettled, but such divorces have been recognised.

NICARAGUA.

In Nicaragua, divorce by mutual consent is recognised under certain restrictions. The wife cannot contract a fresh marriage within 300 days after the divorce. But if she does, the second marriage is not void, but she incurs the penalties of the Penal Code. The children born within 300 days after divorce and 180 days after the second marriage are legitimate. The Courts take jurisdiction to divorce foreigners who are domiciled, or if not domiciled who are actually found in the country or where they expressly submit to

the jurisdiction, or impliedly by taking part in the action without raising the question of jurisdiction. Foreigners are considered domiciled when they have opened a house, taken up three years' residence, or inscribed themselves on the Register of Foreigners. There is the right to divorce after two years' judicial separation without reconciliation. Divorce by mutual consent can only be had twice. Decrees of divorce, separation, or nullity must be reviewed by the Court of Appeal. These reviewed decrees must be published in the official newspaper and recorded in the Register of Civil Status–a most excellent provision. Without this they are void as to third persons, civil status being proven by the entires in the register. Reconciliation puts an end to judicial separation and a decree to that effect, must also be similarly registered. The Courts have jurisdiction of the cases of domiciled foreigners where one of the parties is either a national or a domiciled foreigner. The competent Court is that of the defendant's domicile though parties may expressly or tacitly submit to the jurisdiction., There is a tacit submission by taking part in the action without objecting to the jurisdiction. The Code provides for dissolution by mutual consent of a marriage celebrated abroad whether of nationals or foreigners, by applying the *lex loci celibrationis.*' In actions for divorce by mutual consent the parties themselves must be present. Foreign judgments are given the effect provided by treaty; if no treaty, reciprocity is applied, and the judgments are executed if they are authenticated in accordance with Nicaraguan and the Foreign law. Such judgments as to status of their nationals is part of their personal law. The Public Minister must be made a party to divorce and nullity suits, and to those for separation where there are minor children, and in the proceedings for review by the Court of Appeal. There is marriage by 'proxy' by means of a duly authorised Power of Attorney. If the power is in fact recorded (though unknown) at the time of the marriage, it is void.

NORWAY.

There are 15 causes for divorce, including epilepsy at the time of the marriage; sentence of three years' penal servitude or for habitual vagrancy; addiction to drink; begging or neglect to support family (by the King); insanity for three years with 'no fair chance of recovery'; one year's judicial separation and both parties request divorce. Decrees granted by the King or Supreme Court of Appeal are final; others are final when the time for appeal has expired and no appeal is taken. If the ground for divorce is a crime, the Criminal Court can combine with the sentence a decree of

divorce. The Courts exercise jurisdiction when both parties were domiciled in Norway and one leaves the country; where two Norwegians are domiciled abroad and one returns, but not if both are domiciled abroad. There is no fixed time for acquiring domicile. If defendant's residence is unknown the writ is served by public advertisement, as it is in the United States. Foreign decrees are recognised, unless by Norwegian law the case should be submitted to their Courts. The significant remark is made that there is no King's Proctor, and neither the King nor the Courts have any 'control' (assurance) 'that the alleged cause for divorce is real.'

SPAIN.

In Spain there are 'canonical' marriages for Catholics who can procure divorce only in accordance with the regulations of that Church, the civil effects of which must be enforced by the ordinary courts; and 'civil marriages' (for non Catholics) which can only be dissolved a *mensa*, not *a vinculo*. Perpetual imprisonment is a ground for divorce. Foreign judgments are given the recognition provided by treaty, and in the absence of treaty the reciprocity rule is applied, but decrees divorcing Spaniards to be valid must be confirmed by the Spanish Courts, and be for causes allowed by Spanish law. There is always jurisdiction to divorce resident nationals, and foreigners after two years' residence together with declaration of intention to become domiciled, and after ten years' residence without declaration. Public advertisement of a writ against a non-resident defendant is provided for.

SWEDEN.

Some of the grounds for divorce are 'mental disability' without lucid interval lasting three years, and with no hope of then being re-established; sentence of death; loss of civil rights; two years' penal servitude; for drunkenness; placed under guardianship because of waste of money; living apart for one year under order for judicial separation. The King has power (without any certain limit to his right) to grant divorce. There is separation at the request of one party, there being 'animosity and discord.' This is the ordinary preliminary to a divorce by the King. Epilepsy is a ground of nullity. Sweden is a signatory to the Hague Convention, and applies the same principles to subjects of countries not signatories. The Courts take jurisdiction (with restrictions) of nationals domiciled out of Sweden. They may petition the King for divorce if there is no competent Court. The Courts grant divorce where the ground is a crime, though it is committed abroad. The law as to nullity for causes existing abroad is not settled. There is registration of

'residents,' and domicile of those not resident is a question of fact. Foreign decrees divorcing residents are recognised if for causes recognised in Sweden. There must be ratification of foreign decrees divorcing foreigners before a fresh marriage can take place in Sweden.'

The Committee, after summarising the recommendations of the Royal Commission on Divorce, express the belief that they have gathered in the three reports they have now prepared a mass of useful material never before collected. 'But the result of our inquiries is that, there being such an extreme divergence among nations as to the grounds of divorce, as to jurisdiction and procedure and the effect to be given to foreign judgments of divorce: we do not see our way to make any recommendations which will be likely to gain present adhesion.'—*Ibid.*

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The New Lord Chief Justice.—The appointment of Sir Rufus Isaacs as Lord Chief Justice of England has been generally acclaimed as an act of justice due to his distinguished talents and a well deserved recognition of his commanding claims to high judicial office. It is admitted on all hands that he possesses all the natural and acquired faculties which go to the making of great Chief Justices, and there are few who would withhold from him the proud title to preferment—*omnium consensu capax imperii.* But to the profession the elevation of this plain merchant's son, born of an ancient but alien race, to the seat of Mansfield, of Ellenborough, and of Cockburn is specially welcome for the proof it affords that of all careers that of the Bar of England is the one most open to all the talents. The new Lord Chief Justice may be depended upon not only, according to his oath, to 'do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will,' but to apply his great administrative powers to the speedying of justice. His aim, if we mistake not, will be to secure that some approach may be made under his chiefship to the ideal, which he himself has proclaimed, that the Courts shall be always open and ready to settle disputes and remedy grievances whenever, and as soon as, they are presented by any of the King's subjects.—*Ibid.* Oct. 25.

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The New Law Officers.—Sir John Simon, who has, in the natural course of events, been promoted from the office of Solicitor-General to the Attorney-Generalship, possesses a capacious and cultured mind and a strong and attractive personality which will enable

him to fill with distinction, at the almost unprecedentedly early age of forty, the high position of leader of the English Bar. He fills so great a place in Parliamentary life that his inclusion in the Cabinet in accordance with the precedent created in the case of Sir Rufus Isaacs, is difficult to criticise, but we still hope that a practice which by emphasizing the political character of the Attorney-General's office, tends to diminish its professional prestige will not be continued. But there is no member of the profession who does not cordially congratulate Sir John Simon upon attaining the position of leader of the Bar, which he is so eminently qualified to fill. In accordance with expectation, he is succeeded in the Solicitor-Generalship by Mr. Buckmaster, who has won a great reputation at the Chancery Bar, and who is justly regarded in the House of Commons as an effective speaker, whose political zeal never encroaches upon his fair-mindedness. Not since the late Sir John Rigby ceased to be Attorney-General nineteen years ago has a Chancery lawyer been a Law Officer. It is a very distinguished list of Law Officers who have come from the Chancery Bar in modern times, including, as it does, the names of Cairns, Roundell Palmer, Jessel, and Davey. The new Solicitor-General will be no unworthy addition to the number.—*Ibid.*

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Contempt of Court in a Head-line.—The gist of the decision of the Divisional Court last week in the case of the *Pall Mall Gazette* is that a head-line in a newspaper may amount to a contempt of Court, as being calculated to interfere with the course of justice, although there be nothing in the printed matter to which the head-line refers which could afford sufficient ground for complaint. The *Pall Mall Gazette* had grouped together the head-lines relating to a writ in Chancery, issued by shareholders against the managing director of the Marconi Company (for libelling whom Mr. Cecil Chesterton was then undergoing his trial) with the other directors, in respect of certain dealings with American shares in which the Company was interested, and the head-lines referring to the criminal trial. It was said, on behalf of the *Gazette*, that newspapers frequently group together the head-lines relating to the same or kindred subjects ; but the Court held that this practice could not justify the combination of the head-lines relating to the civil proceedings and to the report of the criminal trial, as it might tend to prejudice the minds of the jury trying the case. No doubt the head-lines may influence the reader, especially as in these days of hurry and hustle many men only peruse the contents of their newspapers

in a very perfunctory fashion. But the prosecution was not, in fact, prejudiced, a conviction being secured against Mr. Chesterton, and, the gravamen of the offence being the mixing up of the criminal and civil proceedings as if they had some real connection in fact, the opinion of the Court was sufficiently marked by an order against the respondents to pay the whole costs of the proceedings—a heavy enough punishment, even if there was no wilful contempt.—*Ibid.*

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The Duty of County Court Judges.—It rarely happens that an order is made against a County Court Judge requiring him to hear and determine a remitted action, as was done on Monday in *The King* v. *Judge Mellor*. The reason of the learned Judge's refusal was that his Court was congested with local cases, and that the cause ought to have been remitted to the Liverpool Court, where, if the action had been instituted in a County Court, it would in the ordinary course have been commenced. The judgment of the Divisional Court was based on the unimpeachable ground that a County Court Judge must obey an order of the High Court. Such an order may press hardly on a County Court Judge whose lists are heavy; but he ought to do his best to cope with the work that falls to his lot. A public and vigorous protest against unfair treatment in the matter of remitted actions may be justifiable, and would probably not be without effect—a pointblank refusal to try a case is a denial of justice to the litigants. The view that the Divisional Court took of the matter is emphasized by the fact that they ordered the learned County Court Judge to pay the costs of the proceedings, Such an order against a respondent occupying a judicial position may be unusual; but there is a precedent for it in the case of *Blades* v. *Lawrence* (1874), in which the Court of Queen's Bench ordered the costs of a similar application to be paid by the Judge of the City of London Court.—*Ibid.*

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The New Lord Chief Justice.—With the cordial approval, not only of the members of the legal profession, with whom he is universally popular, but also of the public, who have long learned to appreciate his legal attainments and manly qualities, Sir Rufus Isaacs has been appointed to succeed Lord Alverstone in the Lord Chief Justiceship, the highest purely judicial office in the land. During the past one hundred years the office of Lord Chief Justice has had eight occupants—Ellenborough, Tenterden, Denman, Campbell, Cockburn, Coleridge, Russell, and Alverstone—and not one of these distinguished men brought to it a larger store of profes-

sional and personal gifts. None of them, at any rate, reached it through a worthier or more romantic career. It is through sheer hard work, combined with forensic gifts of the highest order and personal qualities of a most attractive kind, that Sir Rufus Isaacs has won his way to the great position to which he has been appointed at the early age of fifty-three. He belongs to a race which has given the world some of its finest legal intellects. Sir George Jessel, whose name stands out pre-eminent in the list of modern Masters of the Rolls, was the first Jew to become an English Judge, and Sir Rufus Isaacs, who has been appointed to 'the chair of Mansfield,' is the second member of his race to become one of His Majesty's judges.

About the early days of the Lord Chief Justice there was little, apart from his determination and independence, to suggest the achievement of his later years. A son of the late Mr. Joseph Isaacs, a member of a well-known London firm of fruit merchants, he was born on October 10, 1830, and was educated at University College School, at Brussels, and at Hanover. A spirit of adventure led him, soon after the completion of his schooldays, to abandon the comfortable prospect of entering his father's office, and to obtain a berth as 'boy' on a Scottish vessel, the *Blair Athol,* trading to Rio de Janeiro with coal. A year or so later, after he had endured, none too willingly, the hardships that belong to life before the mast, he went to Magdeburg as agent for his father's firm, and in this position, which he occupied for about two years, he acquired a knowledge of mercantile life which was, no doubt, of c[illegible]siderable use to him when he started his career at the Bar. His [illegible]quent experiences as a member of the Stock Exchange, th[illegible]y did not immediately make for success, were equally val[illegible]m when he adopted the profession in which he was des[illegible]o eminent a place. It was in 1887 that, reading wit[illegible] son Walton, he was called to the Bar at [illegible] a certain experience of County Court wo[illegible] into the foremost rank of the Junior Ba[illegible] years after he was called, he was appoin[illegible] his career was extraordinary in its rapidi[illegible] leader lay chiefly in the Commercial Co[illegible] Walton, then the leader of the Court, [illegible] It was in 1900, when Sir Edward Carso[illegible] General occasioned his withdrawal fro[illegible] Courts, that the new Lord Chief Justi[illegible] ing position at the Bar which he showe[illegible]

hold. His Parliamentary career began in 1904, when he was returned for Reading, the constituency for which he has continued to sit. His first appointment as a Law Officer was in the early part of 1910 when, upon the promotion of Sir Samuel Evans to the presidency of the Probate, Divorce and Admiralty Division, he became Solicitor-General. Some six month's later, upon the appointment of Sir William Robson as a Lord of Appeal in Ordinary, he succeeded to the Attorney-Generalship, his tenure of which will always be notable because he was the first occupant of the office to be made a Cabinet Minister.

These are the main facts of the new Lord Chief Justice's career. The qualities by which he has gained so high a place in the most competitive calling in the world may be stated less baldly Sir Rufus Isaacs did not achieve his forensic success by any extraordinary gifts of eloquence. He has not had at his command the polished rhetoric of a Coleridge or the passionate oratory of a Russell. Not that he lacks the gift of impressive speech. Lord Bowen once described Russell as an 'elemental force,' and there have been occasions calling for some passionate note on which the phrase might not inaptly have been applied to Sir Rufus Isaacs. As a speaker, however, he has, except on very rare occasions, been content to be lucid rather than eloquent, persuasive rather than dazzling.

'Though deep, yet clear ; though gentle, yet not dull ;
Strong without rage ; without o'erflowing, full.

His real strength as an advocate has lain in his swift and easy grasp of facts, in his unerring sense of what is essential and tactful, and in his remarkable [illegible]rs of cross-examination. No advocate of modern times has show[illegible]dier skill in the handling of witnesses. Others may have bee[illegible]amatic in their methods, but none has used the art of cr[illegible]on more effectively as a means of eliciting [illegible]vocacy, whether in addressing a jury in a [illegible] an important point of law before a [illegible] wholesome disregard of the pedantic [illegible]s fought on the large points rather than [illegible]ted his cases with so fine a sense of [illegible]iumphed, even the 'ranks of Tuscany [illegible].'

[illegible]ns of the new Lord Chief Justice have [illegible]e has displayed a *camaraderie* which [illegible]ular with all ranks of the profession. [illegible] his enormous practice has been most [illegible] and sense of comradeship, appreciated

by the humblest junior no less than by his nearest rival, have never deserted him. Unlike the Serjeant in the 'Canterbury Tales,' he has seemed less busy than he was, and has always found time for those little touches of intimate courtesy which make a great leader of the Bar so popular with his fellows. The affectionate regard in which the new Lord Chief Justice is held by the Bar has frequently been expressed by its leaders. Speaking at a dinner given in honour of Sir Rufus Isaacs when he was appointed Attorney-General Sir John Simon used these words : 'It is his warm-hearted willingness to be friendly to his juniors, more than even his splendid qualities of intellect, which has caused his appointment as head of the profession to be welcomed by every member of the Bar'. His doughtiest opponent, Sir Edward Carson, who was present on the same occasion, observed that Sir Rufus had always preserved the highest traditions of the Bar of England, and that, though he hit hard, he never hit below the belt. 'The surest way of finding out whether a man is a good fellow,' Sir John Holker once said to Lord James of Hereford, 'is to see whether, after a hard day's fighting at *nisi prius*, you want to walk back from Westminster to the Temple with him.' Sir Rufus Isaacs never had an opponent who did not desire to walk homewards with him. The warm tribute which Sir Edward Clarke paid to Sir Rufus Isaacs at the annual meeting of the Barristers' Benevolent Association is so fresh in the memory of the profession that it need not be further recalled. The high regard in which Sir Rufus Isaacs has been held by the Bench was fitly expressed by Lord Sumner of Ibstone at the recent Hardwicke banquet, when he described him as having uniformly showed at the Bar 'the ardour of an athlete and the spirit of a sportsman.' The possession of the qualities to which these tributes have been paid—the unremitting industry, the large knowledge of legal principles, the ready grasp of facts the innate sense of fairness, the serenity of temper and the dignity of demeanour which Sir Rufus Isaacs has always displayed at the Bar—makes it certain that he will worthily maintain the highest traditions of the historic office which he now fills.—*Ibid.*

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A tribute to Lord Alverstone.—In a Court presenting a notable array of judges and members of the Bar, the new Lord Chief Justice was sworn in on Tuesday morning. The Lord Chancellor and the Master of the Rolls were among the judges present, and Sir John Simon, the new Attorney-General, and Mr. Buckmaster, the new Solicitor-General, and Sir Edward Clarke were among the K.C 's. Immediately upon the Lord Chief Justice's arrival Master Kershaw, King's Coroner, and Master of the Crown Office, handed to his lord-

ship a card on which were printed the two oaths which every judge is required to take, one being the oath of allegiance and the other the oath of faithful service. Stepping forward, the Lord Chief Justice, upholding a Testament, recited in clear tones the words of the oaths as follows, everybody meanwhile standing: 'I, Sir Rufus Isaacs, swear by Almighty God that I will be faithful and bear true allegiance to his Majesty King George V., his heirs and successors, according to law. So help me God.' 'I, Sir Rufus Isaacs, swear by Almighty God, that I will well and truly serve our Sovereign Lord King George V., in the office of Lord Chief Justice, and I will do right to all manner of people after the laws and usages of this realm without fear of favour, affection or ill will. So help me God.' The Attorney-General formally moved 'that the oaths now taken be recorded,' whereupon the Lord Chief Justice, now fully inducted to the office, responded 'Be it so, Mr. Attorney.' While all in Court, including the Lord Chief Justice, remained standing, the Lord Chancellor, who was seated, delivered a short oration, first giving a welcome to the Lord Chief Justice and passing on to pay a tribute to Lord Alverstone, in which the Attorney-General subsequently joined.

THE LORD CHANCELLOR: It is in accordance with precedent that I, as the titular head of the Judiciary, should say a few words on this occasion. The Bench and the Bar are assembled here to witness the introduction of the new Chief Justice of England, and to take farewell of one whom I have known long, and whom illness has prevented from remaining with us. I will speak first, in the few sentences I have to say, of the new Lord Chief Justice of England. Some of us have known him intimately for a quarter of a century, some of us still longer at the Bar and on the Bench. There is no relationship more searching, no relationship in which more intimate knowledge comes of a man with whom you are brought into the daily contact of legal life. To the commanding grasp of his profession in its various branches he adds other qualities. It is not often that one has such a combination of mastery of the law with keenness in dealing with facts as one finds in Sir Rufus Isaacs. But, more than that, we of the Bench and we of the Bar get to know a man, and we have known him during these years in that intimate relationship of which I have spoken as a man whose highest desire it has been to do right between man and man. We have known him as one of the highest honour and of the highest desire to seek out and ensue truth whenever the truth may be ensued. I wish to add a few sentences about his predecessor, and it is difficult for me to do so without emotion.

During the time I have held my present office I have been brought into close contact with Lord Alverstone. His helpfulness to a new Minister is something I shall always bear in most grateful recollection. He is a man of vast experience, with unrivalled knowledge in law and in business, and we cannot but feel that his passing from active life amongst us is a great loss to the nation. But my hope is that, with rest, we may not wholly lose the benefit of his services. His Sovereign has accorded him a signal mark of recognition—recognition which was the least that was due to him in the step in the peerage which is about to be his—and my own hope is that after an interval we may again see him in the Supreme Tribunals of the country, where he has already, from time to time, given us distinguished assistance. Be that as it may, I know I am expressing the feeling of all here in wishing him happiness and tranquillity in his life.

THE ATTORNEY-GENERAL: The Bar desires to associate itself in the fullest measure with the sentiments to which your lordship, speaking for the Bench, has given expression. We tender our respectful and sincere congratulations and good wishes to the new Lord Chief Justice. We deeply regret that long illness should have overtaken Lord Alverstone, and that he should be laid aside from the work which he has so long discharged with such dignity and distinction. The inactivity which ill-health involves must be doubly wearisome to one whose energy has been unbounded, and to whom hard work has been second nature. There are many of my learned friends in this Court who could speak with longer experience and more authority than I of Lord Alverstone's wonderful record of achievements at the Bar. Here and to-day, in the Lord Chief Justice's Court, where we greet his successor, we think chiefly of the long and honourable discharge of the great office which Lord Alverstone held for thirteen years. We think of his unchanging devotion to his public duties, of his single-minded pursuit of justice, of that patience which he always displayed in examining the fact of a case, and of that promptitude which a business community demands if justice is not to be denied. In the Court of Criminal Appeal he has created out of the mere dry bones of an Act of Parliament a great institution, which offers to any man who has been unjustly condemned the chance of re-establishing his position, without interfering with the swift retribution of punishment of the guilty. And there are many in this Court who, when they think of Lord Alverstone, will always remember the unfailing kindness, the unfailing generosity and encouragement he has shown to men struggling at the foot of the ladder which he has so brilliantly ascended. My brethren at the Bar and I rejoice to hear that your lordship holds out some

prospect that Lord Alverstone, in the House of Lords or on the Privy Council, may hereafter, given better health, be able to put his great judicial powers at the service of the State. And we all trust that the demonstration of admiration and sympathy which this crowded Court has displayed will give to Lord Alverstone some consolation at the moment when he has laid down the office to which he has devoted so large a part of his life.

Upon the conclusion of Sir John Simon's speech the judges filed out of Court, and the Lord Chief Justice began the trial of his first action, in which, since it related to a stockbroker's action, he was immediately at his ease.—*Ibid.*

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Law Lords in the Appeal Court.—Not only did the Appellate Jurisdiction Act strengthen the House of Lords and the Judicial Committee by providing for the appointment of two additional Lords of Appeal in Ordinary; it also strengthened the Court of Appeal by enabling the Lords of Appeal to assist that tribunal when their help is desirable. Formerly, though ex-Lord Chancellors and puisne judges were capable of sitting in the Court of Appeal, the Lords of Appeal in Ordinary were unable to come to the Lord Justices' aid. As a result of the removal of this anomalous disability a third Court of Appeal has been constituted during the present week, in which Lord Parker and Lord Sumner have been sitting. How necessary it was that this assistance should be given is shown sufficiently by the fact that two Chancery appeals before the third Court on Wednesday had been in the list since March. Another section of the Court of Appeal, in which King's Bench appeals were being taken, had before it on the same day three appeals which were entered nine months ago. The assistance of the Law Lords will, it may be hoped, enable the Court to permanently avoid a condition of things in which litigants have to submit to such mischievous delay.—*Ibid.* Nov. 1.

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The Court of Criminal Appeal.—The sitting of this Court on Monday was memorable as being the first at which the new Lord Chief Justice presided. For the attitude of the Court of Criminal Appeal towards cases which come before it is influenced to a certain extent by that of its presiding judge, and a somewhat greater readiness to reduce sentences was shown by the new Lord Chief Justice. In two cases sentences were reduced, and in two other appeals the convictions were quashed.

In one of the appeals against sentence, *Rex* v. *George Bruce* (October 27), the reduction of sentence indicated no new departure. Bruce had been convicted of stealing brass taps and sentenced to nine months' hard labour at the London County Sessions. At that date his record was unknown, and since he had persistently refused to assist the police by giving them any information about himself the Chairman seems to have not unnaturally assumed that he had a bad career to conceal. After conviction, however, the police discovered various facts to his credit, and counsel for the Crown very properly brought out those facts upon prisoner's appeal against his sentence. The discovery of new facts favourable to the defence has always been treated as a ground for reducing a sentence (*Rex* v. *Francis*, 1 Cr. App. R. 259; *Rex* v. *Ettridge*, 2 Cr. App. R. 62, 66; *Rex* v. *Bradshaw, Beacham and Williams*, 6 Cr. App. R. 222); and the Court followed these precedents in altering the sentence to one of three months' hard labour.

In the other appeal against sentence, *Rex* v. *John Martin* (October 27), a new precedent was created. The appellant had been tried at Bristol City Sessions, had pleaded guilty to two indictments for larceny and receiving, the goods in one case being valued at fourteen shillings and in the other at fifteen, and had been sentenced to five years' penal servitude. His record was extremely bad. Where the goods stolen are of small value, and the prisoner's record shows no very recent previous crime or habitual course of crimes, the Court has often interfered with a long sentence on the ground of excessive severity; but hitherto, we believe, it has not done so when the record is indisputably very bad. In the present case, for the first time, the small value of the articles stolen has been treated as a sufficient ground on itself for reducing a sentence of penal servitude. The substituted sentence passed—one of eighteen months' hard labour—was, however, severe enough.—*Ibid.*

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The Resignation of Lord Alverstone.—It is now definitely announced that Lord Alverstone has resigned the office of Lord Chief Justice, which he has occupied for 13 years almost to a day. It was on October 22, 1900, after filling the position of Master of the Rolls for a few months, that he succeeded Lord Russell of Killowen in the chair of Mansfield, Ellenborough, and Cockburn. To the judicial qualities he has displayed in his high office, as well as to the personal attributes which have made him so widely popular, we pay a full tribute in another column. It is sufficient to say here that no occupant of the Bench ever won in a larger measure the

cordial regard of the profession, and that no gap in the judicial ranks occasioned by ill-health has been more deeply deplored. It was Lord Alverstone's fortune, as Sir Richard Webster, to hold the office of Attorney-General for an unprecedently long period, and it would have been most gratifying to the profession if his tenure of the Lord Chief Justiceship had acquired the same distinction. As we go to press no official announcement of the appointment of his successor has been made, but it is stated that Sir Rufus Isaacs will become Lord Chief Justice in his place, that Sir John Simon will succeed Sir Rufus as Attorney-General, and that Mr. Buckmaster, K. C., will be appointed Solicitor-General. All these appointments would receive the full approval of the whole profession.—*Ibid.* Oct. 18.

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The New Judicial Appointments.—Most prominent among the Judicial appointments which have signalised the opening of the new legal year is the promotion of Lord Justice Hamilton to the office of Lord of Appeal, and it is an appointment which will be welcomed in all parts of the King's dominions. The promise to appoint additional 'judges of the finest quality' to complete the re-modelled tribunal of final appeal in accordance with Lord Haldane's scheme is further carried out by the transfer of the head of the Scottish judiciary to the House of Lords. Lord Dunedin and Lord Hamilton will add greatly to the strength of the ultimate tribunal in both its branches. Sincere congratulations will be extended to Mr. Justice Phillimore on his elevation to the position of a Lord Justice, and it will be generally recognised that, apart from other claims, his special services as Judge in Bankruptcy have entitled him to this promotion above some of his seniors in office. The judgeship in Bankruptcy has nearly always been a stepping stone to the Court of Appeal, and the profession will watch with interest the developments which are to be expected when the report of the Judicial Commission appears dealing with the proposal to transfer this work to a Judge of the Chancery Division. The vacancy in the King's Bench Division created by Mr. Justice Phillimore's elevation cannot be filled up till Parliament meets. An Address to the Crown must be passed in accordanee with the absurd provision by which, until appropriate remedies are found for the delay in justice, the King's Bench Division is to be kept constantly in check—to the great detriment of suitors—by the necessity of such an Address on every fresh appointment.—*Ibid.*

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The Late Sir Ford North.—So long had Sir Ford North ceased to take an active part in legal affairs that the news of his

death, though received with sincere regret by the older members of the Chancery Bar, has not created an intimate sense of loss. It is nearly fourteen years since he retired from the Bench. For a short period he sat not infrequently as a member of the Judicial Committee, but, unlike Sir Edward Fry and Sir Robert Romer, he refrained from utilising any part of his well-earned leisure in taking part in public inquiries, and his name rather faded from remembrance. His judicial career began in unfavourable circumstances which might have permanently disturbed a weaker man. Essentially a Chancery lawyer of the old school, with a pedantic regard for old cases and procedure, he was chosen to personify the fusion of Law and Equity by serving as a Common Law judge. The experiment, though signally successful in the case of Lord Lindley, was a disastrous failure in the case of Sir Ford North, and the lack of worldly knowledge and tact which he displayed on circuit was, no doubt, responsible for the discontinuance of the doubtful practice of appointing Chancery lawyers to do Common Law work. In the Chancery Courts, when he returned to them, his legal learning and painstaking industry found their proper sphere. His methods were exceptionally slow. He sought to verify every statement that was made to him, and was apt to exhibit some impatience towards counsel who proceeded more quickly than he desired. A strange distrust in his own powers prevented him from coming to a conclusion quickly, and on more than one occasion his habit of reserving his judgments for unreasonable periods was the subject of criticism in the House of Commons. But even his defects all leaned to virtue's side, for they were but expressions of his desire to do justice. The members of the Chancery Bar who practised before him never failed to appreciate the high qualities which, with some shortcomings, he brought to the discharge of his judicial duties.—*Ibid.*

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The New Lords of Appeal.—Lord Dunedin has, under the provisions of the Appellate Jurisdiction Act, been appointed a Lord of Appeal. Andrew Graham Murray, who succeeded the late Baron Kinross as Lord President of the Court of Session in Scotland in 1905, when he was raised to the peerage, was born in 1849. Educated at Harrow and Trinity College, Cambridge, where he graduated in 1872, he was called to the Scottish Bar in 1874, became Sheriff-Principal of Perthshire in 1890, and was made Solicitor-General for Scotland in 1891. Later in the same year he was returned to the House of Commons as the Unionist member for Bute. On the return of the Unionist Party to power in 1895 he again became

Solicitor-General for Scotland. A year later he was appointed Lord Advocate, and in 1902 he vacated that office to become Secretary for Scotland. It was whilst occupying this purely political post that he was appointed to be the head of the Scottish Judiciary. Already, with Lord Haldane, Lord Loreburn, and Lord Shaw sitting regularly, the Supreme appellate tribunals have a strong Scottish element. The promotion of Lord Dunedin is an agreeable addition to it.

LORD JUSTICE HAMILTON, who has been chosen to fill the second additional Lordship of Appeal created by the Appellate Jurisdiction Act, has enjoyed a career of almost unexampled rapidity. Called to the Bar at the Inner Temple in 1885, he was created a Q.C. in 1901, appointed a Judge of the King's Bench Division in 1909, promoted to the Court of Appeal in 1912, and now, at the age of fifty-four, he has become a Lord of Appeal. The second son of Mr. Andrew Hamilton, a Manchester iron merchant, he was born in 1859, and was educated at Baliol College, Oxford, and is an Honorary Fellow of Magdalen. He read with Lord Mersey, with whom he edited the 1893 edition of 'Lee's Practical Digest of the Merchant Shipping Acts.' At the beginning of his professional career he practised locally at Manchester, but his success in those early days was not sufficiently marked to prevent him from entertaining an idea of seeking some means of livelihood other than at the Bar. It is said that it was Mr. Justice Mathew, before whom he subsequently acquired an enormous practice in the Commercial Court, who dissuaded him from abandoning the calling for which, both by natural talents and acquired knowledge, he was so eminently qualified. His name figured in the last list of Q.C.'s whose appointment was approved by Queen Victoria, and five other occupants of the Bench—viz., Sir Samuel Evans, Mr. Justice Scrutton, Mr. Justice Avory, Mr. Justice Horridge, and Mr. Justice Eldon Bankes—received the honour ot 'silk' at the same time. The new Law Lord never took any active part in political life, though not long before his appointment as a King's Bench Judge his name became very familiar in political circles. He was appointed by the Board of Education to inquire into the attitude of the education authority toward Oxford Street Church of England School in Swansea. He found that the education authority had committed a default in its duties towards the school. His report was accompanied by a letter from the Welsh Department of the Board of Education throwing over his decision. This decision was the subject of severe criticisms in Parliament, and ultimately came before the Courts on proceedings of *certiorari* and *mandamus*, which were finally dealt with by the Court of Appeal, where it was decided that a *mandamus* should

issue to the Board of Education directing it to determine the issues. Sir John Andrew Hamilton is a graceful speaker with a gift of pretty wit, and the speech he delivered at the Hardwicke banquet in July, in which, in proposing 'The Bar,' he paid a warm tribute to the high qualities of Sir Rufus Isaacs, was an admirable specimen of his powers as a speaker in the lighter vein.

LORD JUSTICE PHILLMORE.

MR. JUSTICE PHILLIMORE, who has been appointed a Lord Justice, in the place of Sir John Andrew Hamilton, has been a Judge of the King's Bench Division nearly sixteen years, the only Judges of the Division who are senior to him, being Mr. Justice Ridley, Mr. Justice Darling, and Mr. Justice Channell. The only son of Sir Robert Phillimore, a Judge of the Admiralty Court and the author of standard works on ecclesiastical and international law, he was born in 1845, and was educated at Westminster School and at Christ Church, Oxford, where he took a first in classics and gained the Vinerian Law Scholarship. He was called to the Bar at the Inner Temple in 1868, became a member of the Western Circuit, was granted a Patent of Precedence in 1883 and acquired a large practice both in the Probate Divorce and Admiralty Division and in the Ecclesiastical Courts. Among the famous cases in which he was engaged was the Dilke divorce case, in which, with Mr. Justice Bargrave Deane, he appeared for the Queen's Proctor. He made three unsuccessful efforts to enter the House of Commons as a Liberal : in St. George's, Hanover Square, in 1885, and in the Henley Division of Oxfordshire in 1886 and 1892. Notwithstanding his Liberalism, he was appointed by Lord Halsbury a King's Bench Judge in 1897, and for several years past he has acted as Judge in Bankruptcy. On taking his seat in Court on the opening day of the sittings the new Lord Justice was congratulated by Mr. E. W. Hansell, who also expressed the sincere regret of counsel practising in the Court that they were to lose his Lordship as a Judge in Bankruptcy. His Lordship replied : 'Mr. Hansell and Gentlemen,—It is very kind and touching of you to say this. During the years that I have been the Judge in Bankruptcy I have always received the utmost courtesy and consideration and have been enormously helped by you and the gentlemen practising in the Bankruptcy Court. Of course I am not sorry to go to the Court of Appeal. But, apart from that, I must say that I am particularly sorry to leave my Bankruptcy work, which I have always found most interesting.' Sir Walter Phillimore has taken an active part in the work of the International Law Association, and was present

with Lord Justice Kennedy at the conference recently held by the Association at Madrid.

NEW PRESIDENT OF THE COURT OF SESSION.

Mr. Alexander Ure, who has been Lord Advocate since 1909, has been appointed Lord President of the Court of Session, in the place of Lord Dunedin. Mr. Ure, who has been in Parliament eighteen years, has held office ever since the present Government came into power in 1905, when he was appointed Solicitor-General for Scotland. As a platform speaker he has been one of the most strenuous of the Government supporters. He was born at Glasgow in 1853, his father being Lord Provost of the city. Educated at Glasgow and Edinburgh Universities, he was called to the Scottish Bar in 1878, and soon afterwards was appointed Lecturer on Constitutional Law and History in Glasgow University, a position he held for ten years. Some few years ago he declined the Secretaryship for Scotland because his ambitions lay in the direction of judicial work.—*Ibid.*

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Old Rules and New.—A striking instance of the Court's power to extend time for the doing of any act under the Rules was afforded by an application made to the full Court of Appeal on the first day of the sittings for leave to enter an appeal, although it was out of time under the old Rule, which was superseded by the new Order XXXIX coming into effect that day (*Evans and Lloyds Bank* v. *Thomas*). Under the old Rule a distinction was made between motions for the new trial of actions tried with a jury and motions for the new trial of cases tried by a Judge without a jury. In the former case Rule 4 of Order XXXIX applied limiting the time for service of notice of appeal to ten days after the trial, while in the latter case the motion was treated as being in all respects an appeal from a final judgment within Order LVIII., Rule 15, and, therefore, entitled to three months' time. The effect, therefore, was to put judgments after trial in jury cases on the same footing as interlocutory judgments or orders, while judgments in non-jury cases were in a more favoured position for the non-successful party, who was allowed the full time accorded to final judgments. Mistakes were frequent through this unequal treatment of cases according to the mode of trial, and the new Rules which came into operation on the first day of the sittings swept the inconsistency away by making the time for appeal in all cases six weeks after the trial, whether with or without a jury. In the case we are referring to, which came under the old Rule, the applicant's advisers had fallen

into the common error and given their notice long after the ten days allowed by the Rule had expired, but the Lord Chancellor, with the concurrence of all the other members of the Court of Appeal, decided to apply the principle of the new Rule, and exercising the plenary jurisdiction of the Court in matters of time allowance, directed that the appeal should be entered, notwithstanding that it was too late under the old Rule. It was a salutary exercise of the Court's power and a good instance of the value of a commonsense application of the Rules.—*Ibid.*

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Trespass and Improvement of Property.—There is no such thing as a 'meliorating' trespass. Meliorating waste may often afford no ground for an action, but a trespasser is not allowed to justify his entry on another man's land by showing that he has actually improved the property, as by making a building more secure. This important principle of law was illustrated in the case *Kirby* v. *Chessum,* tried befere Mr. Justice Avory and a jury last Tuesday. Building operations were being carried on by the defendants upon land adjoining the plaintiff's house. In the course of these operations the defendants removed the soil from under part of one of the walls of the plaintiff's house, and put in a foundation of brickwork and concrete. As a matter of fact the work was well done, and the stability of the house was increased, but the leave of the plaintiff was not asked. An action was therefore brought to recover damage for the trespass. It was urged on behalf of the defendants that the new foundation was necessary to prevent the wall from falling, and the recent case of *Cope* v. *Sharp* (1912) was cited. In that case damage to property was held justified by the necessity of extinguishing a fire. But the fire had not been caused by the defendant. In the present case the defendants themselves—the trespassers—brought about the necessity for the new foundation by their own action in first removing the soil. Mr. Justice Avory, in summing up, said that as a matter of law the defendants had not justified their trespass, and the question for the jury was what damage the plaintiff had suffered as owner of the house. The jury assessed the damages at 20*l.*, and they also found the danger to the plaintiff's house was not so imminent as to make the work done necessary without first obtaining the plaintiff's consent. It seems clear, as the evidence was that the stability of the house was actually increased, that these damages were given by way of punishing the defendants, and as sentimental damages to the plaintiff for the invasion of his rights of property. Even higher damages might

not unreasonably have been given in such a case of deliberate trespass.—*Ibid.*

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'*An Imperial Assize.*'—Lord Haldane appears to have been 'thinking aloud' at an educational function at University College, where he adumbrated a remarkable scheme for the future hearing of Colonial appeals, which the *Times* neatly sums up in its heading, 'An Imperial Assize.' The Lord Chancellor regards the House of Lords, as a judicial as well as a political chamber, as being *in articulo mortis*. What is to take its place? He says 'the great link of the Empire,' the Judicial Committee of the Privy Council—just as has been proposed for Irish disputes in the Home Rule Bill. But the work will be far too great for the Judicial Committee as it is at present constituted, so, as the King is 'not a local institution but an Imperial institution,' so his Privy Council ought to be regarded as an imperial body, and there is no reason why it should not be as much localised in the Dominions as it is localised in London at home. That way, it seems, we shall get a Court which 'will not offend against the canon which the self-governing Dominions desire to set up—that their Supreme Court of Appeal shall not be outside themselves.' But that does not entirely solve the problem. Having reduced the Judicial Committee of the Privy Council to an abstraction, to an institution without local habitation, there is no reason, it is said, why it should not sit in more than one division, so that it need not be sitting always in the same place but might move, if necessary, from time to time about the Empire. 'What more easy than to export some members from London from the Judicial Committee to go and sit as the King's Imperial Privy Council in Canada?' That is the meaning of the 'Imperial Assize.' It rather takes one's breath away. But we are glad to see that Lord Haldane does not commit himself to the scheme. We rather hope that he does not mean it.—*Ibid.* November 8, 1913.

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The Reduction of Sentences.—The precedent established last week in *Rex* v. *John Martin* has been followed this week by the Court of Criminal Appeal in a number of appeals. In that case, as was pointed out in this column, the Lord Chief Justice adopted a principle not formerly acted upon generally by the Court namely, that there should be, within reasonable limits, a certain proportion between length of sentence and value of goods stolen in cases of larceny irrespective of the prisoner's record, and that sentences which greatly exceed this proportion ought to be reduced upon

appeal. In *Rex* v. *James Connor* (November 3) the prisoner had been sentenced at the West Riding of Yorkshire Quarter Sessions to 18 months' hard labour for stealing a pair of boots; he had been convicted twenty times since 1888, and seven of those convictions were for larceny. When the present crime was committed he had been only four days out of prison. Such a record has hitherto been generally considered by judges as requiring a sentence of penal servitude; but the Court, applying the test of value, reduced the sentence to nine months' hard labour, Again, in *Rex* v. *John James McKone*, a sentence of three years' penal servitude passed at Sheffield Sessions after a conviction for receiving stolen goods—an offence usually treated with severity because it assists burglars to follow their avocation—was for similar reasons reduced to one of twelve months' hard labour. And in *Rex* v. *Charles Sanders*, where the prisoner had received a sentence of five years' penal servitude at Barnstaple Quarter Sessions, for obtaining goods by false pretences, the sentence was reduced to one of three years. Here, however, no novel principle was required, since, although the prisoner was an old offender, he had been living an honest life for the two years immediately preceding the crime—a fact which has already in several cases been held sufficient to justify a reduction of sentence (*Rex* v. *John Hill*, 2 Cr. App. R. 74; *Rex* v. *Cullen*, 4 Cr. App. R. 7; *Rex* v. *Benjamin Smith*, 4 Cr. App. R. 48).—*Ibid.*

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Criminal Responsibility of Parents.—A commonsense view as to the possibilities of parental control led the Court to quash the conviction in *Rex* v. *Alfred Chainey*. The prisoner, an engine driver whose employment kept him from home, had a daughter under sixteen years of age who associated with women of immoral character. Her mother, a drunkard, did not prevent her doing so, and although her father, when at home, reproved and threatened the girl for her misconduct, she continued such association. The father was thereupon indicted and convicted, under section 17 of the Children Act, 1908 (as amended by the Children Act (1903) Amendment Act, 1910 sec. 1), for 'knowingly allowing' the girl to consort with persons of known immoral character. The prosecution supported their case on the ground that the father, if unable himself to control the girl, should have placed her in a home or brought another woman into the house to take care of her! These suggestions the Court of Criminal Appeal, having regard to prisoner's rank in life, rightly regarded as utterly impracticable and unreasonable.—*Ibid.*

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New trial of acquitted persons.—Although in India the Penal Code permits in certain cases the retrial of persons who have been acquitted by a competent tribunal, and even the conviction and execution of such persons for a capital offence, the Common Law of England has always leant strongly against the introduction of such a principle into our criminal procedure. The maxim *Nemo bis vexari debet*, indeed, not only saves an acquitted person from the oppression of a new trial, but also protects in the same way a person who has been convicted but whose conviction has for technical reasons been quashed, provided he has been once in peril. An acquitted person in such cases can always successfully plead *autrefois acquit*; and the rule on this point was clearly laid down by Lord Chief Justice *Coleridge* in the leading case of *Regina* v. *Duncan* (7 Q.B.D. 198). 'The practice of the Court,' he said in a famous passage, 'has been settled for centuries, and is that in all cases of a criminal kind where a prisoner or defendant is in danger of imprisonment, no new trial will be granted if the prisoner or defendant, *having stood in that danger*, has been acquitted.' These words seem clear, as well as comprehensive; but the words we have italicised have raised a doubt in two cases. In *Regina* v. *Galway Justices* (No. 2), [1906] Irish Reports II., 499), where a prisoner had been tried and acquitted before a tribunal consisting of Justices against whom bias was alleged, it was suggested that, owing to the existence of such bias in his favour, he never had 'stood in danger' of conviction; but the Court refused to attach any such limitation to the principle. So in *Rex* v. *Simpson and others exparte Smithson* (October 23), where two miners accused of contravening section 74 of the Coal Mines Act, 1911, by disobeying the directions of the certificated manager of their colliery, were acquitted by a Yorkshire Petty Sessional Court which included among the Justices who heard the case two persons employed or interested in mines, and therefore disqualified from hearing such cases, under section 103 (2) of the Coal Mines Act, 1911, it was argued that this disqualification deprived the bench of jurisdiction and so made the trial a nullity. In the Irish Case the proceedings were challenged on the ground of bias, which only makes them voidable, not void *ab initio*; whereas, in this case, the alleged lack of jurisdiction in the bench because of disqualification would make the trial void *ab initio*. The Divisional Court, however, reaffirmed the broad principle that after an acquittal, no new trial will be granted, whether the technical defect makes the proceedings wholly void or merely voidable.—*Ibid.*

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The fact that Hamilton, L. J., the new Lord of Appeal, at one time nearly abandoned his career at the Bar, as for several years he had so little practice, may afford no little food for reflection, and some consolation for students and not a few practitioners. It was lord Justice Mathew who recognised his abilities, and induced him to reconsider his decision, with the result that before he took silk in 1901 he had acquired a large practice. He is 54 years of age, and was an undergraduate of Balliol, and is an honorary Fellow of Magdalen. He was appointed a Judge of the King's Bench Division in 1909, and a Lord Justice in 1912.—*The Law Student's Journal.* November 1913.

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In Georgia they tell of a prisoner who had been convicted a dozen times of stealing, who, when placed at the bar for his latest offence, displayed a singular curiosity.

"Your honor," said he, "I should like to have my case postponed for a week. My lawyer is sick."

"But," said the magistrate, "you were caught with your hand in this gentleman's pocket. What can your counsel say in your defence?"

"Exactly so, your honor; that is what I am curious to know." —*National Corporation Reporter.*

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The *Westminster* gave, one night, some interesting remarks on the circumstances under which some of the old "Chiefs" were selected. When Lord Kenyon died the wags declared that the cause of death was his habit of eating apple-pie crust at breakfast to save the expense of muffins, and that Ellenborough, who succeeded, ever after bowed with great reverence to apple pie. Lord Tenterden owed his appointment to the fact that the Attorney-General of the day was too deaf to take the position. Strangest of all was the case of Chief Justice Wright. He was a boon companion of Jeffreys, who said to him: "As you seem unfit for the Bar, or for any other honest calling, I see nothing for it but that you should become a judge yourself."—*Law Notes.* November 1913.

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Lawyers and the Devil:—In the Canadian Law Times for September, Mr. Courtney Kenny tells us of a familar Italian legend about the Advocate who when turned blindfold into a Church to select for himself and his brethren a patron saint, stumbled over the

base of the statue of the victorious St. Michael, and clutching the defeated and prostrate fiend, cried " Here is our patron."

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Law library purposely destroyed.—A law library worth several hundred dollars was burned to-day by D. A. Yearger, state representative of the American Law Book Co. This library was purchased by Welza G. Fairchild of this city from the American Law Co., of New York, publishers of the well known authoritative work—Cyclopedia of Law and Procedure, commonly called "Cyc." Mr. Fairchild contracted tuberculosis and had paid but S. 20.00 on account of the S. 365 (contract price of Cyc. and Home Edition of the same) when he was forced to seek a climate suited to the disease from which he was suffering.

The owners of the library have strictly held to the policy never to rebind and sell a set of their work when the set has been used by a subscriber suffering from consumption. In accordance with their rule the library was burned, thereby effectively preventing dissemination of the dreaded disease as the tubercle bacillus, or germ, cannot withstand such treatment.

CONTEMPORARY LEGAL LITERATURE.

In the *American Law Review* for September-October, Mr. W. M. Blatt advances the theory that changes in the form of law are largely the result of group balancing in the economy of state, of the ruling group, the nobles, the subject class the middle class, the clergy, the merchants and lastly the local interests. Each group has a peculiarity of its own. The ruling group is inspired by what Nietzche calls master morality, the subject class by what he calls the slave morality. Through the middle class it is that most of the legislative safeguards of fairdealing have come. Extremes in laws controlling vice, irreligion and radicalism can usually be traced to the influence of the clergy. The merchant group is the prime factor in all legal changes looking to convenience in conveying property, the protection of employers of native industries and of commerce generally. The merchant differs from the typical middle class citizen in the lack of an inherent love of honest principles. The loose corporation laws which invite fraudulent representations of capital and the evasion of taxes are satisfactory to most merchants. The pure food laws are almost unanimously execrated by them. "In fact" says the writer "Mercury still remains the god of merchants, liars and thieves." The pressure of the lowest or subject class is very

slight compared with its numerical strength. The labor group has recently been acquiring strength. The pressure of local interests is generally fruitful only of political corruption. Foreign pressure opposes itself to the labor group which resents importation of labor from outside. Ambition, hunger, climate, geography, education and a thousand and one details affect each class and sometimes all classes but all such forces, before affecting law, must be converted into the form of energy which has been described above.

Dr. Baty dwells in another article upon the silent revolution that is going on in English Criminal Procedure which has introduced into the English system the dangers of the inquisitional system of the Continent with none of its safeguards. This is due to the Criminal Evidence Amendment Act which permits the accused to give evidence on his own behalf. The Judges look upon the failure of the accused to give his own explanation with suspicion and have begun to insist upon his disclosing his defence at the earliest stage possible. It has led the Police to take to cross-examining the accused, though many judges have strongly condemned the practice. The view that the accused must disclose his defence early works a peculiar hardship on the accused in that the prosecution is under no such obligation. The change in the attitude of judges is partly due to their looking upon the Magistrates as regular tribunals which they are not.

Another writer in the same journal pleads for greater security of judicial tenure in the various States of America. As it is, in most of the States, the judicial tenure is very short and the office being elective, the judges can hardly be counted upon to judge aright in matters in which popular prejudice runs high. Any way, the strain upon the judge's impartiality is very great. There is besides very little time for judges to pick up experience. In the Federal Courts, the principle of life-tenure prevails as in England and has been found to work very satisfactorily.

A writer in *The Canadian Law Times* for September puts together a lot of curious learning as to execution and delivery of deeds. Lord Coke enumerates no less than ten essentials to a valid deed. But some of the essentials concern the subject matter of the transaction rather than the requirements of a valid deed. Among the essentials mentioned by him are writing on paper or parchment, sealing and delivery. Neither signing nor attestation is necessary for the validity of a deed. The necessity for delivery is illustrated by the story of a man who hit upon the plan of having the

terms of a deed inscribed on his back but was dissuaded from doing so by his legal advisers who told him that a deed was not valid without delivery. What amounts to delivery has been the subject of much discussion. Though mere affixing the seal is not sufficient, any acts or words which to show that the party intended to be bound by it is sufficient. Sometimes delivery is merely confirmatory that is when the act constituting delivery takes place sometime after the deed are drawn up. It occurs where there has been some defect in the original execution which makes it not binding against a party. This is called redelivery. Redelivery is acknowledgment by the party sought to be bound that the document is binding against him. Excepting the recent case of (1913) 1 Ch. 489, all have been cases of alienations for consideration where deeds have been upheld on the ground of re-delivery. The case referred to carries the matter a step further and applies the principle to gifts.

This issue of Candian Law Times contains also an address of Sir Frederick Pollock on Judicial Records. The lecture after discussing the way in which records are kept in England dwells upon their historical value and contrasts the methods of pleading in Bracton's time with those in later times up to the present. The Professor thinks that there is more approximation in the methods of the 13th century and the 20th than of the 18th and the 20th. For twenty years the original records are kept in the vaults of the Royal Courts; afterwards they pass into the custody of the Master of the Rolls. We have at the Record office, records of suits for the last 700 years and more. The late Master of the Rolls—Sir George Jessel committed himself to the statement that the Court of Chancery was not a Court of Record. The reason assigned by him was that the records of that Court were not in the custody of the Lord Chancellor but of the Master of the Rolls The Professor thinks that the Master of Rolls was doubly wrong: *first* because the Master of the Rolls acts only as the Deputy of the Lord Chancellor; *secondly* because the test for determining whether a Court is a Court of Record is not that the judges keep their own record but that the record itself is the only authentic and conclusive proof of what the Court has done.

This issue contains also a learned discussion of what "nexum" in Roman Law meant, whether Niebuhr's theory or Huschke's theory is to be preferred or a third one which the writer puts forward is the true solution of the difficulty.

BOOK REVIEWS.

The Current Statutes (1913) complied by C. S. Somanatha Shastry, B. A. B. L. and P. Ramanatha Iyer B.A. B.L,. First grade Pleaders, Published by the Lawyer's Companion Office. We have no doubt that this publication will be felt a useful addition to every lawyer's library. In it, the enterprising editors promise to print in one place British Statutes relating to India, Acts of the various legislatures in India (with Select Committee's reports) and notifications, rules and orders under the various Statutes and Acts. It will serve to keep the lawyers up-to-date in their information as to the exact state of the law in any given part of India. Its value to the comparative study of Indian law can hardly be over estimated. For the volume of matter (one was hardly aware of the full extent of the legislative activity going on in India) the price is moderate.

The Indian Decisions (*New Series*) *Madras*.—By the Lawyer's Companion office. This brings us up to the end of the 7th Volume in the Madras Series.

Hindu Woman's Estate (*Non-Technical Stridhana*) by Bhagawan Das Sirvya, B.A., L.L.B. Published by Butterworth and Co. (1913) : We are not certain that the heading of the book is quite accurate but a quarrel on that ground would be purely academic. The subject dealt with is Hindu Woman's Limited Estate. The book presents a full and careful analysis of the case law on the subject with not uninteresting discussions on the original authorities. The introductory chapter is positively interesting though many might not agree with the author's views as to the history of the growth of Woman's rights in India. Those that have a taste for the curious will find at the end of the book an explanation by figures of the leading principles of the law. We must confess we have no taste for them. We consider all such things whether in the hands of a writer on Economics or in those of a Hindu law writer, equally fantastic and not of much profit. We would have liked the author to give the original Sanskrit wherever there was occasion for the citation of texts. We should also protest against such vulgarities (we consider them nothing less) as Narad, Gotam, and Parasar, But these are small matters. On the whole, the work is well done. The various ways in which a woman's estate may be acquired, the nature of the estate, the power of women in the management and

disposal of the estates in their possession, the rights of the reversioners, limitation for their suits, presumptions that avail for and against them, evidence to be tendered in suits and the equities that have to be considered are all so well and fully dealt with that we have little doubt that the work will be very popular with the profession.

The Law of Land Acquisition and Compensation in British India by Walter Russel Donogh, M. A., (1913) published by Messrs. Thacker Spink & Co.

The book as its title shows is a comprehensive one dealing with compulsory land acquisition by the state generally and not merely the Land Acquisition Act, though the main topic is the Act. The history of the legislation as to land acquisition is given in the introductory chapter and in the appendix the proceedings of the Legislative Council and the report of the Select Committee etc., are given. The value of these to the practitioner and the judge is very great though in strict theory, judges are not entitled to look into them. Relevant English decisions—as the provisions of the Indian Act run close to the English Act, they are many, are cited under appropriate sections. All relevant Indian decisions also are noted. The non-official journals no less than official journals have been consulted. The notes are full and clear without being verbose. Altogether the book is a creditable performance and is in every way worthy of the reputation of the author which deservedly stands high with the profession. The get up is lovely.

Indian Decisions (New Series) Vol. 9 by Law Printing House, Madras. This brings us up to Vol. 22 in the Allahabad series, that is to say, all the Volumes in that series, for which this enterprising firm got permission have been printed. We hope—judging from the past, we have every reason to believe, the other series also will be completed very shortly.

Hindu Law by C. S. Ramakrishna, B.A. B. L., in 2 Vols:—Hindu Law has been interpreted in such a mass of case-law, interpreted out of shape and recognition as some say—but that is another story—that reference to original authorities is a necessity only in rare cases. So that, the lawyer's desideratum now is more an accurate analysis of the case law as it stands at present and an

The Madras Law Journal Reports.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Ordinary Original Civil Jurisdiction.

Present :—Mr. Justice Bakewell.

K. Sheik Meeran Saib ... ... *Plaintiff.**

v.

C. Ratnavelu Mudaly ... ... *Defendant.*

Malicious prosecution—Cr. P. C. Ss. 200, 202, 204—Chapter XVI, object of—Separation of unfounded from substantial cases—Notice of inquiry under S. 202—Not contemplated by Cr. P. C.—No prosecution—Commencement of Prosecution—Issue of process—Meaning of—Warrant or summons after entertainment of complaint.

Sheik Meeran Saib *v.* Ratnavelu Mudaly.

Where on a complaint by the defendant accusing plaintiff of defamation the Magistrate issued a notice to plaintiff and held an inquiry under S. 202 Cr. P. C. and after hearing counsel for both parties dismissed the complaint.

Held: that on these facts there was no prosecution and a suit for damages for malicious prosecution was unsustainable.

Prosecution of the accused under the Criminal Procedure Code commences with the issue of process after the complaint has been entertained by the Magistrate and prior proceedings constitute at most only an attempt to prosecute the accused.

Notice that a preliminary inquiry would be held in respect of a complaint is a mere intimation that the Magistrate intends to take action and does not amount to an issue of process to the accused.

Proceedings against the accused commence ordinarily with a summons or warrant, and a hearing of the accused before such summons or warrant is not authorised by the Code and could not be attributed to the defendant so as to render him responsible for any damage caused thereby to the plaintiff.

The object of the procedure prescribed by Chapter XVI Cr. P. C. is the separation of unfounded from substantial cases at the outset and to prevent innocent persons from being brought into Police Courts and subjected to the annoyance of frivolous charges and this object would be frustrated by a preliminary hearing of the accused.

Golapjan v. *Bholanath Khettry*[1], *De Rozario* v. *Gulabchand Anandjee*[2] followed.

Civil Suit No. 260 of 1912 in the ordinary original civil jurisdiction of the High Court.

Messrs. T. Ethiraja Mudaliar and *R. Madanagopal* for Plaintiff.

Messrs. Grant and *Greatore* for Defendant.

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* C. S. No. 260 of 1912. 12th November 1912.

1. (1910) I. L. R. 37 C. 358.
2. (1911) I. L. R. 38 C. 880.

Sheik Meeran Saib v. Ratnavelu Mudaly.

The Court delivered the following

Judgment:—The plaintiff in this case alleges that the defendant preferred a complaint in the Presidency Magistrate's Court charging the plaintiffs with the offence of defamation, which on the 30th July last was dismissed, under S. 203 of the Criminal Procedure Code after a preliminary inquiry, and prays for damages for the malicious prosecution of the plaintiff.

Upon the case coming on for settlement of issues counsel for the defendant argued that the plaint does not disclose a cause of action, because the facts averred shew that that there was no prosecution by the defendant. It is admitted that no process was issued to compel the attendance of the plaintiff before the Magistrate, but the latter issued the notice, Ex. A, to the plaintiff and held an inquiry under S. 202 of the code, and after hearing counsel for both parties dismissed the complaint. The notice recites that the defendant had filed an information and complaint before the Magistrate, charging the plaintiff with the offence of having defamed the former and praying that a summons might issue against the latter, and continues as follows:—"Notice is hereby given that a preliminary inquiry will be held in the matter of the complaint at this court at 11 A.M. on 3rd day of July 1912." The document is thus a mere intimation that the Magistrate intends to take action upon the complaint, and does not amount either to a summons or to an invitation to the party charged to appear or take any other step in the matter; moreover, it is not included in the Fifth Schedule of the code as one of the forms to be used by the court, nor does it appear to be prescribed or contemplated by the Code of Criminal Procedure, 1898. Nevertheless, upon receipt of a formal document of this kind the party affected by the complaint might well think it expedient to appear and be represented by his legal adviser on the day mentioned and if he did so appear, he would naturally desire to be heard and possibly to adduce evidence. Chapter XVII of the Code is entitled "of the commencement of proceedings before Magistrates" and read together with chapter VI "of processes to compel appearance" shows that proceedings ordinarily begin with the issue of a summons or warrant. Prior to the issue of process, the Magistrate has to satisfy himself that there are sufficient grounds for setting the law in motion [S. 204 (1)] and for that purpose he is bound to examine the complainant (S. 200), and may postpone the issue of process while he inquires into the matter himself or a local investigation is made by another person (S. 202).

Sheik Meeran Saib v. Ratnavelu Mudaly.

It appears to me that the object of the procedure prescribed by Chapter XVI, which is entitled "of complaints to Magistrates" is the separation of unfounded from substantial cases at the outset, and to prevent innocent persons from being brought into the Police Courts and subjected to the annoyance of frivolous charges, and that this object is frustrated by the procedure adopted in this case.

In a warrant case such as this is, the Magistrate may issue a summons to the accused to appear, [S. 204 (1)], and may discharge the accused at any stage of the case, [S. 253 (2)]. Having regard to this provision and section of the code above mentioned, I am of opinion that the hearing in this case by the Magistrate was not authorised by the code, and cannot therefore be attributed to the defendant so as to render him responsible for any damage caused thereby to the plaintiff. I am also of opinion that these provisions show that the prosecution of the accused commences with the issue of process, after the complaint has been entertained by the Magistrate, and that the prior proceedings constitute at most an attempt by the complainant to prosecute the accused.

I do not think it necessary to discuss the English and Indian cases which have been cited, since they are fully dealt with in two decisions of the Calcutta High Court reported in *De Rozario* v. *Gulabchand Anandjee*[1] and *Golapjan* v. *Bolanath Khettry*[2] with which I entirely agree.

For these reasons I am of opinion that the plaint discloses no cause of action and accordingly dismiss the suit with taxed costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Godihal Karibasavana Goud ... *Appellant (Defendant).**

v.

Nandanaram Veerabhadrappa ... *Respondent. (Plaintiff.)*

Karibasavana v. Veerabhadrappa.

Damages—Tort and Contract—Principles of assessment—Difference between—Damages resulting directly from wrong only awardable—Mitigation-damage—Basis of the rule Remoteness—Obstruction to right of way—Loss of crops, unless no other reasonable access, remote—Easement Act S. 33—Damages for interference with evidence of right.

Alike in actions on Contract and on Tort, the damages which the plaintiff is entitled to must result directly from the wrongful act of the defendant and no

1. (1910) I. L. R. 37 C. 358. 2. (1911) I. L. R. 38 C. 880.

*S. A. No. 642 of 1911. 2nd August 1912.

Karibasavana v. Veerabhadrappa.

claim be made to damages which are only remotely connected with it. This is the basis of the rule that the plaintiff should avoid or diminish the damage as far as he could.

Where the plaintiff sued the defendant for damages for obstruction caused by the latter to his right of way and the court allowed damages for loss of crops on land which was left waste, the other route that was available being hazardous and roundabout.

Held; that unless the plaintiff could show that in consequence of the defendant's wrong it was not reasonably possible for the plaintiff to cultivate, the damage was too remote and the plaintiff could not recover.

But that he was entitled to recover the extra cost he would be put to in consequence of his right of way being obstructed and in addition substantial damages for interference with the evidence of his right.

Baijnathsingh v. Totai Chowdhry[1] followed.

Difference between the applicability of the rule as to mitigation of damages in contract and torts considered.

Second appeal from the decree of the Court of the Subordinate Judge of Bellary in A. S. No. 113. of 1909 presented against the decree of the District Munsif of Bellary in Original suit No. 12 of 1908.

C. V. Anantakrishna Aiyar for Appellant.

J. C. Adam for Respondent.

C. V. Anantakrishna Aiyar.—The damages in this case are too remote. Plaintiff's failure of crops is not consequential upon obstruction by defendant. He could have avoided failure of crops by taking another route. The rule of law in such cases is laid down by S. 73 I. C. A. There is no difference in this matter between contracts and torts. Halsbury Vol X p. 475. Sedgwick S. 201. *et seq.*

J. C. Adam.—Anyhow plaintiff is entitled to substantial damages for obstruction of his right *Baijnath Singh* v. *Totai Chowdry*[1]. Damage is not the gist of this action as in the case of a public right of way. He would therefore be entitled to the same damages on one head as the other. He submitted also that the question of remoteness was a question of fact. Defendant had no right to require the defendant to mitigate the consequences of his wrong.

Cur Ad vult.

The court delivered the following

Judgment:—The suit, out of which this second appeal arises, was instituted for the recovery of damages sustained by the plaintiff in consequence of an obstruction caused by the defendant of the

1. (1901) 6 C. W. N. 197.

Karibasavana v. Veerabhadrappa.

plaintiff's right of way to certain lands of the plaintiff. A decree had been previously obtained by the plaintiff establishing his right of way but that decree was apparently under appeal at the time of the institution of this suit. The plaintiff claimed damages sustained by him owing to his inability to cultivate his lands in 1905 in consequence of the obstruction. The defendant contended that the plaintiffs could have gone to his fields by another route, that it was his own fault that he did not cultivate the lands and that therefore he could not claim any damages at all. The District Munsif upheld his contention. He held that the plaintiff was guilty of contributory negligence and was therefore not entitled to recover any damages. He found that there was another way to the plaintiff's fields though it was less convenient than that which the defendant obstructed and that the plaintiff did not act rightly in not sowing his fields.

On appeal, the subordinate Judge held that the other way which the plaintiff could have used was not one along which carts could pass during the rains, that it was sandy that there were boulders here and there and that it was on the whole a hazardous route. To use his own words the plaintiff was not bound "to tempt his fate by attempting to get into his fields through that hazardous roundabout route." He was of opinion that the plaintiff was entitled to recover damages sustained by him by the lands lying waste. We may observe that the District Munsif found that the plaintiff's lands were really dry lands and that it was not necessary to pass to them during the rainy season. We cannot take the Subordinate Judge to have found that it was not reasonably possible for the plaintiff to avail himself of the other route to pass to his lands. The subordinate Judge awarded a sum of Rs. 177 as damages, for loss of crops. He did not give the plaintiff any damage for the injury sustained by him by the interference with his right of easement on the ground that it affected the evidence of his right. The defendant, who has appealed from the decree of the Subordinate Judge, contends that the damages have been assessed on a wrong principle and that the plaintiff is not entitled to damages for loss of crops. It is argued that the plaintiff was bound to diminish the damages he might sustain by the obstruction of the way by doing all that he reasonably could by finding another way to the lands he had to cultivate and he asks us to apply the same principle to the assessment of damages in an action on tort as would ordinarily apply to an action for damages for breach of contract. He draws our attention to paragraph 203 of Sedgwick on Damages. It is not necessary to discuss at any length in this case how far the principle that the plaintiff is bound to avoid the damages caused by the defendant's breach

Karibasavana v. Veerabhadrappa.

of contract would be applicable to actions on tort. But it cannot be denied, that, alike in actions on contract and on tort, the damages which the plaintiff is entitled to must result directly from the wrongful act of the defendant and that no claim can be made to damages, which are only remotely connected with it. This is in reality the basis of the rule that the plaintiff should avoid or diminish the damages as far as he could. The learned author cited by the appellant, observes: "It is frequently said that it is the duty of the plaintiff to reduce the damages as far as possible. It is more correct to say that by consequence which the plaintiff, acting as prudent men ordinarily do, can avoid, he is not legally damaged. Such consequences can hardly be the direct or natural consequence of the defendant's wrong, since it is at the plaintiff's option to suffer them. They are really excluded from the recovery as *remote*. In this view, the doctrine would rest on the intervention of the plaintiff's will as an independent cause. *Ad hoc* he is not damaged by the defendant's act, but by his own negligence or indifference to consequences." This principle applied to actions on contract would really lead to the rule enunciated in somewhat different words that it is the duty of the plaintiff to reduce the damages as far as possible; for a breach of contract consists in the defendant's failure to do a certain act that he is bound to do. That failure by itself would not result in damages, for it is quite open to the plaintiff, if he could, to obtain the result which he expected from the defendant's performance of the contract by other measures which an ordinarily prudent man would adopt. A tort, on the other hand, may consist in the defendant's failure to do an act which he is bound to do, or in doing one which he ought not to do or in preventing the plaintiff from doing an act which he is entitled to do. Therefore, there may be differences in the application to actions on tort of the basic principle which is, no doubt, common to both kinds of actions, *viz.*, the damages should be the direct consequences of the wrong complained of. In this case, the defendant's wrong consisted in his preventing the plaintiff from doing something that he was entitled to do. The mere prevention does not directly lead to the non-cultivation of the lands. The loss of produce was the result of the lands lying uncultivated. No doubt, the plaintiff might show that in consequence of the wrong, it was not reasonably possible for him to cultivate. But unless he could show this, he could not claim the damages resulting from non-cultivation. In the same work the learned author referring to the decided cases in support of his position says: "So too, the loss of crops is not the proximate result of the deprivation of an animal by which the owner intended to

Karibasavana v. Veerabhadrappa.

harvest the crops; consequently, in an action for deprivation of the animal, no compensation can be recovered for the loss of the crop. So where through deprivation of the use of an agricultural machine or through a defect in it, the owner loses his crops, such loss is too remote and he cannot recover compensation for it. And loss of crops from loss of service of a servant or slave is too remote to be compensated in an action founded on the loss of service. It is, however, held that where no other assistance can be procured the plaintiff may recover compensation for the loss."See paragraph 202. The true measure of damages in such a case is laid down in paragraph 215 of the same work:—"The reasonable expenses of avoiding the consequences of the defendant's wrong are recoverable and when the plaintiff fails to take proper steps, he is limited in his recovery on this head to what the cost of such steps would have been." Among the illustrations given to the rule, the author mentions the case of the obstruction of a right of way. He observes: "when the defendant wrongfully refused to allow the plaintiff's vessel to proceed through a certain channel, the only practicable means of reaching its post of destination, it was held that the plaintiff might recover the expense of unloading the cargo by lighters. Where the defendant obstructed a river and the plaintiff's vessel grounded upon the obstruction, the expense of getting off from and over the obstruction may be recovered."

We must hold that what the plaintiff was really entitled to in this case was the extra cost which he would be put to for the cultivation of his land in consequence of his right of way being obstructed and that the Subordinate Judge has assessed the damages on a wrong principle. At the same time we agree with the learned counsel for the respondent that the plaintiff would really be entitled to substantial damages for the interference with the evidence of his right. See section 33 of the Easements Act and *Baij Nath Singh* v. *Tetai Chowdry*[1]. The learned Vakil for the appellant and the respondent's counsel have been able to agree on an amount which may be regarded as the proper award on the principle enunciated by us. We accept that amount and give the plaintiff a decree for Rs. 100 and costs on that amount in the second appeal. We do not interfere with the order of the Lower Court as to costs.

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1. (1901) 6 C. W. N. 197.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

N. Arthanari Goundan and another ... ... } *Appellants 1st & 2nd Defendants.*

v.

Ramasami Goundan and others ... ... } *Respondents—Plaintiff and (Defendants 3 to 30.)*

Hindu Law—Gift by widow of portion to next reversioner on his undertaking not to object to alienation of the rest--Construction of—Partial surrender Validity of—Inheritance—Whole blood and half-blood—Preference, not restricted to special cases mentioned in Mitakshara—Estoppel—Acceptance of hypothecation by actual reversioner of a portion of property gifted.

Arthanari Goundan *v.* Ramasami Goundan.

Where a Hindu woman conveyed by way of gift a portion of the property which she obtained by inheritance from her son to the next presumptive reversioner on his consenting " to allow her to have possession and enjoyment of the remaining properties with full rights and powers."

Held Per Miller J:—(1) that the transaction did not amount to a surrender to the reversioner of the whole of the life estate and a re-transfer of a portion to the lady.

(2) That it was a partial surrender to the next reversioner in consideration of his undertaking *not to raise any objection* to her disposal of the other property in case she chose to deal with it and was invalid under the Full Bench ruling in *Marudamuthu Nadan* v. *Srinivasa Pillai*[1].

(3) and that the authority of the said ruling has not been affected by the decision of the Privy Council in *Bajrangi Singh* v. *Manokarnika Baksh Singh*,[2]

Per Sadasiva Aiyar J.—The law as to the effect of reversioner's consent to widow's alienations has been developing though not logically and the effect of the decision of the Privy Council in *Bajrangi Singh* v. *Manokarnika Baksh Singh*[2] is to put partial alienations on the same footing as alienations of the entire inheritance.

Held: accordingly, that the alienation in favour of the reversioner was valid and binding against the actual reversioners.

Per curiam: As between collaterals and their descendants of the same degree those related through whole blood are to be preferred to those related through halfblood. The preference based on the distinction between whole blood and half is not restricted to the special cases referred to in the Mitakshara *Subba Singh* v. *Sarapur Kumar*[3], *Sham Singh* v. *Krishna Sahai*[4] followed, *Vithal Row* v. *Rama Rao*[5] not followed.

One R was the last male owner. His grandfather was who was S also the great grandfather of the plaintiff, the 1st and 3rd defendants. Plaintiff, 1st defendant and R were descendants through his sons by one wife, the 3rd defendant through the son of another wife.

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* A. No. 6 of 1910. 3rd March 1913.

1. (1897) I. L. R. 21 M. 128.
2. (1907) I. L. R. 30 A. 1.
3. (1896) I. L. R. 19 A. 215.
4. (1902) 6 C. L. J. 190.
5. (1899) I. L. R. 24 B. 317.

Arthanari Goundan v. Ramasami Goundan.

Held: The plaintiff and 1st defendant excluded the 3rd defendant from inheritance.

Held further *Per Miller J.* That the plaintiff was not estopped from contesting the gift by reason of his having accepted a hypothecation of a portion of the land to which the gift applied.

Appeal from the decree of the District Court of Salem in O. S. No. 13 of 1908.

B. Sitarama Rao and *A. KrishnaswamiAiyar* for Appellant.

T. R. Ramachendra Aiyar for Respondent.

A. Krishnasami Aiyar:—Partial alienation by the widow is good. *Marudamuthu Nadan* v. *Srinivasa Pillai*[1] is no longer law. *Bajrangi Singh* v. *Manokarnika Baksh Sing*[2] must be taken to have impliedly overruled it. The case of *Rangappa Naik* v. *Kamti Naik*[3] is not a governing authority on this question. This point was not referred to the Full Bench though the Judges express opinions on the question. So far as Mr. Justice Sankaran Nair's opinion goes, it is in my favour. In effect according to the learned Judge a partial surrender is good. *Challa Subbia Shastri* v. *Paberi Pattabhirama Iyer*[4] points to the same conclusion. *Muthu Veera Mudali* v. *Vythilinga Mudali*[5] is against me. The difference between alienations for value and gifts made by the Bombay Court in *Pilu* v. *Babaji*[6] and *Abhesang* v. *Raisang*[7] is not accepted in this Court. *Venkatasubbier* v. *Chinnasamier*[8]. The Bombay case has no doubt been followed in Allahabad which once held very strict views on the subject *Bakhtwar* v. *Bhagwan*[9]. The Calcutta Court in *Pullin Chandra Mandal* v. *Balai Mandal*[10] takes the same view as *Wallis* J. Another way of looking at the transaction is as a family arrangement. The plaintiff has consented to the transaction by taking a mortgage of the properties. He is even estopped. A mortgagee is estopped from denying the title of the mortgagor.

T. R, Ramachandra Aiyar:—Submitted that the Full Bench case in *Marudamuthu Nadan* v. *Srinivasa Pillai*[1] has not been overruled but on the other hand has been confirmed and therefore ought to be followed.

The Court delivered the following

1. (1897) I. L. R. 21 M. 128.
2. (1907) I. L. R. 30 A. 1. (P. C.)
3. (1908) I. L. R. 31 M. 366.
4. (1908) I. L. R. 31 M. 446.
5. (1908) I. L. R. 32 M. 206.
6. (1909) I. L. R. 34 B. 165.
7. (1912) 14 Bom. L. R. 602.
8. (1911) 22 M. L. J. 488.
9. (1910) 7 A. L. J. 121.
10. (1908) I. L. R. 35 C. 939.

Arthanari Goundan v. Ramasami Goundan.

Miller J.

Judgments.—*Miller* J:—The plaintiff as reversionary heir of the son of one Marakathammal sued for a declaration that a deed of gift executed by her to one Ramaswami Goundan was not valid and binding on him and for partition. The principal question in this appeal is whether the gift by Marakathammal to Ramasami Goundan, (the transaction as evidenced by Exhibit I) is valid and binding on the plaintiff Ramasami Goundan, the donee, as the next presumptive reversioner to succeed on the death of the donor. The document Exhibit I runs as follows;—"As you have performed the funeral rites to my husband, the deceased Arthanari Goundan and my son the deceased Ramasami Goundan, as you have the right to inherit as surviving heir, all my properties after my death, as you have spent on my behalf and on behalf of my son, your own, and after borrowing monies required for conducting O. S. No. 5 of 1883 on the file of the District Court, Salem, conducted by my son, the deceased Ramasami Goundan, as plaintiff and all other Civil and Criminal proceedings in connection therewith in other Courts, as I am advanced in age and unable to supervise and manage the Mitta and other lands and to collect the amount due on the hypothecation debt bonds, and as you have consented to my possession and enjoyment with all rights and interests of all the properties other than those mentioned below which belong to me, under the Razinama decree in O. S. No. 5 of 1883 on the file of the District Court of Salem, and which I am enjoying and of which I make a gift to you, and as you have promised to support me during my life-time at your expense and to have the marriage of my unmarried daughter performed according to our customs and to perform all *Siru* and *Sirappu* to this and to another daughter who has been married, I have made a gift of the undermentioned properties valued at about Rs. 10,000 to you who is the elder brother's son of my husband the deceased Arthanari Goundan, and delivered possession to you. Therefore you shall in comfort possess and enjoy the undermentioned properties from generation to generation and with powers to give away by gifts sale etc. I have no manner of rights or interests over the said gift properties. To this effect is the deed of a gift executed by me with my consent." This document it is contended on behalf of the appellant should be taken as representing a transaction by which Marakathammal surrendered the whole of her life estate to the nearest reversioner, Ramasami Goundan and by which he returns to her the properties other than those which are described as given to him. In that way, it is said, we have here a surrender to the reversioner of the whole of the life estate without a reversion and a re-transfer to the widow of a portion of th

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property. I think it is perfectly clear on a proper construction of the document that, though the result may have been the same as if there had been a gift in return, those gifts were not actually made—what was done was merely that a portion of the property valued at Rs. 10,000 was handed over to the reversioner in consideration of his having undertaken to do something for the widow and among others, I may take it, his having undertaken not to raise any objection to her disposal of the other party in case she chose to deal with it as if she were an absolute owner; that may be what is meant by the words " and as you have consented to my possession and enjoyment with all rights and interests" I take it then there is no surrender of the whole with re-conveyance of this part. Then if that is the construction of the document, the case is clearly a case of surrender of a part of the widow's estate to the nearest reversioner and therefore is invalid according to the Full Bench decision in *Marudamuthu Nadar* v. *Srinivasa Pillai*[1]. Now we are bound by that decision unless we can hold that it has been overruled by the Privy Council decision in *Bagranji Sing* v. *Manikarnika Baksh Singh*[2] which was a case in which alienations to third parties made by a widow were ratified by certain deeds by the next presumptive reversioners. The Privy Council held that was sufficient to validate the alienation. As I have said before in *Muthuveera Mudaliar* v. *Vythialinga Mudaliar*[3] that that decision did not in my opinion weaken the authority of the Full Bench case in *Marudamuthu Nadar* v. *Srinivasa Pillai*[1]. The Full Bench case is cited in that judgment and the portions of Mr. Subramania Aiyar's judgment in which he refers to the necessity of the surrender of the whole life estate is quoted by their Lordships of the Privy Council. I am unable to hold in spite of the fact that what was held to have been ratified actually was a series of partial alienations that their Lordships meant and overruled the decision in *Marudamuthu Nadar* v. *Srinivasa Pillai*[1] as to surrender to the next reversioners and cannot find anything in the judgment justifying the view that that decision is not binding on us still. I think the same opinion has been expressed by the Chief Justice and Mr. Justice Sankaran Nair. I think I must therefore hold that I am still bound by the decision in *Marudamuthu Nadar* v. *Srinivasa Pillai*[1] and consequently this partial surrender was not valid against the plaintiff. Then it is suggested that the Plaintiff is estopped in some way by having taken a hypothecation in respect of

1. (1897) I. L. R. 21 M. 128. 2. (1907) I. L. R. 30 A. 1.
3. (1908) I. L. R. 32 M. 206.

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a portion of the land to which this gift applied. I do not think there is any estoppel in these matters.

Then the other question which was raised is whether the share which, in the event of partition the plaintiff should get is properly the one half share which the District Judge has given him : and that contention is based upon this, the 3rd defendant like the plaintiff is a great grandson of Sengotti Velu Gounden who is the grand father of the last male holder. The plaintiff, 1st defendant and 3rd defendant are all great grandsons of Sengothavelu, the plaintift and the 1st defendant and the last male owner are descended from him through his son by his second wife ; while the 3rd defendant is descended from him through his son by his first wife. The question then is whether the 3rd defendant by reason of his being related to the last male holder through a wife different from the lady who was the progenitor of the line to which the plaintiff, 1st defendant and the last male owner belong, is excluded by the plaintiff and the 1st defendant from sharing in the property of the last male holder. As said the plaintiff and the 1st and 3rd defendants are of the same degree. They are all connected with the last male holder as the descendants of Sengothivelu Gounden and they are all of the same degree of remoteness from Sengotti Velu Gounden. It has been held in *Subba Sing* v. *Sarafraz Kunwar*[1] in which the parties stood in very much the same position as in this case, that in the same circumstances the whole blood would exclude the half. In the case of *Sham Singh* v. *Krishna Sahai*[2] Mr. Justice Mookerjee after discussing the question at length has stated that he is of the same opinion in holding that a paternal uncle of the half blood is excluded by a paternal uncle of the whole blood. On the other hand in the case on which the appellant relies *Vithal Rao* v. *Ram Rao*[3] it was held that a paternal uncle of the half blood was not excluded by a paternal uncle of the whole blood. The view taken being that the difference between the half and the whole blood when preference is made, should be held to have application only to the special cases which are expressly referred to in the Mitakshara. The other view is held in Calcutta and Allahabad as expounded fully by Mr. Justice Mookharjee in the case to which I have referred, and I prefer to accept the conclusion arrived at in those Courts. The effect of that will be that the District Judge is right in giving the plaintiff one half of the estate and in my view, therefore, this appeal must be dismissed with costs.

1. (1896) I. L. R. 19 A. 215. 2. (1907) I. L. R. 30 A. 1. (P. C.)
3. (1899) I. L. R. 24 B. 317.

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There is a Memorandum of objections in which the 3rd defendant objects that he should not be made to pay the costs of the plaintiffs. He has succeeded in the whole of his claim as regards one half of items Nos. 1 and 2 and as to the rest of the property in dispute, he had made no claim in his written statement. He should not therefore be made to pay the costs of the plaintiff at all. He does not ask for costs in the Court below. The memo of objections will therefore be allowed with costs and the decree modified to the extent of striking out the provision that the 3rd defendant is to pay the costs of the plaintiff.

Sadasiva Aiyar J:—As regards the memo of objections, I agree that it should be allowed with costs for the reasons given by my learned brother. As regards the main appeal I am of opinion that it should be allowed in respect of items 1 and 3 to 32 on the short ground that a partial alienation by a widow to the nearest reversioner is valid in law when he is a male and gives him full ownership right in the alienated property. I know that this view is against the decision of the Full Bench in *Marudamuthu Nadar* v. *Srinivasa Pillai*[1] but I adhere to the opinion which I expressed in *Kakamudy Ragupathi* v. *Kakamudi Kamamma*[2] that this case of *Maradamuthu Nadar* v. *Srinivasa Pillai*[1] should be held to have been overruled by the decision of the Privy Council in *Bajranji Singh* v. *Manokarnika Baksh Singh*[3]. The reasons are the same as those given by Mr. Justice Wallis in the Full Bench case of *Rangappa Naik* v. *Kampti Naik*[4]. I do not mean to say that in *Bajrangi Singh* v. *Manokarnika Baksh Singh*[3] their Lordships of the Privy Council expressly stated that they were overruling *Maruda Muthu Nadar* v. *Srinivasa Pillai*[1] but having regard to the facts of that case and the language used, I think that that is the implication which follows from the judgment of their Lordships. The position of a widow under the Hindu Law as administered by the Courts and the position of the so called reversioners give rise to many anamolous and strange doctrines. The widow is neither a life tenant nor an absolute owner but she is a full owner subject to certain restrictions as to alienation. The next presumptive reversioner again has got only a *spes successionis* according to many observations in the judgment of the Courts but unlike a man owning a *mere spes successionis* he is allowed to bring suits to set aside alienations by the widow. He has also got a very effective voice in consenting to or vetoing an adoption intended

1. (1887) I. L. R. 21 M. 128.
2. (1912) 12 M. L. T. 325.
3. (1907) I. L. R. 30 A. 1.
4. (1908) I. L. R. 31 M. 366.

Arthanari Goundan v. Ramasami Goundan.

Sadasiva Aiyar J.

to be made by the widow and could sue to set aside such an adoption, if made. He could get a valid surrender at once from the widow of the property to which he would be entitled only if he survives the widow, and certain alienations by the widow (I will not just now say whether of the whole estate or portion of the estate) to strangers are validated by his consent. In such an anamolous state of affairs it is impossible to expect the law to be logical. Even the successive development of the law on this subject (developments effected by judicial decisions) have not been strictly logical. I think that some remarks of the learned Chief Justice in *Rangappa Naik* v. *Kamti Naik*[1] support my view that the decisions even of the Privy Council cannot be wholly reconciled with one another on mere grounds of logic. The development of law does not usually take place by direct statement of fresh propositions or logically but frequently by implications following from passages in the judgment of high authorities dealing with the questions as they arise. I am of opinion that by Privy Council judgment in the case of *Bajrangi Singh* v. *Manokarnika Baksh Singh*[2] the law was declared to have developed to this extent *viz.*, that partial alienations by the widow with the consent of the next reversioner or to the next reversioner himself are valid and also that the doctrine of estoppel (which their Lordships for the first time laid down in that case in such a connection) prevented the heirs of the reversioner who gave his consent to an alienation for consideration from questioning that alienation even when such heirs claim the reversion in their own right and not through their propositus who had only a contingent reversionary right when he gave his consent. I have read criticisms of their Lordships' above extension of the doctrine of estoppel that it is not warranted by the authorities and text writers who have written on that doctrine but (as I said already) as Lord Halsbury laid down in a well known case, the law is not always logical. In fact consideration of convenience and of equity and of public policy had not a little to do with the development of the law in these matters and I think that such considerations lead to the conclusion that partial alienation should be considered to be on the same footing as alienations of the estate in the entire inheritance obtained by the widow from her husband. The Calcutta High Court have interpreted the decision of their Lordships in the case in *Behari Lal* v. *Mado Lal Ahir Gayawal*[3] as validating partial alienations also and I think the Privy Council in *Bajrangi Sing* v. *Manokarnika Baksh Singh*[2] intended to approve the Calcutta view in regard to such alienations. For these

1. (1908) I. L. R. 31 M. 366. 2. (1907) I. L. R. 30 A. 1.
3. (1891) I. L. R. 19 C. 236.

reasons, I would allow this appeal as regards 1 and 3 to 32. In respect of the other items I agree that as the 3rd defendant cannot claim as a reversioner along with the plaintiff and the 1st defendant who belong to the whole blood; the appeal as regards one-sixth share in those properties must be dismissed with costs.

The result is that the appeal is dismissed with costs to be paid by the 1st and 2nd defendants.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

Duvvada China Jagayya Cowdary and 9 others ... ... *Appellants*.*

v.

Probha Narasimham ... ... *Respondent.*

Madras Rent Recovery Act (Act VIII of 1865)—Patta and muchilika, exchange of—Between Zamindar and ryot—Fresh exchange between farmer and ryot, for the same fasli—Not essential.

The provisions of Act VIII of 1865 (Madras Rent Recovery Act) do not require the exchange of a second muchilika and a second patta between the ryot and the farmer of the land under the Zamindar when for the same fasli, a patta and muchilika have already been exchanged between the ryot and the Zamindar.

Appeal from the decree of the District Court of Ganjam in O. S. No. 10 of 08.

P. Nagabhushanam for appellant.

K. V. L. Narasimham for respondent.

The Court delivered the following.

Judgment:—We do not think the provisions of Act VIII of 1865 require the exchange of a second muchilika, and a second patta between the ryot and the farmer of land under the Zamindar, when for the same fasli a patta and a muchilika have already been exchanged between the ryot and the zamindar. This is the only ground argued. The appeal is dismissed with costs.

The same judgment follows in S. A. No. 1573 of 1910 presented from the decree of the District Court of Ganjam in A. S. No. 1 of 09 preferred against the decree of the District Munsif of Sompettah in O. S. No. 127 of 08.

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* A. No. 147 of 1910. 4th March 1913.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Iyer.

Adusumalli Suryanarayana ... ... *Appellant (Plff.)

v.

Vallurapalli Sriramulu ... ... Respondent.

Mortgage—Transferee of decree—Subsequently purchasing a share of redemption—Effect of—Right to recover proportionate share of decree amount —Co-mortgagor discharging encumbrance, right of—Difference between.

Surya-narayana v. Sriramulu.

Where one of two mortgagors discharges an encumbrance binding on both, the mortgagor doing so could not recover from his co-mortgagor more than the proportionate share of the amount actually paid by him.

The case is different where the transferee of a mortgage decree subsequently becoming the purchaser of a share of the equity of redemption sues the other sharers. His right as decreeholder which had became complete before his purchase of the equity of redemption could not be affected or curtailed by it and he is entitled to recover the proportionate share of the decree amount and not merely of the amount paid by him for the transfer of the decree.

Second appeal from the decree of the Temporary Sub-Court at Masulipatam in A. S. No. 563 of 1910 presented against the decree of the District Munsif of Gudivada in O. S. No, 193 of 09.

P. Nagabhushanam for Appellant.

P. Narayanamurti for Respondent.

The Court delivered the following

Judgment :—The facts found are that there was a decree for Rs. 750 on a mortgage against the interests of two persons in the mortgaged property Nagabhusanam and Punnamma. The plaintiff took a transfer of the decree from the decree-holder for Rs. 324. Afterwards the equity of redemption in the property of Nagabhushanam and Punnamma passed by transfers respectively to the defendant and the plaintiff. The plaintiff claimed to recover half the amount of the mortgage on the security of Nagabhushanam's share in the hands of the defendant. The defendant pleaded that the plaintiff was entitled to recover only half the sum that he actually paid for purchasing the decree and not half the amount of the decree.

The lower Courts upheld this contention but we think that they were wrong in doing so. The case is not one where one of two mortgagors discharges an encumbrance binding on both. In that case the mortgagor doing so could not recover from his co-mortga-

*S. A. No. 1224 of 1911. 20th March 1913.

Surya-narayana v. Sriramulu.

gor more than a proportionate share of the amount actually paid by him. Here the plaintiff's purchase of the equity of redemption was subsequent to his purchase of the decree on the mortgage. This right as decree holder was complete before his purchase of the equity of redemption and could not be affected or curtailed by it.

We modify the decree of the Courts below by giving the plaintiff a decree for the whole of the amount sued for and costs throughout. Interest from the date of the Munsiff's decree will be calculated at 6 per cent. The time for redemption will be till the 30th September 1913. The plaintiff will have a decree for a sale in default.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, Chief Justice and Mr. Justice Spencer.

Sri Rajah Bommadevara Venkata Narasimha Naidu Bahadur Zemindar Garu. } **Appellant in the two appeals—Claimants.*

v.

Atmuri Subbarayadu and others. ...*Respts. in A.* 38 *of* 1909.
M. Narasimham and others. ... *Do. in A.* 39 *of* 1909.

Venkata Narasimha Naidu v. Subbarayadu.

Land Acquisition Act—Nature of proceedings under Part III—New enquiry and not appeal—Party at whose instance reference made, not adducing evidence—Effect of—Not precluded from asking for modification—Zamindar and ryot—Muchilika—Construction—Provision for separate cist for fruit trees—No cist levied and user with tenants—Award of entire value to tenant upheld—Ratio of apportionment of compensation for land—No fixed ratio of three-fifths and two-fifths—Factors to be considered.

Proceedings under Part III of the Land acquisition Act are not by way of appeal and what is contemplated is a new enquiry by the District Judge. But it would be going too far to say that because the party on whose behalf the order of reference is made adduces no evidence before the Court, he is precluded from asking the Court for a modification of the award as made by the Collector although the fact that he is not in a position to adduce evidence before the Judge is a matter to be taken into consideration in determining whether the award of the Collector should be disturbed.

Where in a muchilika there was a provision that "as the cist on the palmyras and other trees is not included in this cist I (ryot) shall not object to any arrangement you (Zamindar) may make regarding them."

Held (i) that the clause apparently meant that if the Zamindar insisted upon the payment of a separate cist, the tenant would not object to it.

(ii) that having regard to this clause and the fact that there was no evidence that the zamindar had ever insisted upon a separate cist, and the user

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*A. S. No. 38 and 39 of 1909. 7th September 1911.

Venkata Narasimha Naidu v. Subbarayadu.

and enjoyment of the trees was with the ryots, having regard also to the fact that the zamindar had adduced no evidence before the District Court, the award of the entire value of the trees to the tenant made by the Collector could not be held to be wrong.

There is no fixed rule that in all cases where compensation (for land) was to be apportioned between a Zamindar and ryots with permanent right of occupancy compensation should be apportioned in the ratio of three-fifths to two-fifths. The ratio is to be determined after taking into consideration several factors viz., the respective shares of the Zamindar and the ryot in the produce, the expenses of cultivation, the fact that the cultivator has a home and a sphere for labour for himself and his family and the nature of the tenure.

Accordingly, in the absence of any evidence on the part of the Zamindar as to the ratio of compensation their Lordships refused to interfere with the award of three-fifths to the ryot and two-fifths to the Zamindar made after a due consideration of all these factors.

Appasami Mudali v. Rangappa Nattan[1] followed, *Shama Prosunno Bose Mozumdar v. Brakoda Sundari Dasi*[2], *Dinendra Narain Roy v. Tituram Mukerjee*[3], *Bhupati Roy Chowdhuri v. The Secretary of State*[4], *Satish Chunder Chattopadhya v Raijatindra Nath Chowdhury*[5] distinguished.

Appeal from the awards of the District Court of Kistna in P. C. No. 123 of 1908 and C. C. No. 1 of 1908 and C. P. No. 124 of 1908 and C. P. No. 2 of 1908.

P. Naghabushanam for Appellant.

T. Prakasam for Respondent.

The dispute in this appeal relates to the rate of apportionment between a zamindar and his occupancy tenants when their land is taken under the Land Acquisition Act and a certain amount awarded as compensation.

P. Nagabhushanam :—In apportioning the amount of compensation paid between a Zamindar and a tenant three-fifths must be given to the landlord and two-fifths to the tenant; *Appasami Mudali* v. *Rangappa Nattan*[1]. This was followed in A. S. No. 119 of 1893 and A. S. No. 118 of 1898.

T. Prakasam :—*Appasami Mudali* v. *Rangappa Nattan*[1] does not apply to this case, for there the sharing system prevailed under which the land-lord was getting half the produce; moreover it was a case of Mirasidars and a kudi who could not sell his interest. Here the tenant who is an occupancy tenant pays only Rs. 2 per acre to the Zamindar the share or interest of each in the land should first be fixed and the compensation given in that ratio. The share of three-fifths and two-fifths is an arbitrary rule. The land-lord is

1. (1880) I. L. R. 4 M. 367.
2. (1900) I. L. R. 28 C. 146.
3. (1903) I. L. R. 30 C. 801.
4. (1907) 5 C. L. J. 662.
5. (1902) 7 C. L. J. 284.

Venkata Narasimha Naidu v. Subbarayadu.

only entitled to the capitalised value of the rent he receives from the tenant *Shama Prosunna Mazumdar* v. *Brakoda Sundari Dasi*[1], *Dinendra Narain Roy* v. *Tituram Mukerjee*[2], *Bhupati Roy Choudhry* v. *The Secretary of State*[3], *Satish Chunder* v. *Rai Jatindranath Chowdhry*[4]. Rule 28 of the Standing Orders of the Board of Revenue lays down that the rental of the whole estate minus the revenue which the Zamindar pays to Government represents the interest of the Zamindar.

P. Nagabhushanam :—The decisions of this Presidency have established the principle that the Zamindar and the tenant are co-owners. But the zamindar's right is certainly greater on account of his possible reversion for which he ought to get at least one-tenth which is the thing done by giving three-fifths and two-fifths. The cases quoted by the other side do not apply as they relate to the apportionment between the zamindar and his undertenure-holder and not the tenant. Some arbitrary proportion which is a rough and ready rule must be fixed. *Raja Khetro Kristo Miller* v. *Kumar Dinendra Narain Roy*[5].

The Court delivered the following

Judgments :—*The Chief Justice.*—These are two appeals from awards made by the Acting District Judge of Kistna in proceedings under the Land Acquisition Act. They are both appeals by the Zamindar. The awards give the ryots the whole value of the trees that stood upon the land which was compulsorily acquired and apportion the total compensation awarded in respect of the land compulsorily acquired in the ratio of three-fifths to the ryots and two-fifths to the Zamindar.

I will deal first with that part of Appeal No. 38 which has reference to the value of the trees. With regard to this the District Judge says "I uphold the Collector's award." Then he points out that the dispute centres round the value of the trees and he says 'and that the Zamindar has no evidence to adduce in this case.' That is practically the whole of his award with reference to this question as to whether the whole value of the trees should go to the Zamindar as the Zamindar claimed or the whole value should go to the ryots as the ryots claimed. Now the award which the District Judge says he upholds so far as we can follow the course of the proceedings and it has been by no means easy and as so seems to be the revised award which is printed on page 9 of the pleadings paper

1. (1900) I.L.R. 28 C. 146, 148.
2. (1903) I. L. R. 30 C. 801.
3. (1907) 5 C. L. J. 662.
4. (1902) 7 C. L. J. 284.
5. (1897) 3 C. W. N. 202.

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in A. 38. It is not clear under what provision of law the Deputy Collector was called upon by the District Judge to make a revised award after the reference to the judge under S. 30 had been made. However a revised award was made. Mr. Prakasam has contended that inasmuch as no evidence has been adduced before the District Court by the party on whose behalf the order of reference was made the District Court had no alternative but to decline to interfere with the award made by the Deputy Collector. No doubt proceedings under Part III of the Act are not by way of appeal and what is contemplated is a new inquiry by the District Judge. But I am not prepared to go so far as to say that because a party on whose behalf the order of reference is made adduces no evidence before the Court, he is precluded from asking the Court for a modification of the award as made by the Collector, although of course the fact that he is not in a position to adduce evidence before the judge is a matter to be taken into consideration in determining whether the award of the Collector should be disturbed.

In the award of the Collector with reference to the question of trees the Collector refers to a provision in the Muchilika that as the "cist on palmyras and other trees is not included in this cist I (meaning the ryot) shall not object to any arrangement you (meaning the Zamindar) may make regarding them." The Deputy Collector points out that this is capable of being interpreted to mean either that the ryot could take the trees paying a separate cist therefor or that the Zamindar is the sole master. Apparently it means that if the Zamindar insists upon a separate cist for the trees the ryot will not object to paying it. There is no evidence that the Zamindar ever did insist upon cist for the trees and the evidence called on behalf of the ryots shews that they had the use and enjoyment of the trees. I do not think it necessary for us to consider the questions of law raised in the cases of *Narayana Ayyangar* v. *Orr*[1] and *Bodda Godappa* v. *The Maharaja of Vizianagnram*[2]. No doubt there are cases in which damages have been awarded to Zamindars in respect of trees cut by the ryots specially possibly in the case of fruit trees, and the trees in question in this case are fruit trees. Cases which turn upon special agreements as between the Zamindar and the ryot do not afford us very much assistance in this case. We have to deal with it with reference to the special condition to which I have referred and in the light of the evidence with regard to user and in view of the fact that the Zamindar did not think it necessary or was not able to adduce any evidence before the

1. (1902) I. L. R. 26 M. 252. 2. (1906) I. L. R. 30 M. 155.

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District Court. I am not prepared to say that the learned Judge was wrong in upholding the Collector's award with regard to the question of trees.

I now turn to the other question and that is—was the learned judge right in upholding the award of the Deputy Collector with reference to the question of apportionment? The learned judge says:— " I uphold the Collector's award'. The Collector's award is to be found on page 3 of the papers in A. No. 38. In that award with reference to this question the Deputy Collector states the contentions on both sides. He states that the contention of the Zamindar was that the compensation should be divided between the Zamindar and the ryots in the proportion of three-fifths to two-fifths and that the contention of the ryot was that they were entitled to the whole of the compensation with the exception of one ryot who is content with three-fourths to the Zamindar and one fourth to himself. His finding is in paragraph—" The rates of apportionment between the tenants and the Zamindar will be $\frac{3}{5}$ths and $\frac{2}{5}$ths." I think I am right in saying that in his award he gives no reasoning for apportioning compensation in these ratios. But in the reference to the District Court (which is to be found printed on page 9 of the pleadings papers in A. No. 39), which is stated to be under S. 18 of the Act though really it is one under Ss. 18 and 30, he does give reasons why the award is apportioned in these ratios. They are to be found in paragraph 8. He cites the principle laid down in certain Calcutta cases and with reference to that he says—" If the principle contained in the above rulings were adopted the Zamindar would get much less than what has been awarded, that is much less than two fifths out of five fifths. Now in the award by the District Judge with reference to this part of the case, all that the Judge says is, " The claimant is not ready with his evidence. With regard to that the same observations that I have made with reference to the other appeal seem to applicable." Then he says—" Two judgments the Zamindar relies on, but neither of these relate to the village in which the lands in controversy were acquired. I uphold the Collector's award". That really is the whole of the District judge's award with reference to this question of apportionment. On behalf of the Zamindar Mr. Nagabhushanam has contended that on the strength of the judgments to which the District Judge refers the award ought to be varied by giving the Zamindar three fifths out of the total amount leaving two fifths to the ryots.

Before I refer to the two Judgments upon which Mr. Nagabhushanam relies I would like to refer to a decision which is cited

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at any rate in one of the judgments *viz., Appasami Mudali* v. *Rangappa Nattan*[1]. That was a case in which the question arose as to the apportionment of compensation as between the mirasidar and the party holding under an Ulkudi tenure. The Court found that as between the mirasidar and the party holding under Ulkudi tenure in the division of the produce 5 kalams and 2 marakals went to the Zamindar 8 marakals to the Mirasidar and 4 kalams and 2 marakals to the Ulkudi. We are told that 12 marakals make one kalam. My learned brother has referred to the definition of marakal in Wilson's Glossary and it appears there that it is 12th of a kalam and this appears to be correct. So the ratio will be 62 marakals to the Zamindar, 8 marakals to the Mirasidar and 50 marakals to the Ulkudi out of 120 marakals. That seems to be the first fact considered by the Court in apportioning the compensation. Then the Court refers to another matter which should be taken into consideration, *viz.*, the expenses of cultivation and the fact that the cultivator has a home and a sphere for labor for himself and his family. Taking all the factors into consideration the Court comes to the conclusion that the interests should be appraised by awarding three fifths to the Mirasidar and two fifths to the cultivator. The exact nature of the tenure of the cultivator in this case is not clear (see p. 3 to 97 of the judgment). It would seem however that he had not the same unqualified right of permanent occupancy such as is admitted to be the right of the ryots in the case now before us.

Now one of the judgments on which Mr. Nagabushanam relies is an unreported decision of this Court in A. No. 119 of 1893. The question arises with reference to the same *Zamindari* as that in which the land in the present case is situate. That is a decision by Mr. Justice Shephard and Mr. Justice Boddam on appeal from the District Judge who gave an award under the Act. The District Judge purported to apply the principle of the decision in *Appasami Mudali* v. *Rungappa Nattan*[1] and applying the principle he worked out the ratios as one fifth to the Zemindar and four fifths to the ryots. This Court in dealing with his judgment observes "The District Judge appears to have been guided by figures as to which there is no evidence whatever. No evidence having been adduced we think he ought to have followed the rule laid down in *Appasami Mudali* v. *Rangappa Nattan*[1] and apportioned $\frac{3}{5}$ths to the Zemindar and $\frac{2}{5}$ths to the ryots". I do not think the judges intended in *Appasami Mudali* v. *Rangappa Nattan*[1] to lay down a general rule. I do not think they intended to lay down that in all

1. (1880) I. L. R. 4 M. 367.

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cases where compensation has to be apportioned between a Zamindar and ryots with a permanent right of occupancy and there is no evidence before the District Judge the compensation should be apportioned in the ratio of three fifths to two-fifths. If they did so intend with all respect I must say that I am not prepared to follow them.

The other case which was cited before the District Judge and on which Mr. Nagabhushanam relies is A. No. 118 of 1898. There the Zamindari is not the same but the land was situated in the same District as the Zamindari with which we are now concerned is situated. That is a judgment of Mr. Justice Subramania Aiyar and Mr. Justice Moore and this question of ratios was only raised in the Memorandum of objections which was put in by the ryots on the appeal by the Zamindar with reference to the award of the District Court as regards the question of occupancy rights. It would appear that the Memorandum of objections put in by the ryots was that the apportionment of three fifths to the Zamindar and two fifths to the ryots was wrong. That memorandum of objections was dismissed. But there is nothing to show that this question was argued or even stated to the Court. There is nothing to suggest that the learned judges had before them the decision in A. No. 119 of 1893 or that this question was in any way considered. I do not think we ought to regard the decision in A. 118 of 1898 as accepting or affirming the decision of Mr. Justice Shephard and Mr. Justice Boddam to which I have referred. It seems to me the real principle is that laid down in *Appasami Mudali* v. *Rangappa Nattan*[1]. That is certain factors should be taken into consideration and apportionment made after a consideration of the various factors. If there is no evidence before the District Judge he was of course entitled to take this fact into consideration in delivering whether he should disturb the award of the Collector.

Mr. Prakasam has called our attention to several Calcutta cases *viz.*, *Shama Prosunno Bose Mozamdar* v. *Brakoda Sundari Dasi*[2] *Dinendra Narain Roy* v. *Tituram Mukerjhee*[3] *Bhupati Roy Chowdhury* v. *The Secretary of State*[4] and *Satish Chunder Chatopadhya* v. *Kaigaturi Nath Chowdhery*[5]. The principle of apportionment there is not altogether the same as the principle laid down in *Appasami Mudali* v *Rangappa Nattan*.[1] I do not know whether we need compare these two principles because so far as the

1. (1880) I. L. R. 4 M. 367. 2. (1900) I. L. R. 28 C. 146.
3. (1903) I. L. R. 30 C. 801. 4.)1907) 5 C. L. J. 662.
5. (1902) 7 C. L. J. 284.

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Calcutta cases are concerned the tenure owned by the cultivator is not the same as the tenure by right of permanent occupancy which is enjoyed by the ryots in this case, and it is not quite clear what was the precise nature of the tenure in some at any rate of the Calcutta cases. So I do not propose to discuss it. All I propose to say with reference to the award in this appeal is that applying what seems to me to be the principle we ought to apply namely that laid down in *Appasami Mudali* v. *Rangappa Nattan*[1]; so far as we can apply it in the absence of evidence before the District Judge it cannot be said that an apportionment of three-fifths to the ryots is excessive. It seems to me that the appellant in this case has failed to show that the District Judge was wrong in upholding the two awards made by the Deputy Collector. Appeal No. 38 will be dismissed with costs.

As regards appeal No. 39 the Collector was made a party to the appeal and so far as the Collector has any interest in the appeal. The award of the District Judge states that the zamindar's vakil gave up his contention as regards the amount of compensation payable. That was the only question which arose as between the Zamindar and the Collector. In these circumstances I think A. No. 39 must be dismissed with costs of the ryots' and also with the costs of the Collector.

Spencer J. I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

Ramana Gounden ... ... * *Appellant* (*4th Deft.*)

v.

Ramalinga Mudaliar and others ... { *Respondents Plff. & 1, 2 & 3 Defts.*

Ramana Gounden v. Ramalinga Mudaliar.

Res Judicata—Mortgage, suit upon—Decision that debt should be realised from one property only if another property insufficient—Bar to a suit for contribution by owner of latter against former.

The decision in a suit by a mortgagee that the mortgage amount should be realised by the sale of property in the possession of one of the defendants and that the property in the possession of the other defendants should be proceeded against only in the event it became insufficient, bars a suit for contribution by the former against the latter.

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* S. A. Nos. 881 and 882 of 1911 30th January 1913.

1. (1880) I. L. R. 4 M. 367.

Second Appeals from the decrees of the Court of the Subordinate Judge of Coimbatore in A. S. Nos. 158 and 159 of 1910 preferred against the decree of the Court of the District Munsif of Coimbatore in O. S. No. 66 of 1908.

T. V. Gopalasami Mudaliar for Appellant.

S. Muthia Mudaliar for Respondent.

The Court delivered the following

Judgment :—These second appeals arise out of the same suit brought by the plaintiff for contribution. The plaintiff alleged that he paid off a mortgage debt which he and the appellants before us, who were defendants in the 1st Court, were bound to pay, and he sued accordingly to recover his share of the mortgage debt. The main defence is that as between themselves the plaintiff alone was bound to pay the debt as declared by the decree and judgment in suit No. 26 of 01. The question therefore depends upon the effect to be given to that decree and judgment. That was a suit brought by one Guia Chettiar, who is not a party to this suit, for the recovery of a sum of nearly Rs. 3,000 by the sale of certain properties mortgaged to him by the first 3 defendants in that suit. The 4th defendant in that suit is the plaintiff, who now claims contribution, and the 1st respondent before us. He and the 5th defendant were made parties as purchasers of portions of the mortgaged property. The 5th defendant in that suit is the predecessor-in-title of the 4th defendant here and the appellants in S. A. No. 881 of 1911. The 3rd defendant therein is the appellant in S. A. No. 882 of 1911. The plaintiff Guia Chettiar alleged that the 4th defendant therein (Respondent before us) had purchased the properties on the understanding that he would pay off Guia Chettiar's mortgage. The written statements in that suit are not before us. But it is stated in the judgment therein that the 4th defendant had first pleaded that he purchased without notice of the plaintiff's mortgage "but at the first hearing withdrew this allegation as the prices paid by himself and his vendor proved the contrary," and his pleader declared that he was willing to pay the plaintiff what was due to him on his mortgage. A decree in favour of the plaintiff was given, but it directed that the mortgage debt should first be discharged by the sale of those properties which were in the possession of the plaintiff respondent and the balance if any by the sale of the properties in the possession of the defendants 1, 2 and 3 therein (the 3rd defendant as I have already stated being the appellant in one of these appeals before us) and then, if it became necessary, those in the possession of the 5th defendant in that suit, (the appellant in the

other appeal before us,) were to be sold to satisfy the mortgage debt. The contention on behalf of the appellants before us is that these directions were embodied because the plaintiff was the person who, as between the parties to this suit, was the person liable to pay. The contention of the respondent (plaintiff) before us is that the decree indicated only a mode of discharging the debt. The terms of the decree itself are consistent with either view We will therefore turn to the judgment to see the reasons for the decree. We have already stated that Guia Chettiar in that suit alleged that the plaintiff had purchased the property on the understanding that he would pay off the mortgage and that the latter withdrew his plea, as the Judge states, " as the price paid by himself and his vendor proved the contrary. " Now in deciding one of the issues in that case the District Judge stated that the 4th defendant, the present plaintiff, " is in possession of the Bolampatti suit properties which are said by the 2nd defendant to be worth Rs. 6,000 under an agreement to pay off the whole of the suit mortgage " and he finally decided that so far as the 5th defendant therein, the appellant in S. A. No. 881 was concerned, the property in his hands " is only liable to sale in satisfaction of the suit mortgage in the event of the suit properties in the hands of the 4th defendant and defendants 1 to 3 proving insufficient to satisfy the same. This appears to be a clear decision that the liability of the 5th respondent arises only if the property in the hands of others proved insufficient to satisfy the debt. We are therefore clearly of opinion that so far as the appellant in S. A. No. 882 of 11 is concerned the suit must be dismissed with costs. As regards the other defendants, the appellants in S. A. No. 881 of 1911 also the judge states in the judgment. " The object of defendants 1, 2 and 3 and Ramasami Mudaliar in this transaction appears to have been to take steps to exact the amount from 4th defendant, the plaintiff in this suit, who by the terms of the sale to 4th defendant in O. S. No. 188 of 1900 from whom he bought is bound to pay it off. " This taken with the other recitals in the judgment to which we have already referred places beyond all reasonable doubt the fact that the plaintiff in the present suit was, as between the parties to the present suit, liable to pay the mortgage debt himself and it was on the ground that he purchased the properties on the understanding that he was to pay off the debt that the decree was passed in the form in which it was passed. We hold therefore that the plaintiff is not entitled to recover any contribution. We reverse the decrees of the Lower Courts and dismiss the suit with costs throughout.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present :—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Sri Narain and another ... *Defendants—Appellants.**

v.

Lala Raghubans Rai ... *Plaintiff—Respondent.*

Hindu Law—Mortgage by father—General charge of immorality—Not sufficient to prove immoral purpose of debts—Proof of connection between immorality and debts necessary.

A general charge of immorality against the father is not sufficient to prove that the debts for which he executed a mortgage of joint family property were incurred for immoral purposes and in the absence of evidence to connect the debts with his immorality, the sons will be held bound by the mortgage.

Sri Narain *v.* Lala Raghubans Rai.

This was an appeal from a judgment and decree, dated the 30th of November 1909, of the High Court of Judicature for the North-Western Provinces at Allahabad, which modified a judgment and decree, dated the 26th of September 1907, of the Court of the Subordinate Judge. The Sub-Judge decreed the plaintiff's claim in part only, but the said High Court allowed it in full.

Sir E. Richards, K. C., and *Mr. Ross* for Appellants.

Mr. L. DeGruyther, K. C., and *Mr. Bhugwandin Dube*, for Respondent.

Their Lordships' Judgment was delivered by

Lord Macnaghten :—In this case their Lordships entirely agree with the High Court that the Appellants have failed to prove their case. Their evidence comes to nothing more than a general charge of immorality which is not sufficient.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed, and the Appellants will pay the costs.

Solicitors :—*Messrs. T. L. Wilson & Co.*, for Appellants.

Solicitors :—*Messrs. Barrow Rogers* and *Nevill*, for Respondent.

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*8th November 1912.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On consolidated Appeals from the High Court of Judicature for the North-Western Provinces, Allahabad.]

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Kunwar Raghubir Singh ... ... *Appellant.**

v.

Musammat Moti Kunwar ... ... *Respondent.*

and

Kunwar Sati Singh ... ... *Appellant.*

v.

Musammat Moti Kunwar ... ... *Respondent.*

Hindu Law—Partition—Agreement between some members—Acted upon by all the members—Division in interest—Reunion, a question of fact.

Kunwar Raghubir Singh *v.* Moti Kunwar.

In 1871, for the purpose of giving the share of one of the members of a joint Hindu family an agreement was executed by 3 members of the family subsequently in 1873 another agreement was executed between the same three persons which after declaring that the executants along with two others (one of whom was a minor) were sharers in the villages therein mentioned and each was in possession of a definite share, went on to say that each share "shall be considered to be the property of that very person who is in possession thereof." This agreement was acted upon by all the members including the persons who were not parties thereto up to the time when disputes arose.

Held having regard to the agreement of 1873, all the members were divided in interest and the share of one of the executants went to his widow.

Appovier v. *Rama Subba Aiyan*[1], *Balakishen Das* v. *Ramnarain Sahu*[2], *Parbati* v. *Naunihal Singh*[3] followed.

Reunion is a question of fact to be established by evidence.

Two consolidated appeals from the two Judgments and decrees of the High Court of Allahabad, one of them reversing a judgment and decree of the court of the Subordinate Judge of Mainpuri and the other affirming a judgment and decree of the Court of the Assistant Collector of Etawah.

DeGruyther, K. C. and *B. Dube* for Appellant.

Ross K. C. for Respondent.

Their Lordships' judgment was delivered by

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*26th November 1912.

1. (1866) 11 M. I. A. 75. 2. (1903) 30 I.A. 139=I.L.R 30 C. 738.
3. (1909) 36 I. A. 71=I. L. R. 31 A. 412.

Kunwar Raghubir Singh. v. Moti Kunwar.

Lord Macnaghten :—These are consolidated appeals from a judgment and two decrees of the High Court of Allahabad pronounced in favour of the respondent—Musammat Moti Kunwar.

In the Court of the Assistant Collector of Etawah, Moti Kunwar, widow of Baldeo Singh, who died in 1895, succeeded in making good her claim to arrears in respect of a specific share of property which undoubtedly at one time formed part of the joint property of an undivided Hindu family to which her husband belonged. Thereupon the appellants, who alleged that Baldeo Singh was not separated at the time of his death, brought a suit in the Court of the Subordinate Judge of Mainpuri and obtained a declaration that they were the absolute owners of the property claimed by Moti Kunwar, and that she had no right of ownership therein but merely a right to maintenance. There was an appeal to the High Court by Moti Kunwar, against the decree of the Subordinate Judge, and an appeal by the present appellants against the order of the Assistant Collector. The two appeals were consolidated. The High Court reversed the decree of the Subordinate Judge and dismissed the suit of the present appellants, as well as their appeal against the order of the Assistant Collector.

The whole controversy depends upon the question whether Baldeo Singh was separate in title and interest at the time of his death.

In 1871 Madan Mohan Singh, who was a member of the undivided family, separated and received his share. For the purpose of this transaction and in settlement of all disputes "relating to the Zamindari, the household articles, and the money-lending business, etc.," an agreement was executed on the 19th of December 1871, by Baldeo Singh, Lalta Parshad, the adopted son of a deceased member of the undivided family, and Madan Mohan Singh. On the 10th of October 1873 another agreement was executed between and by Baldeo Singh, Lalta Parshad and Madan Mohan Singh. After declaring that the executants along with Raghunath Singh and Soti Parshad were sharers in the Villages specified below, the agreement proceeded as follows :—

"Now we have already come to terms and according to the "shares given below we have been in possession and enjoyment of "our respective shares. As regards it, we have, with our mutual "consent, entered into an agreement according to the terms given "below.

"The same share in the property which is in the possession of "a particular person, as given below, shall be considered to be the

"property of that very person who is in possession thereof. If any "of us brings any suit in Civil or Revenue Court to the effect that "his share is less or he is a loser, it shall be considered to be false "in every Court. By virtue of this agreement no person shall be "competent to bring any claim in any court in respect of any por-"tion of the property other than the property detailed below."

Then after some provisions, which it is not necessary to set out, there followed a specification of the villages belonging to the family and the shares in which those villages were thereafter to be held. The agreement was registered on the same day. From that time the property has been entered in the register in accordance with the arrangement contained in the agreement. And on the death of Baldeo Singh his share was entered in the name of his widow, the respondent Moti Kunwar.

From the terms of the agreement of 1873 the learned Judges of the High Court rightly, as it appears to their Lordships, "gather "that the members of the family were in separate possession of "defined shares of the family property before the date of its execu-"tion" and they also gather from it that Raghunath Singh as well "as Soti Parsad," who was then a minor so far as the latter could "assent to an arrangement, had agreed to the allotment of shares "specified in the instrument."

The learned judges further point out that the khewats of two of the villages specified in the agreement of 1873 which were in evidence, show that at the close of 1872 the entry of the names was altered and the names of Lalta Parshad, Soti Parshad, Raghunath Singh, Baldeo Singh and Madan Mohan Singh were entered, separately in respect of their separate specific shares.

As regards the share of Raghunath who was not a party to the agreement of 1873 the partition appears to have been accepted and acted upon by him up to the time of his death which occurred in 1879. On his death the name of his widow was recorded in his place and she was appointed *lambardar* of the village which had been allotted to him. On her death the names of Baldeo Singh, Lalta Parshad and Soti Parshad were entered in her place, not jointly, but in respect of specific shares.

Soti Parshad, as already stated, was a minor at the date of the agreement of 1873, but it appears that on attaining majority he made no objection to it. He seems to have recognised the partition and acted upon it until Moti Kunwar applied for complete partition in the Revenue Court.

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The contention on the part of the appellants was (1) that the agreement of 1873 was a partition only as regards the share of Madan Mohan Singh, and that the other members of the family remained joint, or (2) that the other members reunited either immediately or shortly afterwards. There seems to be no foundation for the latter contention, and indeed it was only faintly put forward. Reunion is a question of fact, and there is not a scrap of evidence to show that any members of the family reunited or even contemplated reunion.

In support of their principal contention the appellants put in a mass of parol evidence which was contradicted by parol evidence on the other side. The learned judges of the High Court thought the parol evidence vague, unsatisfactory, and inconclusive.

The High Court also rejected, and in their Lordships' opinion rightly rejected, a petition of Baldeo Singh himself, in which he alleged that Raghunath's widow was entered as owner solely for her consolation. This petition was in answer to an application by the widow to remove him from the office of *Sarbarahkar* and is irreconcilable with an earlier petition presented by him, in which he distinctly admitted that he paid to the widow the annual profits of her share, and that the agreement of 1873 had been acted upon.

The High Court also rejected as unworthy of consideration a document which was referred to as proving that Moti Kunwar herself admitted that the property registered in her name was joint-family property. This document purports to be a certified copy of a deposition made by Moti Kunwar in another suit which was not even put to her in cross-examination although she averred that she had never made an admission to that effect.

The High Court also rejected as inconclusive certain accounts which purported to show that the expenses of the marriage of Baldeo Singh's daughter and his funeral expenses were paid out of joint family property.

In conclusion the learned judges say that it was sufficient for them that an agreement was committed to writing, which was clear and definite in its terms, and they add that that agreement has been shown to have been acted upon up to the present time.

Their Lordships agree in the result at which the High Court arrived. Having regard to the agreement of 1873 they think that the case is concluded by authority. The result is entirely in accordance with the principle laid down by this Board in the Judgment

Kunwar Raghubir Singh v. Moti Kunwar.

delivered by Lord Westbury in the *Appovier case*[1] and in the more recent cases of *Balkishen Das* v. *Ram Narain Sahu*[2] *Parbati* v. *Naunihal Singh*[3].

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for Appellants :—*Barrow, Rogers* and *Nevill.*

Solicitors for Respondents :—*Ranken Ford, Ford* and *Chester.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar

Mothey Atcheyya Garu and others ... *Appellants (Defts)*

v.

Vennavalli Seshagiri Rao ... ... *Respondent.*

Atcheyya v. Seshagiri Rao.

Deed—Construction—Sale on behalf of temple Committee to defendants father—Sale as agent—No action by or against defendant maintainable.

Where a sale was made to the defendant's father on behalf of a temple Committee.

Held: The defendants' father being only an agent no action would lie against the defendant or at his instance to enforce the provisions of the sale deed.

Appeal under S. 15 of the Letters Patent against the order of the High Court in Civil Revision Petition 56 of 1911 presented against the decree of the Court of the District Munsif of Ellore in Small Cause Suit No. 576 of 1910.

P. Nagabhushanam, for appellants.

P. Narayanamurti, for Respondent.

The Court delivered the following

Judgment :—Exhibit A clearly shows that the sale was made to the defendants' father on behalf of the Committee. He was therefore only an agent of the Committee and would have no right to enforce the provisions himself. Nor would any action lie against him on the document. We must therefore reverse the judgment of the learned Judge and the decree of the District Munsif and dismiss the suit with costs throughout.

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1. (1866) 11 M. I. A. 75. 2. (1903) 30 I. A. 139.
3. (1909) 36 I. A. 71.

* L. P. A. No. 57 of 1912, 22nd October 1912.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Sitamraju Ramabrahmam ... ... *Appellant.**

v.

M. Lakshmanna ... ... *Respondent.*

Rama-brahmam *v.* Lakshmanna.

Inamdar—Landlord and tenant—Ejectment—Occupancy right—Question of fact.—25 years' possession, good evidence of—Presumption, Kudivaram not in Inamdar.

In a suit in ejectment by an inamdar against a ryot in occupation.

Held: (1) The question whether the defendant had occupancy right was a question of fact.

(2) 25 years' possession would not by itself confer occupancy right but was good evidence of it.

(3) The land being inam the presumption was that the Kudivaram was not vested in the plaintiff.

* Second appeal from the decree of the District Court of Kistna in A. S. No. 199 of 09 presented against the decree of the Court of the District Munsif of Gudivada in O. S. No. 2 of 1908.

P. Nagabhushanam for appellant.

V. Ramdas for Respondent.

The Court delivered the following

Judgment :—The question whether the defendant has occupancy right is one of fact. The judge is not right in saying that 25 years' possession would by itself confer occupancy right on the defendant but it is good evidence of such right. Possibly this was all that the Judge meant. The land being an Inam the presumption also is that the Kudivaram was not vested in the plaintiff. The defendant's written statement cannot be said to contain any admission that his claim of occupancy right was only under an express grant. We must accept the Judge's finding and dismiss the second appeal.

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*S. A. No. 429 of 1911. 28th November 1912.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the Court of the Judicial Commissioner of Oudh, Lucknow.]

Present:—Lords Shaw and Moulton, Sir John Edge and Mr. Ameer Ali.

Bhaiya Janki Pershad Singh, on whose decease, Bhaiya Dharaband Singh, minor. } *Deft.—Appellant.**

v.

Bhaiya Dwarka Pershad Singh ... *Plaintiff—Respondent.*

and

Bhaiya Dwarka Pershad Singh ... *Plff.—Appellant.*

v.

Bhaiya Janki Pershad Singh, on whose decease, Bhaiya Dharaband Singh, minor. } *Def.—Respondent.*

Hindu Law—Joint family property—Partition—Oudh Estates Act I of 1869 Ss. 2, 3, 8, 10 and 22—Succession in Taluqdari tenure and in acquisitions therefrom—Concurrent findings—impartible estate.

Janki Pershad Singh *v.* Dwarka Pershad Singh.

Where a family had been in possession of a Taluq of 25 villages until 1856 when the British occupied the kingdom of Oudh, the representative thereof did not enter an appearance until July 1859 *i.e.*,after Lord Canning's Proclamation of March 1858, but on 5th October 1859 on order was passed sanctioning the Summary settlement with him of nine villages, of which the Kabuliat was signed on the 13th of that month, while in the course of the Regular Settlement he recovered six more villages, (thus being in possession of fifteen villages before the Act I of 1859, his name appearing in the List of Taluqdars,) and subsequently acquired other properties :

Held in a suit for partition, that the properties consisting of 15 villages, that is to say, those settled with the representative of the family in 1859 together with those recovered during the Regular Settlement, constituted an " Estate " within the meaning of the Act of I of 1869 and were in consequence impartible, although the formal documents were not executed on or before the 10th of October 1859 as required by Section 3 of the Act I of 1869.

Held further that the incorporation of any acquisition by an owner into "the ancestral estate for the purposes of his succession" depended upon the owner's intentions, in the absence of which as conveniently held by the Lower Courts the ordinary rule of succession of the Hindu Law applied.

Parbati Kumari Debi v. Jagadis Chunder Dhabal[1] referred to and approved.

Consolidated Appeals from a judgment and two decrees of the Court of Judicial Commissioner dated 8th September 1909 affirming a judgment and decree of the Subordinate Judge of Barabanki dated 15th September 1908.

*10th June 1913.

1. (1901) L. R. 29 I. A. 82.

Janki Pershad Singh v. Dwarka Pershad Singh.

The Taluqa of Rani Mau consisting of 21 Villages situated in Oudh was in possession of Autar Singh, 8th holder in regular descent, who was a Surjbansi Rajput and connected with the Haraha Raj till 1856 when the British took possession of the Kingdom of Oudh. During the Mutiny he absented himself from his estate. On 15th March 1858 Lord Canning by his Proclamation confiscated all proprietary rights in the soil of Oudh. On 25th March 1858 the Chief Commissioner of Oudh invited all persons "at once to come in ready to obey his orders," stating that none of their lands would be confiscated and that their claims to lands held by them prior to annexation would be heard. On 23rd June 1858 a circular letter was addressed by the Government to the Taluqdars, inviting them to present themselves in Lucknow and tender their allegiance and assuring them the protection of their heirs and confirming them in the estates possessed by them during the *Nawabi.* Autar Singh appeared on 22nd July 1859 and applied for a settlement of his property with him. As some of the villages had already been settled with others, the government by their letter dated 5th October 1859 granted his request and the Chief Commissioner sanctioned the settlement of nine villages with him. He signed the Kabuliat on 13th October 1859. Later on he acquired six more villages in the course of the Summary settlement. On 24th April 1860 he made a declaration as to the law of descent applicable to his taluq and his name was entered in the first list appended to Act I of 1869 as Taluqdar of Rani Mau estate and in the second list as a Taluqdar "whose estate according to the custom of the family or before 13th February 1856 ordinarily devolved on a single heir." Autar Singh, having acquired other properties, died in 1879 and was succeeded by his eldest nephew Jang Bahadur Singh who died in 1889 and was in turn succeeded by his eldest son, the defendant. On 17th August 1907 the Plaintiff instituted a suit against his brother, the defendant, for partition of all villages alleging that all constituted partible ancestral property and joined his own mother as defendant No. 2 claiming one-third share. The defendant pleaded that the Taluq was subject to Act I of 1869 and therefore impartible. The Subordinate Judge decided that a third share in certain of the lands in question should be given to the Plaintiff, dismissing his claim as to the rest. Both parties appealed to the Court of the Judicial Commissioner which upheld the judgment of the Lower Court in all respects excepting that it made the share of the Plaintiff one-half instead of one-third, the mother having died in the meantime. One of the Judges, however, expressed a doubt as to the estate coming under Act I of 1869 owing to the settlement not being completed by the

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10th October 1859 as required by S. 3 of the said Act. Both parties again appealed to the Judicial Committee, the Plaintiff for a share in the Taluqa as well and the Defendant to have the order giving ½ the share of certain lands to the Plaintiff reversed.

Sir E. Richards K.C. and *K. Brown* for Bhaiya Dharaband Singh contended that the policy of the Government until 1856 was to disregard the rights of the Taluqdars and to support the Zamindars; but when the Mutiny broke out the Zamindars instead of supporting the British joined the Taluqdars. The policy had to be revised and Sir J. Outram strongly advised the British Government to vest proprietary rights in the Taluqdars who were men of power. In 1858 the summary settlement of Oudh which was for three years took place, determining the title of the Taluqdars. The Act I of 1869 was passed to confirm the taluqdars in their proprietary rights in pursuance of the aforesaid policy. The spirit underlying the Act of 1869 was the policy and therefore no technicality should govern the case. The whole superstructure of the Act bore out the view presented. S. 3 defined as to who the Taluqdar was, while the question of succession governed by primogeniture was also dealt with. The properties in question came within the definition of the estate as given under S. 3, while no partition therein ever took place.

DeGruyther K. C. with him *Dube* for Bhaiya Dwarka Pershad Singh contended that the settlement with Autar Singh was not made by the 10th of October 1859 and therefore the provisions of Act I of 1869 did not apply to the case. Autar Singh was all along acting as the managing member of the then existing joint family. As the grant did not prohibit partition, the estate was partible.

Sir E. Richards in reply referred to the case of *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal*[1].

The Judgment of their Lordships was delivered by

Mr. Ameer Ali:—These are two consolidated Appeals from a Judgment and Decree of the Court of the Judicial Commissioner of Oudh, dated the 8th of September 1909, and arise out of a suit brought by the Plaintiff Dwarka Pershad in the Court of the Subordinate Judge of Barabanki, for partition of certain properties known as Taluqa Ranimau, in which he claimed a share as a member of a joint Hindu family governed by the Mitakshara Law.

The two Defendants to this action were the Plaintiff's elder brother Janki Pershad and their mother Marjad Kuar, and as the

1. (1901) L. R. 29 I. A. 82.

mother, under the Mitakshara Law, is entitled on the partition of ancestral property to an equal share with the sons for her life, the Plaintiff asked for a decree in respect of a third share in the entire property included in the list attached to the Plaint.

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The Defendant Janki Pershad alone contested the suit, the ground of his defence being that the Taluqa sued for was, under the provisions of Act I, of 1869, as also by custom governing the family, an impartible estate descendible to a single heir, to which the ordinary rules of the Hindu Law of inheritance did not apply. The parties thus went to trial on two distinct issues, viz., whether the properties in suit belonged to a joint Hindu family and were subject to the incidents ordinarily attached to such properties, or whether they formed in whole or in part, under Act I. of 1869 or by custom, an impartible estate.

A short history of the family will explain the reasons on which the Courts in India have proceeded in arriving at their conclusions. The nucleus of the Taluqa in dispute is said to have been formed by one Suk Shah. He owned nine villages, but the number increased to sixteen in the hands of his son and successor, Sakat Singh, who lived about the close of the 18th century. In 1856, when the British first occupied the kingdom of Oudh, the Taluqa included 21 villages, and was held by Autar Singh, eighth in descent from Gulal Shah, the original ancestor of the parties and the grand-father of Suk Shah. On the outbreak of the Mutiny Autar is said to have disappeared. Nor did he make his appearance on Lord Canning's famous Proclamation issued in March 1858. The British authorities accordingly proceeded to make a settlement of his confiscated villages with third parties. But some time in July 1859 Autar appeared before the authorities, explained the reason of his non-appearance before, and applied for a settlement of his villages. They were apparently satisfied with his explanation, and on the 5th of October 1859, an order was passed on his application, sanctioning the summary settlement with him of the remaining nine villages which had not been finally settled with others. The *Kabuliat,* however, was not signed by him until the 13th of that month.

In the course of the Regular Settlement which followed shortly after, Autar recovered decrees for possession of six more villages. He was thus in possession of some 15 villages when Act I of 1869 was passed into law. Later on he acquired by purchase several other properties.

Autar died in 1879 without issue and was succeeded in the possession of the properties by his nephew Jang Bahadoor, the

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eldest son of his brother Bisheshur. Jang Bahadoor died in 1889, leaving him surviving two sons, viz., the Plaintiff and the Defendant, Janki Pershad, the latter being the eldest. On Jang Bahadoor's death, Janki Pershad came into the possession of the entire property.

The Subordinate Judge has held that the properties which were settled with Autar in 1859, together with those decreed to him in the course of the Regular Settlement, form an " Estate " within the meaning of Act I. of 1869 and are descendible to a single heir and are consequently impartible. But as regards the several properties Autar Singh acquired by purchase subsequent to the Regular Settlement the Trial Judge was of opinion that in the absence of evidence establishing an intention on his part to incorporate the subsequent acquisitions with the " Estate," they must be held to be governed by the ordinary Hindu law of inheritance. He accordingly decreed the Plaintiff's claim in respect of a one-third share in what he calls the " acquired " properties and dismissed the Suit as regards the rest.

Both parties appealed to the Court of the Judicial Commissioner of Oudh which affirmed the decree of the Subordinate Judge with a modification in respect of the parties' shares necessitated by the death of their mother Marjad Kuar, which became one-half each instead of one-third.

The Plaintiff and the Defendant have both appealed to His Majesty in Council against the Judgment and Decree of the Appellate Court. The Plaintiff contends that the Lower Courts are wrong in holding that the properties in respect of which his suit has been dismissed, form an " Estate " within the meaning of the Act, and are, consequently, impartible; whilst the Defendant urges that the properties, a half share of which has been decreed to the Plaintiff, being accretions to the " Estate " or Taluqa, are equally impartible.

As regards the contention of the Plaintiff, the first point to determine is the meaning which the Legislature has attached to the word " Estate " with reference to properties coming within the purview of Act I. of 1869, and that meaning must be gathered so far as possible from the enactment itself.

The term " Estate " is defined in Section 2 to mean " the taluqa or immovable property acquired or held by a Taluqdar or grantee in the manner mentioned in section 3, section 4 or section 5 or the immoveable property conferred by a special grant of the British Government upon a grantee." And " Taluqdar " is declared to mean a person whose name is entered in the first of the lists mentioned in section 8.

Section 3 declares that:—

"Every Taluqdar with whom a summary settlement of the Government revenue was made between the first day of April 1858 and the tenth day of October 1859, or to whom, before the passing of this Act and subsequently to the first day of April 1858, a taluqdari sanad has been granted, shall be deemed to have thereby acquired a permanent, heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or kabuliyat executed by such Taluqdar when such settlement was made, or which may have been or may be decreed to him by the Court of an officer engaged in making the first regular settlement of the province of Oudh, such decree not having been appealed from within the time limited for appealing against it, or, if appealed from, having been affirmed."

Section 8 provides that:—

"Within six months after the passing of this Act, the Chief Commissioner of Oudh . . . shall cause to be prepared six lists, namely:—

"*First.*—A list of all persons who are to be considered Taluqdars within the meaning of this Act.

"*Second.*—A list of the Taluqdars whose estates, according to the custom of the family on and before the thirteenth day of February 1856, ordinarily devolved upon a single heir."

The rest of the section is immaterial for the purposes of this case. Section 22 lays down the rules relating to intestate succession to the estates of Taluqdars whose names have been entered in the second, third or fifth of the lists mentioned in the second, third or fifth of the lists mentioned in section 8. In the first instance it declares that if any Taluqdar whose name is so entered were to die intestate as to his estate, such estate shall descend "to the eldest son "of such Taluqdar or Grantee, heir or legatee, and his male lineal "descendants, subject to the same conditions and in the same manner "as the estate was held by the deceased."

It is common ground that "a summary settlement of the Government revenue" was made with Autar Singh in respect of nine villages "between the 1st day of April 1858 and the 10th day of October 1859." Their Lordships are not omitting from consideration the fact that the *Kabuliat* was not executed until the 13th of October. To this they will advert later. It is also admitted that he obtained decrees in respect of six other villages in the first Regular Settlement of the Province, and that his name was entered in the Lists prepared under the statutory provisions of section 8. It is clear, therefore, that Autar was not only a Taluqdar, but that his

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taluqa acquired by virtue of the above-recited proceedings, was an "Estate" within the meaning of the Act.

One of the learned Judges in the Court below has considered that the execution of the *Kabuliat* after the time-limit mentioned in section 3, deprived Autar Singh's taluqa of the character of an estate defined in the statute, although in his conclusion he agreed with the Subordinate Judge in holding that it was impartible property. His view may shortly be summarised as follows: as the principal villages included in the Taluqa were not acquired either under a grant or a summary settlement made between the two dates mentioned in section 3, the property did not constitute an "Estate" defined in section 2; but as it appeared in the evidence that the Taluqa had ordinarily devolved upon a single heir on and before the 13th of February 1856, it must be treated as an impartible estate descendible under the rules of devolution provided in section 22.

The other learned Judge held in substance that under the circumstances of the case it may fairly be assumed that the summary settlement with Autar was made before the 10th of October 1859.

In their Lordships' judgment the less technical construction seems more in accord with the true intent of the enactment. It is easily conceivable that a settlement might be made within the time-limit, and yet the formal documents connected therewith might not owing to causes beyond the control of the person with whom the settlement is made, be executed until later. The law must be absolutely explicit that non-execution within the time is fatal to the right which it expressly gives before it can be so construed. Clause 3, which declares the right a Taluqdar acquires in villages and lands settled with him, states that "he shall be deemed to have acquired thereby," (that is by the summary settlement), "a permanent heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or Kabuliat executed by such Taluqdar when such settlement was made." The right the Taluqdar is declared to have acquired comes into existence with the settlement, the rest of the clause merely describes the properties with respect to which it takes effect. If the settlement was directed on the 5th of October, to be made with Autar Singh, the delay in the signing of the formal documents would not affect the right he acquired thereby, as the execution of the agreement would relate back to the time when the settlement was in fact made. The authorities charged with the execution of the duties imposed by section 8 of the Act do not appear to have considered that the delay which had occurred in the signing of the *Kabuliat* affected Autar

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Singh's rights in the properties settled with him in 1859, or differentiated him from the other Taluqdars; and although the settlement had been made with him as *Malquzar*, he was, in fact, included as a Taluqdar in the General Lists prepared under the section, and the property of Ranimau was entered against his name as the estate in his possession. Section 10 of the Act provides that "the Courts "shall take judicial notice of the said lists and shall regard them as "conclusive evidence that the persons named therein are such Taluq-"dars or Grantees."

Their Lordships have no hesitation in holding that the properties settled with Autar Singh in 1859, together with those of which he obtained possession under decrees passed in his favour in the course of the regular settlement, constitute an "Estate" within the meaning of the Act, and are consequently impartible.

The Defendant's Appeal relates to that portion of the Lower Court's decree which, affirming the order of the Subordinate Judge, awarded to the Plaintiff a half share in the properties subsequently acquired by Autar Singh. Janki Pershad has died since the institution of this Appeal, and he is now represented by his minor son Dharaband Singh. It is contended on his behalf that by the custom of the family these acquisitions became part of the original estate, and are, therefore, not subject to the ordinary rules of inheritance.

Both the Courts in India have come to the conclusion that the evidence is insufficient to establish the alleged custom. And no adequate reason has been shown to induce their Lordships to take a different view. The only other point that remains to be considered is whether the lands subsequently acquired were as a matter of fact incorporated with the *Taluqa*. As has been pointed out by this Board in the case of *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal*[1], the question whether properties acquired by an owner become part of "the ancestral estate for the purpose of his succession," depends on his intention to incorporate the acquisitions with the original estate.

The Courts in India have concurrently found against the Defendant on this point, and their Lordships see no reason to differ from their conclusion. Both Courts appear, however, to have fallen into an error in respect of one property, Kamrauli, for a half share of which they have made a decree in favour of the Plaintiff. It is admitted on his behalf that Kamrauli is one of the villages for which

1. (1901) L. R. 29 I. A. 82.

Janki Pershad Singh. v. Dwarka Pershad Singh.

Autar Singh obtained a decree in the regular settlement proceedings. The decree of the Lower Court must, therefore, be varied by the elimination of Kamrauli.

Subject to this variation both Appeals will be dismissed, each party bearing his own costs.

And their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant :—*The Solicitor, India Office.*

Solicitors for Respondent :—*Barrow, Rogers* and *Nevill.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present :—Sir Charles Arnold White, KT. Chief Justice, Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

Kandappa Achary ... ... *Appellant* *(*1st Defendant*)

v.

Pathipati Vengama Naidu .... *Respondent (Plaintiff)*

Kandappa Achary v. Vengama Naidu.

Madras Hereditary Village Offices Act (Act III of 1895) Sec. 5—Applicability of—Inams in proprietary estate within Sub. cl. 4, S. 3.

S. 5 of Act III of 1895 is applicable to emoluments of Hereditary Offices in a proprietary estate of the classes mentioned in sub-clause 4 of S. 3. *Mutyala Bapayya* v. *Kosuri Muramullu*[1] approved. *Veerabhadran Achari Suppiah Achari*[2] overruled.

Appeal from the order of the District Court of North Arcot in A. S. No 44 of 1910 presented against the order of the Court of the District Munsif of Tirupati in E. P. No 375 of 1909 in O. S. No. 401 of 1907.

N. Chandrasekara Aiyar and *M. Subbaroya Aiyar* for Appellant.

Respondent was unrepresented.

This appeal coming on for hearing in the first instance before Benson and Sundara Aiyar JJ. the Court delivered the following

Judgment†:—The order of the Lower Court is unsustainable. The District Judge is wrong in holding that a carpenter's Inam is excluded from the operation of S. 5 of Act III of 1895. That section applies to all inams coming within the purview of sub-clause 4 as well as sub-clause 3 of S. 3. The object of exempting from sub-clause 3 the offices mentioned in sub-clause 4 is explained in *Mutyala Bapayya* v. *Kosuri Muramullu*[1].

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* C. M. S. A. No. 60 of 1911. 24th January 1913.

1. (1912) M. W. N. 7. 2. (1909) I. L. R. 33 M. 488.

† 15th November 1912.

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The order of the Lower Appellate Court is set aside and that of the Munsif restored with costs here and in the Lower Appellate Court.

This appeal again coming on for re-hearing when the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.‡

As the case was heard *exparte* on the 15th inst. we have allowed Dr. Swaminathan, the learned Counsel for the respondent, to argue the question again. He has brought to our notice a decision of the learned *Chief Justice* and *Krishnaswami Aiyar* J. in *Veerabadran Achari* v. *Suppiah Achari*[1] and C. M. A. No. 226 of 1904 which are contrary to the decision in *Mutyala Bapayya* v. *Kosuri Muramullu*[2]. The former case however was argued only on one side. We have considered the question again carefully and do not see sufficient reason to depart from the opinion formed by us at the previous hearing which we find is in accordance with another case *Kannam Naidu* v. *Latchanna Dora*[3]. The scheme of the Act appears to have been to divide the offices coming within its purview into four convenient classes for the purpose of dealing with certain questions relating to different kinds of offices separately. The offices include both those in villages in proprietary estates and in ryotwari tracts; clause (1) for instance would include the offices referred to therein in both classes of villages. If the object of the four clauses was, as we conceive it was, to bring under each clause certain kinds of offices the effect of the exception in clause 3 would only be not to include certain offices in proprietary estates in that clause so that the rules of succession laid down in S. 11 and the provisions of S. 7 of the Act might not extend to the excepted offices. There seems to be no reason to suppose that the legislature intended to make any distinction between the same classes of offices in proprietary and non-proprietary villages with regard to the question of the alienability of the emoluments attached to them. Clause 4 itself is perfectly general in its language and would include the offices mentioned therein in both proprietary and non-proprietary villages. Having regard however to the judgment in *Veerabudran Achari* v. *Suppiah Achari*[1] we consider it desirable to have the question authoritatively decided. We refer to a Full Bench the question whether S. 5 of Act III of 1895 is applicable to emoluments of hereditary offices in proprietary estates of the classes mentioned in sub-clause 4 of S. 3.

‡ 21st November 1912.
1. (1909) I. L. R. 33 M. 488.
2. (1912) M. W. N. 7.
3. (1899) I. L. R. 23 M. 493.

Kandappa Achary v. Vengama Naidu.

This appeal coming on for hearing in pursuance of the said Order of Reference before the Full Bench constituted as above.

N. Chandrasekara Aiyar for the appellant.—The question depends on the construction of S. 3 of the Act. The offices in sub-cl. 4 are excepted from the offices in sub-cl. 3 in proprietary estates. The object of the exception is not altogether to exclude the offices in question from the operation of the act altogether if they were in proprietary estates, but only for the purpose of dealing with them separately and conveniently in subsequent sections. Referred to Ss. 7, 8, and 9 regarding the power of punishment given to the collector and the proprietor over the officers in sub-cl. 1 and 3. Officers in sub-cl. 2 are not dealt with in Madras Act II of 1894. Ss. 10, 11 and 12 deal with the offices in sub-cl. 1, 2, 3 so far as rules of succession are concerned. The scheme of the act is to divide the offices covered by S. 3 into convenient groups or classes so that they may be separately dealt with in succeeding sections. Sub. cl. 4 forms a class by itself and the substantive classification supports this contention. Ss. 5 to 21 of the act which lay down the rule as to inalienability and the jurisdiction of the civil courts being ousted, are perfectly general in terms and apply both to non-proprietary and proprietary estates. The legislature could have easily excluded the offices in question from the operation of the act either in S. 3 or in any other section dealing with sub. cl. 3 and 4 if it intended that the offices should be excluded.

Madras Act III of 1895 repealed Reg. VI of 1831. The repealed regulation applied to the offices in question in Zamindari tracts. Sloan's Code pp. 471, 472; *Palamalai Padayachi* v. *Shunmuga Asari*[1], *Pichuvayyan* v. *Vilakkudayan Asari*[2] refd. No reason could be adduced why the legislature should have intended to depart from the Regulation. As pointed out in *Rajah of Vizianagaram* v. *Dantivadi Chelliah*[3] the interdiction on alienation was based on public policy. Public policy requires that emoluments of Village artisans should not be alienated in proprietary estates equally as in non-proprietary estates. The object in both cases is that the lands or emoluments should not get divorced from the offices : The performance of services should not be impaired on that account.

Sub-cl. 1 of S. 3 of act III of 1895 applies both to proprietary and non-proprietary estates. See Madras Village Cess Act S.7. Sub. cl.4 is not expressly limited to non-proprietary estates and therefore there is no reason why if a preceding clause applies to both classes, the later

1. (1894) I. L. R. 17 M. 302. 2. (1898) I. L. R. 21 M. 134.
3. (1904) I. L. R. 28 M. 84.

clause should not also be similarly applicable; *Kannam Naidu* v. *Latchanna Dhora*[1]. The question there arose with reference to Doratanum service in inam lands. The matter was not raised expressly for decision. *Raja of Vizianagaram* v. *Dantivada Chelliah*[2] deals with the office of a village carpenter and is in favour of the appellant. *Veerabudran Achari* v. *Suppiah Achary*[3] is against me. In that case the respondent was unrepresented and the scheme of the act with reference to subsequent sections was not considered in it. *Chinnayya Achari* v. *Mooniappa Mudali*[4] and C. M. A 226 of 56 are also against me. No reasons are given in those cases. *Mutyala Bapayya* v. *Kosuri Murramulla*[5] deals with the question specifically, and the learned judges in an exhaustive judgment dealing with the scheme of the act and the subsequent sections came to the conclusion that the offices in question came within the purview of the act.

B. Narasimha Rao for *S. Swaminadhan* for the respondent:—My submission is *Veerabudran Achari* v. *Suppiah Achari*[3] was correctly decided and ought to be upheld, the view taken therein represents the opinion of six different judges of this Court. First in C. M. A. 226 of 1906 *Davies* and *Benson* JJ. expressed their concurrence in the reasoned opinion of the judge that S. 5 of Act III of 1895 does not apply to artisans in proprietary villages. Then in *Chinnaya Asari* v. *Mooniappa Mudali*[4] *Munro* and *Rahim* JJ. affirmed the same view expressly dissenting from the decision in *Rajah of Vizianagaram* v. *Dantavadi Chelliah*[2]; and lastly in *Veerabudran Achari* v. *Suppiah Achari*[3] the learned *Chief Justice* and *Krishnaswami Aiyar* J. came to the same conclusion after anxious consideration. I submit that as against the opinions of six learned Judges the view now suggested for the first time in *Mutyala Bappayya* v. *Kosuri Murramulla*[5] should not be allowed to prevail. I say for the first time because *Kannam Naidu* v. *Latchanna Dhora*[1] and *Rajah of Vizianagaram* v. *Dantivada Chelliah*[2] on which the other side relied assumed that S. 5 applied to the class of cases now in question. The point was never raised or considered in them. I may also refer, to a case in *Sundara Pandia Thevan* v. *Velathiappa Thevan*[6] which seems to lend support to my contention.

My next submission is the language of S. 3 Sub-cl. 3, is quite clear and it expressly excepts the offices in clause 4 in proprietary estates from the Act. The four groups refer to certain offices in different localities. That the grouping has got reference to locali-

1. (1899) I. L. R. 23 M. 492.
2. (1904) I. L. R. 28 M. 84.
3. (1909) I. L. R. 33 M. 488.
4. (1909) 7 M. L. J. 264.
5. (1912) M. W. N. 7.
6. (1903) I. L. R. 26 M. 490.

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ties was decided in *Audirazu Veerayya* v. *Audirazu Sangayya*[1]. The first group refers to offices in areas governed by the Village Cess Act. Groups 2 and 3 to proprietary villages; group 4 to other villages. The reasoning in *Mutyala Bapayya* v. *Kosuri Murramulla*[2] proceeds too much on the supposed policy and intention of this legislature. To assume that the act was intended to declare all village offices in all villages equally inalienable is I submit with all respect really begging the question. Moreover, I would contend that even that intention of the legislature is by no means so clear. In the 1st place, the preamble to Act III of 1895, shows that it was intended only to apply to certain village offices and not to all. Thus for example, the village astrologer, and village dancing girl do not find a place in this Act. Again if the contention of the other side is accepted it means that cl. (3) refers to other hereditary offices than those mentioned in cl. (4) and I would ask your Lordships to consider why sub-cl. (3) was thus confined to proprietary villages and whether those other offices in ryotwari villages are covered by any of the other clauses and if they are not why they should be excluded from the Act. Therefore either construction leads to serious difficulties and I would submit that the one which gives effect to the plain language of the section would be preferred to the other.

Lastly I venture to suggest a possible reason for the exclusion of these artisan offices in the proprietary villages from the Act. Most of the artisans are really servants of the Zamindars and owe service to him only in return for which they enjoy certain lands. The Government are not interested in seeing that those servants perform their services properly to the Zamindars except the three officers mentioned in Act II of 1894 and in whose performance of duties the Government as well as the Zamindars are interested, the Government have no concern with the minor village servants in Zamindaries. Therefore the Government might have thought it best to let them alone by excluding them from the Act.

The Court expressed the following

OPINIONS :—*The Chief Justice.*—I have great doubts, but as my learned brothers are both of opinion that the question referred to us should be answered in the affirmative, I do not propose to dissent.

Miller J.:—In this matter I am of opinion that the learned Judges who are responsible for the Reference to the Full Bench are right in the conclusion at which they have arrived.

1. (1910) I. L. R. 34 M. 177. 2. (1912) M. W. N. 7.

Kandappa Achary v. Vengama Naidu.

Miller J.

I think it must be conceded that the construction put upon S. 3 of Madras Act III of 1895 by the learned *Chief Justice* and *Krishnaswami Aiyar* J. in *Veerabudran Achari* v. *Suppiah Achari*[1], is that, which its language most naturally suggests, but the reasons for holding that it is not that which ought to prevail are, to my mind, very strong; they are stated in the judgment in *Mutyala Bapayya* v. *Kosuri Muramulla*[2], and I may restate them.

Artisan offices were governed by Regulation VI of 1831 whether they were situated in proprietary villages or not, and no reason or at any rate no reason worth a moment's consideration has been suggested (and the learned Judges who decided *Mutyala Bapayya* v. *Kosuri Muramulla*[2] were unable to conceive of any reason) why those situated in proprietary villages should have been deliberately omitted from Act III of 1895 while those in other villages are governed by that Act.

There is, so far as I can see, no difference whatever from the point of view of the necessity of inalienability, or from the point of view of succession to the office, between the one class and the other. I cannot in these circumstances believe that the legislature deliberately retained the one class within the Act and omitted the other. Is it then necessary, by reason of the language of S. 3, to hold that that which was not done deliberately was done by inadvertence? We should, I think, before taking this course, do all that reasonably can be done to reconcile the language of the Act with what was beyond reasonable doubt the intention of the legislature. And this may be done in the way suggested by *Benson* and *Sundara Aiyar*, JJ. The language of S. 3 is, I venture to think, singularly unhappy in more than one respect, but I see nothing unreasonable in reading the section as the learned Judges have done. I may paraphrase it somewhat with a view to put more clearly what I think it really means. It may be read as if it ran.

The offices to which the provisions of this Act are applicable are divided into the following four classes:—

(1) Those offices provided for in the Village Cess Act, where that Act is, or may be, enforced: (this, I think, must be the real, though perhaps it is not the apparent meaning of S. 3 (1)).

(2) Those offices provided for by Act II of 1894.

(3) Artisan's offices and

1. (1909) I. L. R. 33 M. 488.

2. (1912) M. W. N. 7.

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(4) Other hereditary offices in proprietary estates not being Artisans' offices (already included in (3)) or the Kurnums' office (provided for elsewhere).

I have transposed classes (3) and (4) as perhaps making the matter slightly clearer, but that of course makes no difference. I have also made the word "artisan" do duty for all the persons described in S. 3 (4).

The object of the classification is, I have no doubt, that suggested in the order of reference to enable the draftsman in Ss. 7, 8, 9, 10, 11 and 12 to refer to the classes by number instead of setting out in each section the offices to which that section was intended to be applicable. The different classes are differently treated both as regards the control of the incumbents by the Collector and the proprietor and as regards the succession to the office in the event of a vacancy. There is no other apparent reason why there should be a division into classes at all.

The exclusion of artisans' offices from class(3) is because they are included in class (4) and are to be dealt with differently from the offices included in (3) and the express exception was necessary because they are hereditary village offices in proprietary estates as are those in (3).

I do not think this construction does evidence to the language of S. 3, but if it does, I think we ought, at the risk of some straining to adopt a construction which gives effect to what was so clearly intended rather than a more natural one which frustrates the intention of the legislature.

The authorities are not numerous. In *Kannam Naidu* v. *Latchanna Dora*[1] and *Rajah of Vizianagaram* v. *Dantivada Chelliah*[2], it seems to have been assumed that the artisans' offices in Zamindari villages are included in S. 3. In *Chinnayya Asari* v. *Annayappa Mooniappa Mudali*[3] and C. M. A. No. 226 of 1904 these offices are held to be excluded, but without discussion of the question. The two cases in which the matter has been discussed are *Veerabudran Achari* v. *Suppiah Achari*[4] where one view was taken, and *Mutyala Bapayya* v. *Kosuri Muramullu*[5] to which I have already referred, where the contrary conclusion was arrived at.

For the reasons which I have given, I think the latter decision is correct, and I would answer in the affirmative the question referred to us.

1. (1899) I. L. R. 23 M. 493.
2. (1904) I. L. R. 28 M. 84.
3. (1909) 7 M. L. T. 264.
4. (1909) I. L. R. 33 M. 488.
5. (1912) M. W. N. 7.

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Sadasiva Aiyar J.

Sadasiva Aiyar J;—The answer to the question referred to the Full Bench depends on the interpretation of S. 3 of Act III of 1895. S. 3 says (omitting immaterial portions) "This Act shall apply to the following classes of Village offices...

(3) The other hereditary village offices *in proprietary estates* except the offices forming clause (4) below.

(4) The hereditary offices of village artisans."

Now if we take clause 3 alone it means that the Act shall not apply to the excepted hereditary offices forming clause 4—if those offices are held in villages situated in proprietary estates, *i.e.*, it shall not apply to village artisans, etc., in proprietary estates but shall apply only to other hereditary village offices (other than village artisans etc.) in proprietary estates. If we take clause 4 alone it means that the Act shall apply to the hereditary offices of village artisans in all villages, that is, proprietary estate villages as well as ryotwari villages. What is the object of the legislature in excluding the offices of village artisans in proprietary estate villages in clause 3 but again including them in clause 4 of the same section? One very reasonable view is that though the words of clause 4 include, as it stands, offices of all village artisans whether in proprietary estate villages or in non-proprietary estate villages because clause (3) excepted the offices of village artisans in proprietary estates, the wide words of clause (4) must be confined to the offices of village artisans in villages other than proprietary estate villages. Another tenable view is that clause 3 excepted artisans' offices in proprietary estates merely for purposes of defining and limiting a class of village servants who were intended to be brought under that class *for convenient reference in subsequent* sections of the Act, that clause (4) included those offices for similar convenience of definition and reference, and that so far as the operative opening words of S. 3 were concerned, those offices were also intended by clause (4) to be brought under the operation of the Act. The first of the two views was taken in *Veerabadran Achari* v. *Suppiah Achari*[1] while the second view was taken in *Muthyala Bapayya* v. *Kosuri Muramullu*[2]. In such cases of ambiguity considerations based on the Scheme of the Act and the previous history of the legislation relating to the matters dealt with in the Act might properly be referred to for deciding which of the two views ought to be taken. See Maxwell on Statutes Chapter III and Section I of Chapter IV.

Having in mind such considerations I am inclined to take the second of the above two views. I need not detail the said consi-

1. (1909) I. L. R. 33 M. 488. 2. (1912) M. W. N. 7.

Kandappa Achary v. Vengama Naidu.

derations as they have been set out with sufficient fulness in *Mutyala Bapayya* v. *Kosuri Muramullu*[1] above referred to, and as I further concur in the views formulated in the judgment just now pronounced by my learned brother *Miller J.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Imandi Appalaswami and another ... *Appellants** (*Defts.*)

v.

The Rajah of Vizianagaram ... *Respondent* (*Plff.*)

Madras Estates Land Act (Act I of 1908) S. 3 cl. 11—Rent—Definition—Actual use for agricultural purposes, not essential—Right to use—Test.

Appalaswami v. Rajah of Vizianagaram.

The definition of rent in S. 3 cl. (11), Estates Land Act does not require that the ryot in possession should actually use the land for agricultural purposes. Irrespective of the use to which the ryot puts the lands, he is liable so long as his right to use it for agricultural purposes subsists and what he is so bound to pay is rent.

Second appeal from the decree of the District Court of Vizagapatam in A. S. No. 313 of 1910 preferred against the decree of the Court of the suits of the Deputy Collector, Vizianagaram in Suit No. 87 of 1909.

V. Ramesam for Appellant.

S. Srinivasa Aiyangar for Respondent.

The Court delivered the following

Judgment:—The argument urged in second appeal is that as the defendant has not been using the land in question for a long time for agricultural purposes and as he constructed buildings on it long ago, the suit cannot be regarded as one for rent as defined in S. 3 cl. 11 of the Estates Land Act. The definition given in that clause is "whatever is lawfully payable in money or in kind to a landholder for the use or occupation of land in his estate for the purpose of agriculture." In our opinion the definition does not require that the ryot in possession should actually use the land for the purpose of agriculture supposing he does not use the land at all for any purpose or uses it for some other purpose, he is still liable to pay so long as his right to use it for agricultural purposes subsists and that what he is bound to pay is rent. We may add that this point does not seem to have been really raised in the Lower Courts. We dismiss the second appeal with costs.

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1. (1912) M. W. N. 7.

* S. A. No. 214 of 1912. 12th March 1913.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

P. H. Parameswara Pattar and another ... *Appellants* * (*defts. 2 and 3*).

v.

Viyathen Sreedevi and 5 others ... ... *Respondents* (*plffs.* 1 & *4th defts.*)

Evidence act (Act I of 1872) S. 19—Admission of liability by agent after termination of agency—Relevancy of, against his surety—Weight according to circumstances—Settlement of accounts between principal and agent admissibility of.

Under S. 19 of the evidence Act, admissions of liability by the agent at a time when he has ceased to be such would nevertheless be evidence against his surety provided the liability of the agent for acts done by him as agent has not ceased. The weight to be attached to such admissions however, would vary according to the circumstances of each case. Parameswara Pattar v. Sreedevi.

Held, accordingly, in a suit by the principal against the agent and his surety that the settlement of accounts between the principal and the agent after the termination of the agency was rightly admitted in evidence against the surety.

Second appeal from the decree of the District Court of South Malabar in A. S. No. 453 of 1907 preferred against the decree of the Court of the District Munsif of Alatur in O. S. No. 338 of 1905.

T. R. Ramachandra Aiyar and *G. S. Ramachandra Aiyar* for appellants.

C. V. Ananthakrishna Aiyar and *T. Arunanatham Pillai* for Respondents.

The Court delivered the following.

Judgment† :—*Sundara Aiyar,* J :—The learned vakil for the defendants contends that there is no clear finding in the judgment of the District Court that the amount stated in Exhibit F—the settlement of accounts between the plaintiff and the 1st defendant—was, as a matter of fact, due by him to the plaintiff. The District Judge lays down the law correctly when he observes that " Liability must of course be proved against the surety in the same way as against the principal debtor ". He does not appear to have proceeded on the footing that it was enough to prove that the 1st defendant admitted his liability to the plaintiff under Exhibit F. The lower appellate

* S. A, No. 1613 of 1908. 4th April 1913.

† 12th July 1912.

Parameswara Pattar v. Sreedevi.

Sundara Aiyar J.

Court proceeds to say, "It is difficult to see how under the circumstances of the case plaintiff could have proved the liability of defendants 2 and 3 who in fact guaranteed to identify plaintiff for any sums appropriated by 1st defendant while employed as Kariastan in any other way." It is argued that this amounts to a finding that in the circumstances of the case Exhibit F is sufficient evidence to prove the liability of defendants 2 and 3 also for the claim made. It is possible that this view was taken by the District Judge. But I think it is unsafe to accept the sentence referred to above as an explicit statement that the plaintiff has proved against defendants 2 and 3 that the amount of his claim was due by the 1st defendant.

I would therefore call for a definite finding on the question whether any and what amount was misappropriated by the 1st defendant. The finding will be submitted within six weeks from the date of receipt of this order and seven days will be allowed for objections.

Sadasiva Aiyar, J :—I am not quite sure that I could not take the finding of the District judge to have been based on the 1st defendant's admissions found in Exhibit F having been used as evidence against defendants 2 and 4. But as the language of the District Judge is not very clear, I have no objection to calling for a clearer finding.

In compliance with the order contained in the above judgment the District Judge submitted a finding to the effect that Rs. 989-1-5 must be held to be the amount misappropriated by the 1st defendant.

After the return of the above finding of the lower appellate Court.

The Court delivered the following

Judgment :—*Sundara Aiyar*, J :—The District Judge's finding is to the effect that Exhibit F correctly represents the amount due by the 1st defendant to the Kovilagam when he ceased to be an agent. I have no doubt that Exhibit F is admissible in evidence as against defendants Nos. 2 to 4. The language of S. 19 of the Evidence Act is to my mind clearly in the plaintiff's favour. It enacts that "statements made by persons whose position or liability it is necessary to prove, as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies

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such position or is subject to such liability." It is necessary in this suit to determine the liability of the 1st defendant to the Kovilagom in order to determine the rights of the plaintiffs against defendants Nos. 2 to 4. The admission contained in Exhibit F was made by the 1st defendant while he was still subject to the liability to make good all amounts received by him on account of the Kovilagom and not properly spent by him on its behalf. I do not think it is necessary that a statement or admission by the 1st defendant to be admissible against defendants Nos. 2 to 4, should have been made by him whilst his agency continued. I think the reason of the rule laid down in S. 19 as well as the words of the section will not justify such an interpretation. In *Lysaght* v. *Walker*[1] and *Guardians, Abbayleix Union* v. *Sutcliffe*[2] cited by Mr. Anantakrishna Aiyar for the respondents, the admissions no doubt were made at a time when the agency continued. But I do not think that that is necessary. The reason for making the admission of the agent admissible against his surety would be equally applicable to a statement made by him while his liability for acts done by him as agent continues. The District Judge was therefore at liberty to attach such weight as seemed to him proper to Exhibit F. The weight to be attached to an admission made by the principal debtor as against his surety must depend upon the circumstances of each case. In the judgment of the District Judge who first heard the appeal, reference was made to documents which show that defendants Nos. 2 to 4 took steps to get the accounts settled as between the plaintiff and the 1st defendant. They actively interested themselves in ascertaining the 1st defendant's liability, as it was important for them to do. There was also evidence that one or more of these defendants was actually present at the settlement. The District Judge does not refer to these facts. It is not clear why he refers to letters written by the 2nd and 3rd defendants a year or two years after the accounts were actually settled. I must say that the revised finding of the District Court is to my mind very unsatisfactory. The evidence adduced in the case is not referred to as a whole. At the same time the learned vakil for the appellants has not contended that Exhibit F was prepared under circumstances which would impeach the value of the 1st defendant's admission as one voluntarily made. It was undoubtedly his interest to diminish his own liability as far as possible. There are apparently therefore no reasons to suppose that Exhibit F was not arrived at after an honest examination of the accounts by the Kovilagam and by the 1st defendant. Apart from Exhibit F the

1. (1831) 5 Bligh. N. S. I. s. c. 5 E. R. 208. 2. 26 L. R. Irish Cases 332.

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evidence for the Kovilagom is extremely unsatisfactory. It did not produce the day book and the ledger which was sent up by the first defendant in the ordinary course of business, and the agents admit that the evidence produced before the Court would not lend strength to the admission of the agent in Exhibit F. I have hesitated much whether the appellants are not entitled to have a second remand in order that the District Judge may deal more fully with the evidence. I therefore invited the learned vakil for the appellant to show that any particular entries in Exhibit F. might be regarded as open to impeachment and to refer to any circumstances which would furnish satisfactory evidence that Exhibit F cannot be regarded as a correct account. I must say that I have not been satisfied that he has succeeded in doing so. I feel that, while both the evidence and the finding in the case are unsatisfactory, it would serve no useful purpose to ask the District Judge to record a fresh finding, especially as it is not possible to say that Exhibit F was drawn up under suspicious circumstances. It was for the Judge to decide what weight should be attached to Exhibit F and from his judgment I conclude that, unless Exhibit F be shown to be incorrect by defendants Nos. 2 to 4, he would be prepared to act on it. I find no reasonable ground for supposing that the defendants would be able to perform that task. I feel that no other course is open to me in the circumstances than to accept the finding ; and that the result of doing so must be to dismiss the second appeal with costs.

Sadasiva Aiyar, J :—I entirely agree with the Judgment just now pronounced by my learned brother. Only I have not felt as much hesitation as he has felt before arriving at the conclusion that we must accept the lower Court's finding. In the order of remand itself I expressed my concurrence in passing that order principally with a view to ascertain whether the lower Court really *intended* to act upon Exhibit F as evidence against the defendants. I have no doubt that it *is* evidence as against defendants 2 and 3. Having been taken through the evidence, I have also come to the clear conclusion that the defendants 1 to 3 did not mean to deny the correctness of the entries in this statement of account, Exhibit F. 1st defendant seems to have some claim against the 4th Rajah, Netuthrampalam, and his anxiety evidently was that that amount should be credited in his (1st defendant's) favour and that he (1st defendant) should be made liable only for the balance after deducting from the sum due under Exhibit F the amount which he claims as owing to him from the 4th Rajah. The plaintiff's 1st witness was cross-examined by him (1st defendant) about Exhibit IV, and the witness admitted that Exhibit IV was in his handwriting. Neither the

Parameswara Pattar v. Sreedevi.

Sadasiva Aiyar J.

1st defendant nor defendants Nos. 2 and 3 seems to have cross-examined him as to whether the amount due by that 4th Raja under Exhibit IV should be set off against the present claim. In re-examination the plaintiff's first witness says " the account IV is the account between Netutharapad Thamburan and 1st defendant." That answer clearly indicated that the amount due by the 4th Rajah to the 1st defendant had nothing to do with the kovilagam. The plaintiff's 2nd witness said in his examination-in-chief itself pointedly that " the amount due as per Ex. IV need not be credited to 1st defendant by the kovilagam." I do not find any cross-examination directed by the defendants to this statement of the witness. Of course, the 1st defendant said (as the 3rd defence witness) that, though he had not included any of these accounts in the Masantam suit by him to the higher authorities, that account ought to be credited in his favour at the settlement of accounts. This statement seems to me absolutely of no value, there being strong evidence which can be used not only against the 1st defendant, but also against the other defendant, showing that the 1st defendant really owed the money mentioned in Ex. VII and Ex. F. On these grounds I would also dismiss the second appeal with costs.

IN THE JUDICAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Fort William at Bengal.]

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Azima Bibi and others ... ... *Appellants.**

v.

Munshi Shamalanand ... ... *Respondent.*

Azima Bibi v. Munshi Shamalanand

Mortgage — Mahomadan family following Hindu religion—Ancestral property—Mortgage by males—Management by males—Other transactions by males—Representation by, of females—Inference of—No misleading by females —No liability.

The male members of a Mahomadan family executed a mortgage of ancestral property to the plaintiff. The family was one which in matters of worship had adopted the Hindu religion. There was no evidence however of any custom in the family varying the Mahomadan law of inheritance. Plaintiff took the mortgage under the impression that the Hindu law of descent prevailed in the family and that the female members had no interest in the property. He made no inquiry of the female members or of their husbands. They were *pardanashin* ladies and naturally had left the management in the hands of the males. The mortgage was given for the benefit, and protection of the whole property.

*26th November 1912.

Azima Bibi v. Munshi Shamalanand

Because the females had not actively interfered with the property and it also appeared that in other transactions the male members had dealt with the family property without the active concurrence of the females, the High Court held that the male members "represented" the females in the transaction and the mortgage could be enforced against them. *Held*, on appeal,

That the decision of the High Court was against all principle and authority and that in the absence of any proof that the ladies had misled the plaintiff either by word or conduct their shares could not be held liable.

Appeal from a Judgment and decree of the High Court at Calcutta, which varied a decree of the Court of the District Judge, Arrah.

Ross K. C. and *O'Gorman* for Appellants.

Respondent did not appear.

Their Lordships' Judgment was delivered.

Lord Macnaghten:—This appeal was heard exparte.

The appellants are the female members of a Mahomadan family which in matters of worship have adopted the Hindu religion. There is no evidence that there is any custom in the family by which the Mahomadan law in regard to the descent of property has been altered or varied.

The respondent is a pleader of some standing. He took a mortgage of ancestral property from the male members of the family. He was under the impression that the Hindu Law of descent prevailed in the family, and that the female members had no proprietary interest. He made no inquiry of any of the female members or of their husbands. They were *purdahnashin* ladies and naturally left the management of the property in the hands of the males.

The respondent brought this suit to enforce his security against the family property, making both the males and the females parties. The Subordinate-Judge gave him a decree against the males but dismissed the suit against the females, with costs. On appeal, the High Court passed a decree against the females, and ordered the appellants to pay the costs of the appeal to the High Court.

The learned Judges of the High Court held that the male members 'represented' the females in the transaction because the females had not actively interfered with the property, and it appeared that in other transactions the male members of the family had dealt with the family property without the active concurrence of the females. There was no proof nor, indeed, was there any suggestion, at least in the evidence, that the appellants or any of them had misled the respondent, either by word or by conduct.

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In their Lordships' opinion the decree of High Court is against all principle and authority.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court should be discharged with costs and that the decree of the Subordinate Judge should be restored.

The respondent will pay the costs of the appeal.

Solicitors for Appellants:—*T. L. Wilson and Co.*,

The Respondent did not appear.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On two consolidated appeals from the High Court of Judicature for the North-Western Provinces, Allahabad.]

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Munshi Indar Sahai ... ... *Appellant.**

v.

Kunwar Shaiam Bahadur and others ... *Respondents.*

Hindu Law—Joint family—Self-acquisition—One account of income of self-acquisition and ancestral property—By conduct conversion into joint family property—Will—Invalidity of, without consent—Legatee, a maintenance holder—Non-interference with—No inference of consent.

Indar Sahai v. Shaiam Bahadur.

Where the head and managing member of a joint Hindu family had kept one account of the income of his ancestral and self-acquired property (obtained as a reward for services rendered to the Government in the Indian mutiny) and used to treat the income of both kinds of property as one amalgamated fund, making no distinction between them and applying them for the purposes of the whole family and there was nothing to indicate that he wished to treat the property acquired by him as his separate property.

Held, that the property acquired became by the conduct of the acquirer property of the joint family and could not be disposed of by him by will without the consent of the other members of the family.

Their Lordships refused to draw from the fact that the property in suit was not dealt with on the partition between the other members of the family, the inference that the will was made with their consent as it was probably owing to their reluctance to interfere during the life time of the legatee (who was to take a life estate) with what undoubtedly were the wishes of their ancestor, and as the legatee also was a lady entitled to maintenance.

Appeal from the two Judgments and decrees of the High Court at Allahabad one reversing a judgment and decree and the other affirming a judgment and decree of the Court of the Subordinate Judge of Bareilly.

*26th November 1912.

Indar Sahai v. Shaiam Bahadur.

Sir H. Erle Richards, K. C. and *G. E. A. Ross, K. C.* for Appellant.

DeGruyther, K. C. and *B. Dube* for Respondents.

Their Lordships' judgment was delivered by

Sir John Edge:—The appellant Munshi Indar Sahai was with one Madan Mohan Lal deceased, a defendant in a suit which was brought in 1904 in the Court of the Subordinate Judge of Bareilly and related to shares in Mauza Partapur, two other villages, and a house and shops in the city of Bareilly. The appellant was also sole defendant in a suit which was brought in 1905 against him, as manager of a temple, in the Court of the Subordinate Judge of Bareilly, and related to a moiety of Mauza Nawadia Bahmanpuri. The suits were tried by different Subordinate Judges.

The suit of 1904 was dismissed by the Subordinate Judge, and on appeal his decision was set aside by the High Court at Allahabad and the High Court gave the plaintiffs in that suit a decree. From that decree of the High Court, one of these consolidated appeals has been brought. In the suit of 1905, the Subordinate Judge gave the plaintiff in that suit a decree which was affirmed by the decree of the High Court on appeal. From the latter decree of the High Court, the other of these consolidated appeals has been brought.

The common ancestor of the plaintiffs—respondents and the defendant-appellant was Munshi Jiwan Sahai. Jiwan Sahai had three sons, namely Ram Sahai, who died in 1888; Tirbeni Sahai, who died childless in 1883, leaving a widow Musammat Lado, who died in 1904; and Indar Sahai, who is the defendant—appellant. From Ram Sahai the plaintiffs—respondents descended in the male line Jiwan Sahai, died on the 10th September 1893. Jiwan Sahai, and his sons Ram Sahai, Tirbeni Sahai and Indar Sahai had constituted a joint Hindu family governed by the law of the Mitakshara and at the time of the death of Jiwan Sahai, he, his surviving son Indar Sahai, and the sons and grandsons of Ram Sahai, who were then living, constituted the joint Hindu family.

On the 5th May 1893, Jiwan Sahai made a will by which he purported to give to Musammat Lado, the widow of his deceased son, Tirbeni Sahai, the Village to which the suits respectively relate and an interest for her life in the house and shops in the city of Bareilly, with a direction that Musammat Lado, should dedicate Mauza Nawadia Bahmanpuri to the Thakurdwara of the God Krishna in Mohalla Darzichank. In one of the suits the Subordinate Judge found that Jiwan Sahai had not made that will, but the High

Court found that Jiwan Sahai had in fact made the will. With that finding of the High Court their Lordships agree. The validity of Jiwan Sahai's will has been, however, on other grounds contested. On behalf of the plaintiffs—respondents it has been contended that the property dealt with by the will was the property of the joint Hindu family, which Jiwan Sahai had no power to dispose of by his will, and that the will was not made by Jiwan Sahai with the consent of the other members of the joint family, and was consequently inoperative. On behalf of the defendant—appellant Indar Sahai, it has been contended that the villages Nawadia, Bahmanpuri and Partapur were self-acquired property of Jiwan Sahai, and never became the property of the joint Hindu family, and further that the will was made by Jiwan Sahai with the consent of the other members of the joint family. It is now common ground that the property which Jiwan Sahai purported to dispose of by his will other than the villages Nawadia, Bahmanpuri and Partapur was the property of the joint family.

The villages Nawadia, Bahmanpuri and Partapur were granted by the Government to Jiwan Sahai as a reward for his services in the Indian Mutiny of 1857, and undoubtedly were obtained by him as self-acquired property. It was found by the Subordinate Judge of Bareilly on a remand which was ordered by the High Court that Jiwan Sahai had been the head and managing member of the joint Hindu family, and that he kept one account of the income of his ancestral and self-acquired property, and used to treat the income of both kinds of property as one amalgamated fund. The accounts which had been kept by Jiwan Sahai were examined by a Commissioner and the High Court found that;—" It appears from these " accounts that the income of all the property, ancestral and self " acquired, was blended together in one general account. No distinc- " tion was made between the income derived from the different " classes of property and the whole of the income was thrown into " one common stock and was devoted to the expenditure of the whole " of the joint family of which Jiwan Sahai, his sons, grandsons, and " great grandsons were members. The self-acquired property there- " fore became the property of the joint family. There is nothing " to indicate that Jiwan Sahai wished to or did treat the property " acquired by him as his separate property. The oral evidence " addressed by the defendants on the point is unsatisfactory and " is negatived by the evidence afforded by the accounts to which we " have referred."

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Their Lordships agree with the conclusion of the High Court that the property which had been acquired by Jiwan Sahai as his self-acquired property had become the property of the joint family.

It remains to be considered whether or not the defendant-appellant Indar Sahai established his contention that the will of Jiwan Sahai of the 15th May 1893 was made by him with the consent of the other members of the joint family. That issue was upon him. In one suit, the Subordinate Judge had found that the will had been made with the consent of the family. In the other suit the Subordinate Judge had found that the will was a forgery. The High Court found that there had been no consent. Their Lordships considered that the oral evidence which was given to prove consent was of the most unsatisfactory and unreliable description. After the suits had gone on appeal to the High Court and after the High Court had made its order of remand, the defendant-appellant on the 15th of January 1908 for the first time produced a document dated the 8th May 1893 which purported to be a Razinama, a deed of consent made by or on behalf of the plaintiffs—respondents and the defendant-appellant Indar Sahai. The genuineness of that document was denied on hehalf of the plaintiffs, and Shiam Bahadur, one of the plaintiffs, by whom it was said to have been written and by whom it purports to have been signed, swore that it was not written by him and was not signed by him. The High Court considered that the document was not genuine. As to it the High Court said:—

" The suspicious circumstances under which it was produced, " the absence of any mention of it in the proceedings held in this " and the connected suit before issues, were referred by us to the " Court below, the absence of any reference to it in the will of Jiwan " Sahai specially when the will was not attesteed by the plaintiffs " and Indar Sahai, lead us to think that the deed of consent is not " genuine, and to hold that it is at least a doubtful document."

Their Lordships regard the document dated the 8th May 1893, with the gravest suspicion. Their Lordships do not draw from the fact that the property in question in these suits was not dealt with on the partition between the plaintiffs and the defendant-appellant, Indar Sahai, after the death of Jiwan Sahai, an inference that the will of Jiwan Sahai was made with the consent of the family. The omission to include that property in the partition was probably owing to the reluctance of the members of the family to interfere during Musammat Lado's lifetime with what were certainly the wishes of their ancestor, Jiwan Sahai. It is also to be observed that Musammat Lado was entitled to maintenance. Upon her death

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these suits were brought. For similar reasons their Lordships do not infer from the entries in the Revenue papers that the family had consented to the making of the will. The whole tenor of the will seems to their Lordships to negative the contention that the family had consented to its being made. Their Lordships agree with the opinion of the High Court that had the making of the will been assented to by the members of the joint family, the fact that they consented would have been mentioned in the body of the will, and their signatures to it would have been obtained as attesting witnesses. Their Lordships find that the will of Jiwan Sahai was not made with the consent of the members of the joint family, and that the will was inoperative.

Their Lordships will accordingly humbly advise His Majesty that these consolidated appeals should be dismissed, and the decrees of the High Court be affirmed. The defendant-appellant must pay the costs of these appeals.

Solicitors for Appellant:—*T. L. Wilson & Co.*

Solicitors for Respondents:—*Barrow, Rogers* and *Nevill.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the Chief Court of the Punjab.]

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

The Court of Wards for the property of Makhdum Hassan Baksh } *Appellant.**

v.

Ilahi Baksh and others ... ... *Respondents.*

Hassan Baksh v. Ilahi Baksh.

Mahomadan Law—Wakf—Graveyard—User—Dedication—Punjab Land Revenue Act (XVII of 1887) Sec. 44.

Suit for declaration that a piece of waste land was *wakf* and consequently inalienable. From time immemorial, it was being used by the Mahomadan community for burying their dead. There was no evidence as to when or how it was originally set apart as a burial ground. A probable origin was that a lady revered as a saint having been buried there in the 12th century, Mahomadans began to bury their dead in the waste land about the tomb. In 1858 at a public meeting called by public authorities a resolution was passed that the particular place was to be an open graveyard. The resolution was sanctioned by the Government and in 1867 burial in other than recognised places one of which was the land in dispute was prohibited.

In the *Record of Rights* the place was described as grave yard in the possession of Mahomadans but the defendant was described as owner.

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*26th November 1912.

Hassan Baksh v. Ilahi Baksh.

Held:—*Agreeing with the Chief Court that* the land in suit was a graveyard set apart for the Mahomadan community and *that* by *user*, if not by *dedication*, the land was wakf:

That by force of S. 44 of the Punjab Land Revenue Act, the entry in the Record of Rights was conclusive.

That the defendant was properly described in the Record of Rights as owner as he was the trustee and custodian of the shrine of the saint buried there.

Appeal from a Judgment and decree of the Chief Court of the Punjab reversing a Judgment and decree of the District Judge, Multan.

De Gruyther, K. C., and *G. C. O'Gorman* for Appellant.

Arthur Grey for Respondent.

Their Lordships' judgment was delivered by

Lord Macnaghten:—In the immediate neighbourhood of the City of Multan there is a large tract of unculturable or uncultivated land generally known as the Mai Pal Daman or the Pak Daman graveyard. From time immemorial it has been used by the Mahommedan community in Multan for the purpose of burying their dead. But there is no evidence to show when or how it was set apart for the purpose of a burial ground.

In the Judgment of the Chief Court in this case there occurs the following passage giving, as their Lordships think, a very probable account of the origin and early history of this graveyard:— "Bahawal Hakh, the famous saint, was born in the 12th century of "the Christian Era. He had a son Sadr-ud-din, whose wife was "called Mai Pak Daman. She was revered as a saint, and her "body was buried in a shrine within the area in suit. No one can "tell when the surrounding land was definitely set aside as wakf; "but we can safely conjecture that, in the first instance, Mussal-"mans began to bury their dead here and there in the waste land "about her tomb, because of the desire to be buried near the body of "a saint. There can be no doubt that for hundreds of years the "land about her tomb has been used as a burial ground, and though "there is no direct proof of dedication as wakf, we can safely con-"clude that long before 1858 it had become wakf at least by user."

The year 1858 referred to in the above passage is the date of a representative public meeting of Mahomedans called by the authorities for the purpose of considering the question of Mahomedan graveyards for the city. At that meeting a resolution was passed apparently in accordance with the suggestion of the Government to the effect that owners of khankahs or shrines should keep open grave

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yards in their own Khanakas, that four old grave yards, of which Mai Pak Daman was one, should [be] kept open for the whole Mahomedan Community, that three [n]ew grave yards should be provided, and that all other gravey[ar]ds should be closed. The predecessor-in-title of the person for w[ho]m the Court of Wards is now acting, took part in giving effect t[o t]his resolution.

The resolution was sanctioned by G[ov]ernment, and in 1867 a robkar was published giving notice that if any Mahomedan buried a corpse outside the authorised places it would be taken up and buried in one of those places.

In the Record of Rights of the last settlement an area of land which comprises the land in this suit is entered as "in the possession of the Mahomedans," and is described as Kabristan or Ghair-Mumkin Kabristan, that is "grave yard"or unculturable land forming portion of a "grave yard". In the ownership column Makhdum Hassan Buksh, now represented by the Court of Wards, is entered as "owner." It would seem that he was properly entered as owner being trustee and custodian of the shrine of the Saint Mai Pak Daman, and being or claiming to be the recognised head of the Mahomedan community in Multan.

In this state of things the appellant, the Court of Wards for the property of Makhdum Hassan Buksh, advertised for public sale a piece of ground lying within the area of the graveyard as discribed in the settlement papers.

Thereupon certain Mahomedan residents in Multan of different classes and various occupations combined together and brought this suit as co-plaintiffs, claiming an injunction to restrain the proposed sale, and also asking for a declaration that certain lands described in the settlement records as graveyard, and comprising an area considerably larger than that now in suit was inalienable as wakf. It appeared in the course of the suit that on part of the land described as "grave yard" in the settlement papers there had been encroachments, that part had been acquired for public purposes, and that some lots had been, as it was alleged, sold by the Makhdum for his private purposes. So in order to avoid all questions which might be raised with regard to land which had been so dealt with, the plaint was amended, and the area for which protection was claimed was limited to a piece of ground measuring 437 Kanals and 4 marlas, or something between 40 and 50 bighas.

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The District Judge dismissed the suit with costs. On the Chief Court granted the relief asked for by the plaintiff without costs. From this order of the Chief Court, the Co Wards has appealed to his Majesty in Council.

The only substantial ground of appeal argued before the was that the area known as the Pak Daman grave yard was n continuous burial ground, but merely an area of uncultivated g in which here and there there were to be found graves or cl of graves, and the defence set up was that vacant ground un pied by graves remained the private property of Makhdum H Buksh, and that the Court of Wards was bound or entitled to with it for the benefit of his estate without regard to the advanced by or on behalf of the Mahomedan communit Multan.

The Punjab Land Revenue Act, 1887 Act XVII of 1887, enacts that "an entry made in the Record of Rights in accord "with the law for the time being in force . . . . sha "presumed to be true until the contrary is proved or a new is lawfully substituted therefor."

Their Lordships agree with the Chief Court in thinking the land in suit forms part of a grave yard set apart for Mussalman community, and that by user, if not by dedica the land is wakf. The entry in the Record of Rights s conclusive on the point. It is obvious that if it were held within the area of the grave yard land unoccupied or appar unoccupied by graves was private property and at the dis of the recorded owner, it would lead to endless disputes, and whole purpose of the Government in setting aside land as an grave yard for the Mahomedan community in Multan woul frustrated.

Their Lordships will therefore humbly advise His Ma that the appeal should be dismissed.

The appellant will pay the costs of the appeal.

Solicitors for Appellant:—*T. L. Wilson.*

Solicitors for Respondents:—*Ranken Ford, Ford* and *Che*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, Chief Justice, Mr. Justice ankaran Nair and Mr. Justice Tyabji.

Pokkunuri Balamba... ... *Appellant** (*1st Deft.*)

v.

Kakaraparti Krishnayya and others. } *Respondents (Plff. 2nd and 3rd defts. and L. R. of plff.*

Balamba v. Krishnayya

Insurance—Insurance for the benefit of wife and children—Married Woman's Property Act (III of 1874) Ss. 2, 6.—Whether applicable to Hindu male assured—Rights of daughter of the insured as against insurance company creditor of the assured—Doctrine of advancement—Strangers to contract—right to sue.

Where a Hindu male effects a policy of insurance which expresses on the face of it to be for the benefit of his wife or his wife and children or any of them and dies leaving a daughter.

Held by the Full Bench that S. 6 of Act III of 1874 (Married Women's Property Act) creates a trust in favour of the daughter and the amount of the policy is not available for the creditors.

Oriental Government Security Life Assurance Ltd. v. *Venteddu Ammiraju*[1] not followed.

Per *Chief Justice* and *Sankaran Nair* J. :—S. 2 of Act III of 1874 (Married Women's Property Act) has not the effect of making S. 6 inapplicable to a policy of insurance effected by a Hindu male. S. 2 applies only to Ss. , 5, 7, 8 and 9 and not to S. 6.

A policy for the benefit of one or more children to the exclusion of the wife does not on that ground cease to come within S. 6. The words "a trust for the benefit of his wife or of his wife and children or any of them" in S. 6 mean "a trust for the benefit of his wife or of his children or of his wife and children or any of them."

Per *Chief Justice.*—S. 6 dispenses with the necessity for a separate deed of trust. It does not affect the law of contract or the law of trusts as regards the persons entitled to enforce the contract under the policy. When by virtue of the section a trust is created, the person entitled to enforce the right of the beneficiary is the trustee, if a trustee has been appointed and if no special trustee is appointed the official trustee to whom the money is payable under the 2nd paragraph of the section. The beneficiary himself (or herself) would not be entitled to maintain the action.

The presumption of advancement by way of gift that might arise if the policy was taken out by a father in favour of his daughter cannot arise where the policy purports to be for the benefit of his wife and children. It cannot be held that though there is no gift to the wife, under the doctrine of advancement, there is a gift to such of the children as may be daughters.

In cases contemplated by S. 6, apart from the Act, the beneficiaries have no cause of action. *Khwaje Muhammad Khan* v. *Hussain Begum*[2] distinguished.

Where the Insurance Company contracts to pay not to the parties for whose benefit the policy purports to have been taken out but the executors, administrators or assigns of the assured,

Held per *Chief Justice* that the case does not come within S. 6.

* S. A. No. 2003 of 1911. 1st April 1913.

1. (1911) I. L. R. 35 M. 162.
2. (1910) I. L. R. 32 A. 410.

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v.
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Per *Sankaran Nair* J.—The amount not being payable to the beneficiar there was no scope for the application of the doctrine of advancement by v of gift.

Per *Tyabji* J.—A daughter of the assured is not a married woman wit the meaning of S. 2 of the Act, even if she is married. Her right under insurance policy are affected by S. 6 and the operation of S. 6 is not aff ed by S. 2.

Married Woman in S. 2 refers only to the woman married to the assured

On the rights of the widow or on the construction of the policy in quest his Lordship would express no opinion.

Second Appeal from the decree of the District Court Kistna at Masulipatam in A. S. No. 824 of 1910, presented agai the decree of the Court of Additional District Munsif of Masulipat in O. S. No. 315 of 1909.

This Second Appeal came on for hearing in the first insta before Sankaran Nair and Sadasiva Aiyar JJ. who made the followi

ORDER OF REFERENCE† TO A FULL BENCH.

Sankaran Nair J.—The first defendant is the daughter, a defendants Nos. 2 and 3 are the sons, of one deceased Venkat ratnam, who insured his life for Rs. 2,000 which the Insuran Office agreed to pay to his wife and children. The plaintiff got decree against Venkataratnam and he claims the insurance mon towards the decree, including the Rs. 400 that fell to the 1st defe dant.

The first question for decision is whether the money insured protected by the Married Women's Property Act (Act III of 1874 or whether it is a part of the estate of the deceased. The Jud following the decision reported in *Oriental Government Securi Life Assurance Ltd. v. Vanteddu Ammiraju*[1], as he was bou to do, held that the Act did not apply. This is an appeal from th decision.

It is argued before us that that judgment ought not to followed, and that the Act is applicable to cases like the one befo us. S. 6 of Act III of 1874 runs thus:—

" A policy of insurance effected by any married man on his ow life, and expressed on the face of it to be for the benefit of his wi or of his wife and children, or any of them, shall enure and deemed to be a trust for *the benefit of his wife*, or of his wife an children, or any of them, according to the interest so expressed, an shall not, as long as any object of the trust remains, be subject t the control of the husband, or to his creditors, or form part of hi estate." The Act applies to the whole of British India. Now th words of the section seem to be clear, and according to it, the polic

† 17th February 1913.

1. (1911) I. L. R. 35 M. 162.

of insurance effected by the deceased Venkataratnam should enure for the benefit of the 1st defendant and others. But it is argued that S. 2 shows that this section (6) does not apply to Hindus. The clause relied upon runs thus:—

"But nothing herein contained applies to any *married woman* who at the time of her marriage professed the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion, or whose husband, at the time of such marriage professed any of those religions." Now, it is obvious that this clause applies only to a married woman who professed any of the religions referred to in the section, or who may be a follower of any other religion, say Christianity, but whose husband professed any one of those religions. The proviso, therefore, does not apply to all Hindus and it applies to others than Hindus. It does not apply to males who profess those religions. That this is so, appears to be clear to me from the next clause which enables the Governor-General-in-council to exempt from the operation of the Act members of any race. If, therefore, males who follow those religions have to be excluded, it must be by an order of the Governor-General-in-Council. This appears to be superfluous if the exemption clause applied to them also. The last clause of that section only states that the 4th section of the Indian Succession Act shall not apply, and shall be deemed never to have applied, to any marriage one or both parties to which professed any of the above religions, and is confined solely to that provision of the Indian Succession Act. It appears to me, therefore, that S. 6 does clearly apply, and I am confirmed in this view by a consideration of the general scheme of Act III of 1874, which shows also why the clause in S. 2 is confined to the married women referred to therein. In order to understand it, it is necessary to make a brief reference to Act X of 1865. That Act, with the exception of S. 4, dealt with property which was taken by succession, either under a will or under intestacy, and it was provided by S. 331 that, with reference to such property, the Act should not extend to Hindus, Muhammadans or Buddhists. But S. 4 provided that "no person shall, by marriage, acquire any interest in the property of the person whom such person marries nor become incapable of doing any act in respect of his or her own property which he or she could have done, if unmarried." This section applied also to property taken otherwise than by succession, and as this provision was deemed to be a proper one with regard to property taken by way of succession, and as it affected the property relations of married people, it was deemed more convenient to affirm

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the broad principle than to have the property taken by succession alone regulated by that law. This clause, therefore, went further than the rest and enacted the law which was peculiar to marriage and had nothing to do with succession while the rest of the law dealt with matters peculiar to succession and had nothing to do with marriage, Part VI which is headed "on the effect of marriage" does not touch this question. Now, there was no restriction as regards the communities affected by S. 4; Hindus and Buddhists were not excluded. This Act was passed in 1865, and in 1870 the Married Women's Property Act was passed in England (33 and 34 Vict., chapter 93), and it was deemed advisable to enact some provisions of that Act in India which was done by Act III of 1874. The legislature then proceeded on the view that, as the Hindus etc., had their own marriage law and their own succession law, it was undesirable to interfere with them, and that the new provisions to be enacted need be made applicable only to those whose law of succession was governed by the Indian Succession Act. Accordingly, it was provided by the last clause in S. 2 that the 4th section of the Indian Succession Act shall not apply, and shall be deemed never to have applied, to any marriage one or both parties to which professed at the time of marriage any of those religions. The Sikh and Jaina religions were added as a doubt was entertained whether the Sikhs were Hindus and the Jains were Buddhists, as was thought at the time when the Indian Succession Act was passed. Now, it will be noticed that all the sections except S. 6 referred to laws which were peculiar to English marriage. S. 4 of Act III of 1874, which was S. 1 of the English Act of 1870, was intended to get rid of the right of the husband acquired by marriage under English Law to strip his wife of her wages and earnings. S. 5 also, which is the first paragraph of S. 10 of the English Married Women's Property Act, also had reference to the peculiar marriage law of England. Under that law as it then stood, if a wife effected a policy of insurance on her own life or on her husband's life otherwise than by separate property and died in her husband's life-time, the husband in the capacity of her administrator became the absolute owner of the property. If a married woman had already separate property and if she chose to make any arrangement by means of that separate property in any suit that may be instituted by her to enforce it, the husband must be a party, might raise any questions he liked and could rip up a good deal of domestic life to decide the question whether she had private property. The section avoided any such question as to what is separate property and laid down a rule that, if the wife contracts with an insurance

office and provides the money by which the insurance is effected, the insurance office shall ask no questions as to whether the property in question was her separate property or not. But the insurance office should be liable to the wife and to the wife alone. S. 7 of the Act referred to legal proceedings by and against a married woman. It also was intended to place beyond doubt the difficulties which arose on account of the English marriage law. So, too, Ss. 8 and 9. Now, all those sections with the exception of S. 9 which were taken from the Married Women's Property Act of 1870 had reference to the disabilities of married woman under the English Law. S. 9 was intended to get rid of the husband's liability and was consequential on the removal of the wife's liabilities and deprivation of his rights by marriage. These sections had no reference whatever to the disabilities of married women under the Hindu Law, and therefore, S. 2 distinctly declared that these provisions shall not apply to any married woman who professed the Hindu or any other of the religions referred to therein.

Now, S. 6 stands on a different footing. It had nothing to do with any marriage law, but dealt with the question of contract or of trust. Shortly before this Act III of 1874 was passed, the legislature had passed the Indian Contract Act, by which it is enacted, followed the English Law, that the parties to a contract alone shall be entitled, save in exceptional cases, to enforce the contract. A third party to a contract to whom the Insurance Office may have promised the money due under a policy of Life Insurance, cannot therefore enforce it. But it was deemed desirable for obvious reasons that there should be an exception in favour of wife and children, and that part of S. 10 of the English Women's Property Act which refers to this matter was enacted as S. 6 of Act III of 1874. It will be noticed that S. 10 of the English Act was split into two separate sections. Ss. 5 and 6 in Act III of 1874 consistent with the intention to make S. 6 generally applicable and S. 5 inapplicable to Hindus. The reason is clear. The rule that debarred the wife from enforcing the provision in the contract between the husband and the Insurance Office in her favour is not a rule that depended upon any marriage law. Unlike the other sections of the Act, it dealt with a question which had reference not only to the Christians but also to the Hindus and Muhammadans. The section did not interfere with the Hindu or Muhammadan Marriage Laws and did not contravene the general policy disclosed by the other provisions not to interfere with such laws.

I am not at all sure that the legislature in enacting the Contract Act did not depart from the Hindu Law, under which it is not at all

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clear that the wife and children were not entitled to claim the insurance money. I can therefore easily perceive the distinction between S. 6 which relates to married men and the other sections of the Code which refer to the disabilities of married women under the English law and changes consequent thereon. For these reasons I think the legislature advisedly exempted only married women from the provisions of the Act.

I am also of opinion that the premiums paid by the deceased Venkataratnam were his own self-acquired property. The judge states that Venkataratnam "received a house from his brothers as his share of the family property and that in due course he sold it," that it is therefore for the defence to show that he did not use this property and the sale proceeds and that otherwise the presumption is that all property in the hands of Venkataratnam was family property. But it was apparently not brought to the notice of the Judge that the insurance policy was taken out in 1888 and that the sale of the house was only in the year 1904. The presumption therefore raised by the Judge does not apply. *Prima facie* what is paid as premium is a man's own property. I am accordingly of opinion that the plaintiff has not succeeded in proving that this is joint family property.

It has also been further argued before us that, even if the Act does not apply, the 1st defendant and the others named in the policy must be treated as beneficiaries for whose benefit the policy was taken out by the deceased Venkataratnam. According to English Law, if a man purchase real property or an annuity, stock or other chattel interest or take a bond in the name of a stranger, the equitable ownership results to the person who advanced the purchase money. But an exception has always been recognised to this doctrine; that is that if the person from whom the consideration moved stands *in loco parentis* to the person in whose name the purchase is made then gift or advancement is presumed. This is what is stated by Lord Romilly in *Garrick* v. *Taylor*[1], which was confirmed in appeal: "If a purchase be made by one in the name of another the presumption is that the latter is a trustee for the person who pays the money, unless the parties stand in the relation of parent and child."

The same principle has been applied to policies of life insurance in *Pfleger* v. *Browne*[2], which was a case where an insurance office issued a policy on Pfleger's life the premiums of which were paid by

1. (1860) 29 Beav. 79 (83) 2. (1860) 28 Beav. 391.

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Pfleger but the amount was payable to Browne. It was held that the onus of proof when the benefit of it was claimed by Browne lay on the latter even though the policy stood in his name.

The exception in favour of the children was recognised in *Re Richardson, Weston* v. *Richardson*[1]. In that case the question was whether the policy of life insurance effected by a man on his own life but in his daughter's name was for his benefit or for that of his daughter. He retained the policy in his own possession and he paid all the premiums himself from time to time except the last which on account of his want of money his son paid. *Kay* J. held that " the legal right to call upon the office to pay the sum assured was clearly in the daughter, and not in the executor, the contract on the insurance company having been to pay her. That she was a daughter was sufficient to raise the presumption that there had been an advancement to her." He further held that the mere retention by the father of the policy in his own hands did not show that the beneficial interest was not intended to pass to her.

On the other hand the decision of the case *In re Policy No 6402 of the Scottish Equitable Life Assurance Society*[2], in which many of these cases are referred and principles explained is an instance where the Court refused to draw such presumption, though the policy was taken on a man's life "for the behoof of" a lady who was his deceased wife's sister and with whom he had gone through the ceremony of marriage. The question therefore is whether the relationship of the parties is such we should presume a gift or an advancement in favour of the person in whose name the policy stands. In India S. 82 of the Indian Trusts Act states that where property is transferred to A for a consideration paid or provided by B, the property is presumed to belong to A unless it appears that B did not intend to pay or provide such consideration for the benefit of A. In the Madras presidency, at any rate, there is an increasing disposition to make provision for the benefit of a person's wife, children including daughters as against his joint family, to whom his property would survive at his date, or as against the male heirs. Accordingly *Turner*, C. J., and *Muthusami Aiyar*, J. decided that where notes were purchased in the name of a wife out of funds belonging to the husband " the presumption is that he intended that the notes transferred to his wife should become her property." *Naryana* v. *Krishna*[3]. This view has been accepted in Madras in the case of Hindu females. I have very little doubt that, when

1. (1883) 47 L. T. R. (N S.) 514. 2. (1902) 1 Ch. 282.
3. (1884) I. L. R. 8 M. 214.

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persons in the position of Venkataratnam take the policy in the name of either the wife or daughters, they intend it for their benefit and they must be deemed to be the beneficiaries under the policy.

Various insurance offices in Southern India issue policies under which the moneys are to be paid to the daughters on their marriage. The consideration in such cases is not only the health etc, of the person who pays the premiums but also considerations affecting the daughter. I have no doubt that all these persons who have been effecting these insurance policies always treated the policy money as the property of the daughter payable to her at a certain fixed period. It is not open to the father or husband to revoke that disposition without the consent of either the wife or the daughter. I would accordingly hold that in this case there was a gift or advancement in favour of the daughter and that the plaintiff is not entitled therefore to claim the share due to her.

As a beneficiary there is no doubt that the defendant would be entitled to bring a suit against the insurance company for the recovery of the amount. No doubt in England it has been held that if she is not the beneficiary and the amount is only payable to the daughter on the father's death, then the daughter is not entitled to sue. It is probable that in India this question may require further consideration on account of the ruling of the Privy council in *Khwaja Muhammad Khan* v. *Hossaini Begam*,[1] The facts in this case show this was a settlement similar to the one in that case. But it is unneccessary to consider this question further in this case as the daughter is not the claimant. In *Oriental Government Security Life Assurance Limited*, v. *Vanteddu Ammiraju*[2], the conclusions are no doubt opposed to mine in this case but there the question was not considered. It was assumed that the Married Women's Property Act in its entirety did not apply to Hindus. There the counsel for the insurance office conceded in appeal the rights of the plaintiffs to recover the money. The question of advancement or gift or trust was not raised in that case.

I doubt therefore whether that is authority to be followed. But as the question is of general importance it is desirable that it should be decided by a Full Bench. We accordingly refer to the Full Bench the questions involved for decision :—

(1) Whether Act III of 1874 applies to Hindu married males or not.

1. (1910) I. L. R. 32 A. 410. 2. (1911) I. L. R. 35 M. 162.

(2) Whether in cases similar to the one before us, the daughter is not entitled to enforce her claim against the insurance office or a creditor.

Sadasiva Aiyar, J:—I agree with my learned brother in the finding of fact that the deceased paid his premia out of his self-acquired moneys, and it is unnecessary to repeat the reasons given by him for arriving at that conclusion. The further question arising in the case and which we have resolved to refer for the opinion of a Full Bench is of great importance. That question is whether, when a Hindu male has insured his life with a company by an agreement under which the insurance company undertook to pay the insurance money on the death of the insured to his wife and children, the said wife and children or, at least, the children are entitled to that money or whether such money is part of the estate of the deceased to which his male children who are his heirs are alone entitled. This question has been answered in favour of the second alternative in the case reported in *Oriental Government Security Life Assurance Limited* v. *Vanteddu Ammiraju.*[1] As at present advised and with the greatest respect I feel grave doubts as to whether that decision does not require re-consideration. The question involved might be considered under 4 heads :—

(*a*) Whether under the Contract Act the wife and children can enforce a promise made by the Insurance Company as if the wife and children were promisees under the Contract Act.

(*b*) Whether the wife and children can take advantage of S. 6 of the Married Women's Property Act III of 1874 and claim that a trust for their benefit was created when the policy of insurance was effected.

(*c*) Whether even if the Contract Act and the Married Women's Property Act did not apply, the wife and children could sue under the common law prevailing in India as near relations of the insured intended to be benefited by the insured.

(*d*) Whether under the Trusts Act, the wife and children became the *cestuique trustent* and the company became trustees and thus the trust could be enforced by the wife and children.

As regards the first point it was held in *Chinnaya Rau* v. *Ramaya*,[2] that a third person who was not a party to a contract could sue the promisor though the consideration proceeded from the third person's step-mother and not from the third person himself. *Innes* J., held that the consideration moved indirectly

1. (1911) I. L. R. 35 M. 162. 2. (1881) I. L. R. 4. M. 137.

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from the third person and hence the third person himself became a promisee under the contract Act. He relied upon the old case of *Dutton* v. *Poole*[1] decided in 1868. *Kindersly*, J. held that under S. 2 (*d*) of the Contract Act the consideration need not flow from the promisee and hence even a third person could sue as promisee though no consideration flowed from him. *Dutton* v. *Poole*,[1] went upon the ground that, having regard to the near relationship between the plaintiff and the party from whom the consideration moved, the plaintiff might be considered to be a party to the consideration and that was also the ground on which *Innes*, J., based his decision. According to the argument of *Kindersly* J., near relationship between the brother and the person from whom the consideration moved was not important under the Contract Act. This case of *Chinnaya Rau* v. *Ramaya*[2], seems to have been approved of in *Samuel* v. *Ananthanatha*[3]. If *Chinnaya Rau* v. *Ramaya*[2] decided in 1881 is good law, then the wife and children of the insured are entitled to sue as if they were parties to the contract itself between the insured and the Insurance Company. But Pollock and Mulla point out (see their notes to S. 2, p. 17) that in the two cases in *Chinnaya Rau* v. *Ramaya*[2] and *Samuel* v. *Ananthanatha*[3], clauses (*a*), (*b*) and (*c*) of S. 2 of the Contract Act have been overlooked and clause (*d*) alone has been considered. Though under clause (*d*) the consideration may move from the promisee or *any other person*, under clauses (*a*), (*b*) and (*c*) no man could be called a promisee and no man could therefore become entitled to bring a suit as promisee *unless he has accepted the proposal of the promisor* and thus comes under the definition of promisee in S. 2 (*c*). Here the wife and children were not asked by the promisor whether they assented to the proposal to benefit them and they did not accept any such proposal and hence cannot come under the Contract Act definition of promisee. So also in *Chinnaya Rau* v. *Ramaya*[2], the beneficiary under the agreement was not a party to the agreement as he had not accepted any proposal and hence cannot be called a "promisee" under the Contract Act. However, I am willing to follow *Chinnaya Rau* v. *Ramaya*[2], as it was decided so far back as 1881 and its authority has not been expressly overruled, though if I were to construe the sections of the Contract Act itself I am inclined to agree with the criticisms of Pollock and Mulla.

The next branch of the question relates to S. 6 of the Married Women's Property Act. In the *Oriental Government Security*

3. (1868) 2 Lev. 210. 2. (1881) I. L. R. 4 M. 137.
3. (1883) I. L. R. 6 M. 351.

Life Assurance Limited v. *Venteddu Ammiraju*[1], it was held that no person following the Hindu Law can take advantage of that section because S. 2 paragraph 2 provided that that Act should not apply to any married woman who or whose husband at the time of her marriage professed the Hindu religion. It seems to me there are three answers to the argument based on S. 2. In the first place, S. 6 speaks of a policy of insurance effected by any married *man* and hence the words in S. 2 which exclude the applicability of the Act to a Hindu married *woman* cannot have any bearing upon the provisions of S. 6 which relate to a policy of insurance effected by any married man and not by any married woman whether Hindu or otherwise. In the second place, even if S. 2 will exclude a *married Hindu woman* from the benefit of a policy effected by her husband, *his children* cannot come under the phrase 'married women' in S. 2 and if the insurance was in favour of the children also, S. 6 must apply because S. 6 says that the insurance shall be deemed to be a trust for the benefit of his wife and children *or any of them* according to the interests so expressed. Because the wife cannot take, I do not see why the children should not take. In the third place, the title of the Act III of 1874 says that it is an Act, not only "to explain and amend the law relating to certain married women" but also an Act "for other purposes," referring evidently to the beneficient insurance provision laid down in S. 6. The preamble says that it is expedient to make provision for insurance on lives by persons married before or after that date. It does not say that the provision is restricted to *insurances* on lives of other than those of the Hindu, Muhammadan, Buddhist, Sikh or Jain religions. Though the Act is called the Married Women's Property Act, *this question of insurance was also considered as an important matter* falling to be dealt with by the Act and the provisions under S. 6 have nothing to do with the religion of the parties but are beneficent provisions, the reasons for enacting which are applicable whether the husband who insures his life belongs to one religion or to another. It is clear from the History of the legislation that that provision, as Mr. Hobhouse says, was necessitated by the old doctrine of the English Courts that a husband as such had no insurable interest in his wife's life and similar doctrines. It was also necessitated by the view of English Courts, that such a policy, even when allowed by statutes overriding the common law would only be in the nature of a Voluntary settlement and hence would be liable to the dangers to which such settlements are exposed. It is

1. (1911) I. L. R. 35 M. 162.

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well known that the legislature wanted to encourage those life insurance policies which make provisions for wife and children and not to subject such policies to the dangers to which they were subjected under the English decisions, Judges of English Court being too much bound down by technicalities and precedents. In introducing the Bill (See extra supplement of 2nd August 1873 of the Gazette of India) Mr. Hobhouse said "Some gentlemen connected with insurance offices in this country applied to the Government a short time ago stating that those provisions" i.e., the provisions of the English statute which overruled the English decisions, were found exceedingly beneficial and they did not see why they should not be applied to India. We now propose therefore to introduce an Act which should embody for India the same provisions as those which had been thought fit for the people of England". It will be found from this quotation that the religion of the parties had nothing to do with the introduction of these provisions in the Act, just as the "people of England" were sought to be benefited by the English Act, and protected against the English decisions so, the people of India were sought to be protected by the introduction of this S. 6 in the Married Women's Property Act. Mr. Hobhouse in another speech said (see extra supplement dated 6th September 1873, page 12 of the Gazette of India). "We must remember that a wife's contributions to the family wealth did not usually consist in payment of money. She may bring to her husband no money at all and yet may be a very treasure to him even if measured by a mere pecuniary standard. If the wife kept the household together, brought up the childern, governed his servents, conducted all his petty dealings with tradesmen, and performed other similar domestic duties, the husband might be a far richer man for her services, although he might provide all the actual money that comes into the family. Then, if he chose that his wife should take every year so much out of the common stock, or out of his stock, and spend it in an insurance for herself or her childern, why should she not do so? If the husband chose that that should be done with his property from time to time, Mr. Hobhouse did not see it was a matter for legal question, or that there should be any legal difficulty placed in the way of the wife's enforcing the contracts. It might be the most prudent, the most wise, and the most beneficial arrangement for the whole family, the very best mode of making a provision for them, and it also might be, and often was, *a matter of absolute justice as between husband and wife* which he or his creditors ought not to dispute at any future time." Mr. Hobhouse, therefore, thought that we ought not to import nice legal questions into such transactions; the broad intelligible mode of

treating them was that, if the wife contracted independently with the Insurance Office, and paid the money, the Insurance Office should ask no questions, but should be liable to the wife and to the wife alone.

S. 6 provided that:—" A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children or any of them, shall enure and be deemed to be a trust for the benefit of his wife or of his wife and childern, or any of them, according to the interests so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of the estate."

" Mr. Hobhouse could not say that he attached a great deal of importance to that section. In the first place, such transactions were not very often effected, because people did not like putting their property beyond their control. *In the second place, the thing could be done as the law now stood. The effect of the section would be to place such an arrangement on a safer basis.*

At present, it would be in the nature of what lawyers call a 'voluntary settlement'; and without leading the council into technicalities relating to voluntary settlements, he would only state that in contests with the creditors of the settlor, those settlements stood on a less favourable footing than settlements made for valuable consideration. We propose to follow the example of the English legislature in enacting that settlements effected in this particular way should be good as against creditors, but at the end of the section there was an express reservation of the rights of creditors *in the case of fraud.* He did not attach much importance to that; for fraud would vitiate any transaction whether it was expressly so provided or not. And he did not believe in those fore-sighted, long-headed arrangements for the purpose of defrauding creditors, and in practice, had never known a single instance in which people deliberately plotted beforehand to defraud their creditors *in this kind of way.* At the same time, those who opposed alterations of the law of property in the case of husband and wife, always insisted on the possibility of frauds being facilitated thereby and we followed the English statute in putting on the face of our bill a warning that such things could not be done more easily than now."

I have quoted thus at length in order to show that the religion of the insured had nothing to do with the introduction of the benificent provision contained in S. 6 of the Act. It seems to me

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therefore, that S. 6 of the Married Women's Property Act does apply to a policy of insurance effected by a Hindu married man on his own life and expressed on the face of it to be for the benefit of his wife or of his wife and children or any of them and that S. 2 does not prevent the application of the provisions of S. 6 to any such policy. Having regard however to the case of the *Oriental Government Security Life Assurance, Limited,* v. *Vanteddu Ammiraju*[1], I do not wish to treat this as my final considered opinion till I have heard further arguments on this point.

Then the third branch of this question concerns the argument that under the common law of India, a person who is the near relation of the party from whom the consideration has proceeded is entitled to sue the promisor, though he may not come within the strict definition of a promisee under the Contract Act. I think this is a very tenable position having regard to *Dutton* v. *Poole*[2]. The *ratio decidendi* of that case appeals to me as valid, and though that case is usually treated as overruled by *Tweddle* v. *Atkinson*[3] that fact (namely, that the later English case has overruled the earlier English case) need not prevent Indian Courts from adopting and following the overruled case if it lays down that rule of law which appeals to the Indian Courts as the more equitable rule. "Consideration" in the Indian law under the Contract Act need not be given the restricted meaning given by later English decisions and, as Shepherd, J. points out in his notes to Ss. 2 and 25 of the Contract Act, the word "consideration" in Indian Law comes nearer to the notion of "Causa" as understood in the Roman law. A motive based on near relationship or upon the moral obligation to provide for dependant relations must surely be treated as a very lawful consideration indirectly proceeding from the relative so as to enable such relation to bring a suit against the promisor though, if the person intended to be benefited was not such a dependant relative, the law might hesitate to allow that stranger to sue upon the promise made for his benefit. The cases of *Chinnaya Rau* v. *Ramayya*[4] and *Samuel Pillai* v. *Ananthanatha Pillai*[5] already referred to might be treated as authorities *on this basis,* though the observations therein in respect of the two provisions of the Contract Act may be of doubtful validity. The Privy Council Case of *Khwaja Muhammad* v. *Husaini Begam*[6], seems to me to lend very great support to the above conclusion. Their Lordships say. "First it is con-

1. (1911) I. L. R. 35 M. 162.
2. (1868) 2. Lev. 210.
3. (1861) 30 L. J. Q. B. 265.
4. (1881) I. L. R. 4 M. 137.
5. (1883) I. L. R. 6 M. 361.
6. (1910) I. L. R. 32 A. 410.

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tended, on the authority of *Tweedle* v. *Atkinson*[1], that as the plaintiff was no party to the agreement, she cannot take advantage of its provisions. With reference to this it is enough to say that the case relied upon was an action of assumpsit, and that the rule of (English) Common law on the basis of which it was dismissed is not, in their Lordships' opinion applicable to the facts and circumstances of the present case.........In their Lordships' Judgment, although no party to the document, she is clearly entitled to proceed *in equity* to enforce her claim. Their Lordships desire to observe that in India and among communities circumstanced as the Mahomedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the Common law doctrine was applied to agreements or arrangements entered into in connection with such contracts." On analogous principles, it seems to me that cases decided under the English law about consideration having to flow from the promisee or about persons having insurable interests only in the lives of particular persons and all such technicalities of English law should not be applied in India so as to defeat plain equities favouring the wife and children of an insured person.

The fourth branch of the argument is based on the doctrine of Trusts. I have gone through Ss. 3 to 11 of the Trusts Act with some care, and I am unable to see any difficulty in holding that a married man who insures his life for the benefit of his wife and children in a company which promises to pay the insurance money at his death to the said wife and children creates a "trust," that he becomes the author of the trust, that the company becomes the trustee, and that the wife and children are beneficiaries. It seems to me that the cases in *Suppu Ammal* v. *Subramanian*[2], *Arumuga Gounden* v. *Chinnammal*[3], *Rukmabai* v. *Govind*[4] and *Protap Narayan Mukerjee* v. *Sarath Kumari Devi*[5], have been decided on analogous principles. As *Sundara Aiyar* J. points out in *Rajagopalaraju* v. *Radhayya*[6], marriage settlements are included in trusts, and Pollock points out as follows :—"Closely connected with the cases covered by the doctrine of trusts, but extending beyond them we have the rules of equity by which special favour is extended to provisions made by parents for their children." A policy of insurance effected by the father of a family for his children should therefore be looked upon with great favour by Courts of equity and I see no reason why the children should not directly

1. (1861) 30 L. J. Q. B. 265.
2. (1909) I. L. R. 33 M. 232.
3. (1910) 10 M. L. T. 214.
4. (1902) 6 Bom. L. R. 421.
5. (1900) 5 C. W. N. 386.
6. (1911) 22 M. L. J. 159.

claim rights against the promisor or trustee who has undertaken to act for their benefit. For all the above four reasons I concur in referring the question for the decision of a Full Bench.

V. Ramdas for appellant.

T. Ramachendra Rao for respondent.

V. Ramdas, relied upon the considerations set forth in the referring order.

T. Ramachandra Rao submitted that the Act did not apply. Hindu Married Women's Act, S. 6 did not apply to children only but to married women and children, the fund cannot go to children as that would be contrary to the expressed terms of the contract. Referred to Ss. 10 and 11 of the Married Women's Property Act, 1870.

The policy made the money payable to the insurer, his assigns, administrators and executors and therefore no question of advancement arose. The doctrine of advancement has application when the legal ownership vests in one and the funds are provided by another. Referred to S. 82 Trusts Act. A trust of a moveable (which term includes a policy of insurance) can be created by transferring the policy or by declaring the trust by a registered instrument. Neither of these things has been done in this case. The next point is that a stranger to a contract cannot sue on the contract. The exceptions are provided in S. 23, Specific Relief Act. The cases *Chinnaya Rau* v. *Ramayya*[1] *Samuel Pillai* v. *Ananthanatha Pillai*[2] are no authorities on the point in question. There, there was an express promise in favour of the third party. The whole question was about consideration. *Kwaja Muhammad Khan* v. *Husaini Begum*[3] is a case where the husband promised to the father as guardian of the minor wife. It was really a case of charge.

Similarly *Shuppu Ammal* v. *Subrahmana Iyer*[4]; cases of partition, family arrangement etc, stand on a different footing. *Rajagopalaraju* v. *Radhayya*[5].

Another thing noticeable in those cases is that the promise was made by a registered instrument thus satisfying S. 25 of the Contract Act, and S. 5 of the Trusts Act.

Cur ad vult.

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1. (1881) I. L. R. 4 M. 137.
2. (1883) I. L. R. 6 M. 351.
3. (1910) I. L. R. 32 A. 410.
4. (1909) I. L. R. 33 M. 238.
5. (1911) 22 M. L. J. 159.

The Court expressed the following opinions

The Chief Justice:—The first question which has been referred to us is whether the Married Women's Property Act, 1874 (Act III of 1874) applies to Hindu males.

I feel a difficulty in answering this question in the form in which it has been framed. A general answer might possibly cover a case not contemplated in the order of reference, and not argued before us. The argument before us was confined to the question whether, where a Hindu male effected a policy of insurance on his own life which expressed on the face of it that it was for the benefit of his wife, or his wife and children, or any of them, S. 6 of the Act applied. This is the question I propose to deal with.

Under S. 2 of the Act nothing in the Act applies to a married woman, who at the time of her marriage professed the Hindu religion or whose husband at the time of the marriage professed the Hindu religion.

I am of opinion that Ss. 4, 5, 7 and 8 do not apply where either of the spouses professed the Hindu religion at the time of the marriage. These sections contain the words "married women" and therefore S. 2 applies to them in terms. They are intended to confer rights on a married woman which under the law of England, she did not possess, and to remove disabilities imposed on her by the law of England. These enactments, if not in conflict with, are entirely foreign to, Hindu law. The words "married women" do not occur in S. 9, but the subjectmatter of the Section is foreign to Hindu law, and in my opinion this section also does not apply where either of the spouses was, at the time of the marriage, a Hindu.

Then as to S. 6. the words "married women" do not occur in the section. The section no doubt is in the interest of the wife and children but its primary object is to enable a man to make provision for his wife and children by insuring his life for their benefit, without executing a separate deed of trust. The section enables a Hindu male to do something which but for the section, he would not be able to do. The result may be that a Hindu woman derives a benefit, but I do not feel bound to hold that she is shut out from this benefit by reason of the general enactment that the Act shall not apply to Hindu women. As *Sankaran Nair, J* points out in the order of reference, S. 10 of the English Act of 1874 was split into two sections in the Indian Act, Ss. 5 and 6, which is consistent with an intention to make S. 6 applicable and S. 5 inapplicable to Hindus.

S. 2 only excludes the operation of the Act as regards the married women. There is no exclusion as regards children. If a Hindu male can take the benefit of the section for the purpose of providing for his children but is precluded from taking the benefit of the section in order to make provision for his wife, a curious anomaly arises, and a state of things is brought about which can scarcely have been intended by the legislature.

This suggested anomaly was met by the contention that a similar anomaly arose under the language of S. 6 itself, since the words "or any of them" only apply to children, and that a policy for the benefit of one or more children to the exclusion of the wife, did not come within the terms of the section. The words of the Indian Act are the same as those of S. 10 of the English Act of 1874 (except that the English Act says "be deemed to be a trust for the benefit of his wife *and* of his children or any of them" whilst the Indian Act says "be deemed to be a trust for the benefit of his wife, *or* of his wife and children, or any of them").

These words may be ambiguous, but in S, 11 of the English Act of 1882 we have the words "for the benefit of his wife or of his children, or of his wife and children, or any of them." This makes the matter quite clear, and in my opinion this is the sense in which we should construe the words in S. 6 of the Indian Act of 1874. This seems to dispose of the argument that the section itself creates an anomalous distinction between wife and children.

There are three possible views, as it seems to me :—

(1) That the section does not apply to a policy of insurance, effected by a Hindu male.

(2) That it applies to a policy effected by a Hindu male for the benefit of his children, but not to a policy effected for the benefit of his wife.

(3) That it applies to a policy effected for the benefit of his wife or of his children, or of his wife and children, or any of them.

In my opinion the third view is the right one. S. 6 dispenses with the necessity for a separate deed of trust. It does not affect the law of contract or the law of trusts as regards the persons entitled to enforce the contract under the policy. When by virtue of the section a trust is created, the person entitled to enforce the rights of the beneficiary is the trustee, if a trustee has been appointed, and if no special trustee has been appointed, the official trustee to whom the money is payable under the 2nd paragraph of the section,

Limiting my answer to the first question, to the question whether S. 6 of the Act applies, I would answer it in the affirmative.

The second question is "whether in cases similar to the one before us, the daughter is not entitled to enforce her claim against the insurance officer or a creditor." The first point to be considered is, assuming S. 6 (in accordance with the view I have already expressed) would apply if the facts brought the case within the section whether this particular policy enures as a trust for the wife and children, or forms part of the estate of the assured.

In the case before us the insurance company contracted to pay not the partites for whose benefit the policy purports to have been taken out, but the executors, administrators or assigns of the assured, where as in *Oriental Government Security Life Assurance, Limited* v. *Vanteddu Ammiraju*[1], and in the Maybrick case *Cleaner* v. *Mutual Reserve Fund Life Association*[2], the company contracted to pay the parties for whose benefit the policy purported to be taken out. In the Maybrick case the contract was to pay to the beneficiary.

In *Oriental Government Security Life Assurance Limited* v. *Vanteddu Ammiraju*[1], the contract was to pay to the trustees who might be appointed under the Married Women's Property Act and failing trustees to the beneficiaries. There is nothing on the face of the policy in the present case to indicate that it was for the benefit of his wife and children except the words "for the benefit of his wife and children," which are written in, in ink, in the printed form. There is no evidence as to how, or when these words came to be written. For all we know they have been written in by the assured after the policy had been taken out. I will assume, however, that the words "for the benefit of his wife and children" were part of the policy when the contract was made. How would the matter stand then? I do not think there would be a trust if the section did not apply. The legal interest in the policy money could not be said to vest in the executors in trust for the wife and children or in the company in trust for the wife and children, because the trust, if any, would, in my opinion, be by reason of the operation of the section, and under the section itself, if no trustee is appointed, the legal interest vests in the Public Trustee. Further, so far as the company are concerned, they are under contractual obligation to pay the executors.

1. (1911) I. L. R. 35 M. 162. 2. (1892) I. Q. B. 247.

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White, C. J.

If the policy had been in the same terms as the policy in *Oriental Government Security Life Assurance, Limited* v. *Vanteddu Ammiraju*[1], and the company had contracted to pay the parties for whose benefit the policy was taken out (and this is the assumption on which the order of reference was made) I think there would have been a trust under the section, but the person entitled to enforce the claim as against the company would have been, not the daughter, the beneficiary, but, if no trustee had been appointed the party in whom, under the section, the legal interest vests, viz., the Public Trustee.

As regards the case of *Oriental Government Security Life Assurance, Limited* v. *Vanteddu Ammiraju*[1], the question whether a male Hindu could take the benefit of S. 6 of the Married Women's Property Act does not appear to have been argued. All that the learned judges say upon the point is "We may point out that the Married Women's Property Act is not applicable to Hindus." With all respect to the learned judges I cannot accept this proposition in its entirety. For the reasons I have stated I think a male Hindu can take the benefit of S. 6.

If the view taken by the learned judges as to the Married Women's Property Act was right, I should agree with their conclusion in that case that no cause of action arose to the beneficiaries and that the policy moneys formed part of the estate of the assured, notwithstanding that under the contract the money was payable to the beneficiaries in default of trustees. In the Maybrick case, on the facts, the trust created by the Act ceased to exist. The policy moneys therefore formed part of the estate of the assured and were payable to his executors. In the 35 M. case, in the view taken by the Judges with regard to the Married Women's Property Act, S. 6 did not apply, and no trust, in my opinion was created apart from the Act. The moneys, therefore, as it seems to me, were payable to the executors, since the wife was no party to the contract with the company. The decision of the Privy council in *Khwaja Muhammad Khan* v. *Hussaini Begam*[2], has been relied upon as an authority in support of the contention that the daughter in the present case can enforce the contract, and in the Privy council case the facts were of a special character, and the agreement on which the plaintiff was held entitled to sue, though not a party thereto, gave her a charge on immoveable property. I do not think the present case, on the facts, comes within the principle of the decision in *Khawaja Muhammad Khan* v. *Hussaini Begam*[2].

1. (1911) I. L. R. 35 M. 162. 2. (1910) I. L. R. 32 A. 410.

There is no doubt a special class of cases of which *Weston* v. *Richardson*[1], is an example. If a man insures his own life in his daughter's name, this may amount to a complete gift to the daughter so as to entitle her on her father's death to sue for the policy moneys. But the daughter can sue in this class of cases because the fact that she is a daughter raises the presumption that there was an advancement to her by way of gift.

In the case before us it seems to me that any presumption that an advancement to a daughter is intended is rebutted by the words "for the benefit of his wife and children" I do not think we can hold that although there is no gift to the wife under the doctrine of "advancement," there is a gift to such of the children as may be daughters.

My answer to the second question, therefore is that the daughter is not entitled to enforce her claim as against the insurance office, or as against a creditor.

Sankaran Nair, J.:—I agree with the Chief Justice that S. 6 of the Act applies to a policy of insurance effected by a Hindu male for the benefit of his wife or his children or of his wife and children or any of them. I adopt the reason given in this judgment.

The question whether there was an advancement by way of gift, as held by me in the order of reference, does not arise on the facts of the case. It is pointed out that the insurance office did not agree to pay the money to the daughter.

Tyabji, J:—I agree with the learned Chief Justice, except that on some of the points mentioned by him I wish to express no opinion.

The first question referred to us is "whether Act III of 1874 applies to any Hindu married males or not."

Section *2* of the Act so far as material is as follows:

"Nothing herein contained *applies to any married woman,* who, at the time of her marriage professed the Hindu, Mahomedan, Buddhist, Sikh or Jaina religion or whose husband at the time of such marriage, professed any of those religions." This clause (to which I shall hereinafter refer as the "saving clause") provides merely that nothing contained in the Act shall apply to any such married woman as is mentioned in the clause. It is not easy to determine with precision what is meant by "anything contained in the Act *applying* to a person," within the meaning of the saving

1. (1883) 47 L. T. 514.

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clause. I wish to express no opinion, in any part of this judgment on the point whether there may be provisions in the Act, altering the rights or liabilities of a married woman, which provisions, by reason of their nature, or form, or otherwise cannot be described *applying* to a married woman within the meaning of the saving clause; in any case, provisions which do not alter the rights or liabilities of a person cannot in my opinion, be said so to apply to that person. Hence it would seem to follow that if any provisions contained in the Act affect the rights or liabilities Hindu or otherwise and whether married or not, then those provisions are not prevented from having full effect by reason of the saving clause,—so long at least as those provisions do not come into operation by affecting in the first instance the rights of any such married woman.

If the first question referred to us is meant to raise the point whether any provisions of Act III of 1874 are operative (in spite of the saving clause) in case a Hindu married male effects a policy of insurance—and the referring Judgments contain indications to that effect, the main arguments before us also being based on the same interpretation of the question—then, in my opinion, the answer to the question is that the Act operates at least in so far as it does not purport to affect the rights or liabilities of any such married woman as is referred to in the saving clause; as to whether or not the saving clause prevents the Act from operating in so far as it affects the rights or liabilities of any married woman under a policy of insurance effected by her husband, that question, obviously, does not arise on the facts now before us, because we have to deal with the rights of the daughter of the person effecting the policy of insurance, and not with the rights of his wife, and I express no opinion on the rights of the wife. The point that does arise is more definitely referred to us under the second question that we are asked to answer, and I will deal with it in answering that question.

The second question referred to us is as follows:—

" Whether, in cases similar to the one before us, the daughter is not entitled to enforce her claim against the insurance office or a creditor."

S. 6 of the Act lays down that "a policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife or of his wife and children, or any of them, according to the interest so expressed, and shall not so long as any object of

the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate."

The second question, as I understand it, is framed for the purpose of having it determined whether these provisions of S. 6 can be said to *apply* to the first defendant in this case within the terms of the saving clause above referred to. That question, it seems to me, must be determined in the following manner: If, under the facts of this case, the rights or liabilities of the first defendant would become altered on the supposition that those rights or liabilities are governed by S. 6, in that case alone and not otherwise may S. 6 be said *to apply* to the first defendant; and in that case we should have the further question to determine, whether the first defendant is a married woman within the terms of the saving clause: for, if she is such, then her rights or liabilities are not to be altered by reason of the said section, but must continue to be the same as they would have been had the said section not been enacted.

The facts of the case now before us, in so far as this court is concerned, are as follows:—One Venkataratnam (to whom I shall hereafter refer as the "assured") insured his life for Rs. 1,000 under each of two policies of insurance [Exhibit I and 1 (a)] which are in identical terms, and are dated the 5th June 1888. The policies commence with a recital that the assured "hath proposed to effect an insurance for the benefit of his wife and children" with the insurance company. The latter portion of the insurance policy is not printed, but the arguments addressed to us were on the basis that each of the policies of insurance in question was "expressed on the face of it to be for the benefit of his (the assured's) wife, or of his wife and children, or any of them" within the terms of S. 6, and my judgment is on the same basis. It seems to me to be beyond our province to deal with the question whether the first defendant acquires any interest and, if so, what interest, under the insurance policy. I confine myself to the question whether, assuming that the policy is such as is referred to in S. 6 of the Married Women's Property Act, the first defendant's rights and liabilities, if any, are affected by S. 6, notwithstanding the saving clause—leaving it to the Bench who have referred the case to determine the rights of the first defendant on a construction of the policy. The assured died leaving one daughter and two sons (being respectively the first, second and third defendants). The question arose whether, if it be a fact that some portion of the insurance money was payable to the first defendant on the death of the assured, that portion formed

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part of the estate of the deceased and was thus payable to the creditors of the deceased, or whether it belonged absolutely to the first defendant, and, as such, was not liable to be attached in execution of the debts of the deceased. If S. 6 governs the rights of the parties, then (if the provisions of the policies be as is above mentioned) the legal result will be that the policies "shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest expressed (in the policies of insurance) and shall not, so long as any object of the trust remains, be subject to the control of the husband (the assured), or to his creditors, or form part of his estate." Speaking with reference to the facts of this particular case, if S. 6 governs them, then assuming that the policies in question are of the nature referred to in S. 6, the interest of the first defendant under the policies or the moneys payable to the first defendant by reason of them, will not be capable of being attached in execution of the plaintiff's decree; otherwise the interest of the first defendant under the policies will form part of the estate of the assured, and be subject to attachment by his creditors.

Therefore, it seems to me, that we must hold that the operation of S. 6 would affect the rights or liabilities of the first defendant if it governs the facts of this case; or—to use the expression contained in the saving clause—it would, in that case prima facie apply to the first defendant.

Is then the operation of S. 6 on the rights of the first defendant prevented by the saving clause? I think not. The said clause says that "nothing in the Act shall apply to a married woman." In order that the saving clause should have any bearing upon the operation of a provision contained in the Act and affecting any person's rights or liabilities, it is necessary, not only that that persons rights or liabilities should be affected by that provision of the Act, but it is also necessary that that person should be such a married woman as is referred to in the clause. It seems to me that the first defendant cannot be taken to be included within the description of a "married woman" within that clause. It is true that the first defendant may, as a matter of fact, be married, but I think that, for the purposes of the question before us, the expression "married woman" cannot refer to any woman other than one who is married to the assured. I express no opinion on the point whether it would refer even to the woman married to the assured. All I hold is that it does not refer to the daughter of the assured, even if she is married: it is obvious that the rights of the first defen-

dant do not arise in any way out of the application of any part of the Act to a married woman, unless the first defendant is herself a married woman within the Act.

Hence in answer to the second question referred to us I would say that the daughter's rights under the insurance policies are affected by S. 6 of the Married Women's Property Act and that the operation of that section on her rights is not prevented by the saving clause.

The second question referred to us apparently involves not only the point with which I have dealt, *viz.*, whether or not S. 6 of the Act operates on the incidents of policy of insurance effected by a Hindu Married man and expressed on the face of it to be for the benefit of this wife, or of his wife and children, or any of them, but it also involves the further point whether, in either alternative, on the construction of the particular policies before us the first defendant is or is not entitled to enforce her claim against the insurance office or a creditor. This latter point does not seem to me to have been alluded to in the referring Judgments nor in the arguments before us as I understood them. The operative portion of the policies has not as I have already said even been printed. For these reasons I desire, with deference, to express no opinion on the construction to be placed upon them, except in so far as appears from my Judgment.

What I have stated above is enough in my opinion for furnishing answers to the question referred to us so far as those questions are really contemplated by the order of reference. If the mode of dealing with the matter which I have adopted is correct, then the allusions to the policy underlying the Act, which were made by the learned Judges who referred the case to us, need not be considered. According to the opinion expressed in those Judgments, it would appear that, if the first defendant, instead of being the daughter of the assured, had been his wife, her rights would equally have been governed by S. 6 of the Married Women's Property Act, as the operation of that section on the wife's rights would equally have been unaffected by the saving clause. I am conscious that, if the reasoning in which I have proceeded in this Judgment is correct and the results arrived at on the basis of that reasoning are not to be modified by any other considerations, then the rights of the widow of the assured might have to be held to be different from the rights of his daughter in as much as the rights of the daughter have been determined by me on the basis that S. 6 of the Act governs them, whereas the rights of the widow might have to be determined

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on the basis that the effect on them of S. 6 of the Act is excluded by the saving clause, because the reasons which I have referred to as being sufficient to prevent the applicability of the saving clause on the rights of the daughter may have no bearing in a case where the rights of a widow are in question. This result would no doubt be anomalous, but it would be so only if I had expressed the opinion that the Act should be construed solely on the principles adopted in this judgment, even where the rights in question are those of the widow under S. 6, and that there is nothing in the policy of the legislature or otherwise to show that the saving clause was not intended to interfere with the operation of S. 6 upon the rights of even the widow. If a construction can be put upon the Act which would bring about the result of giving to the widow the same rights, as according to my view the daughter has under the Act, it would not necessarily be opposed to the reasoning adopted in this judgment. But I do not feel called upon to express any opinion on that point at present; I allude to it as, in the first place, I wish to guard myself from appearing to lay down that, because I have pursued a particular mode of interpreting this Act in order to arrive at a decision on the questions now before us, that mode of interpreting the Act may not have to be modified by taking into consideration other matters when the question relates to the rights of the widow. I have construed the Act in accordance with the strict meaning of its terms, because I find that it would do violence to the language of the Act to hold that the saving clause prevents the daughter's rights from being governed by S. 6 of the Act. I do not base any part of my Judgment on the considerations on which my learned brothers rely, viz., the general policy of the legislature, because, for the purposes of the questions now before us, it is unnecessary to rely on those considerations; and I find that, on a strict consideration of the Act the result at which I arrive is the same as would be arrived at on a consideration of what my learned brothers have stated to be the underlying policy of the Act. It is unnecessary to express any opinion on the point whether those considerations would require or permit of the same result being arrived at when the person whose rights are in question is not the daughter but the widow of the assured.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Saiyed Abdullah Khan ... ... *Appellant.**

v.

Saiyed Basharat Husain ... ... *Respondent*

Mortgage—Usufructuary mortgage and lease—Construction of—Lease on favourable terms—Not simple mortgage, notwithstanding—Evidence admissiblity of—Evidence Act, S 92—Negotiations and preliminary Conversations—unregistered agreement, varying mode of application of rents provided in registered mortgage—Admissibility of—Registration Act (III of 1877) S. 49—Diminution of security by adverse title—Knowledge of circumstances, effect of —Transfer of Property Act.

Where a mortgage provided that the mortgagee should take the profits in lieu of interest but the High Court influenced by negotiations and conversations alleged to have taken place before the mortgage was executed and by the circumstance that by a deed practically contemporaneous with the mortgage the property was leased back to the mortgagor for the period of this mortgage on very favourable terms at a rent which worked out at 6 per cent. per annum on the sum secured came to the conclusion that the security was intended to be a simple mortgage carrying interest at the rate of 6 per cent. Saiyed Abdullah Khan *v.* Saiyed Basharat Husain.

Held,—That it was no more permissible in India than it is in England to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations.

That the mortgage and the lease were part of one and the same transaction but that there was no inconsistency between them, and

That the mortgagee was entitled to the whole profits while the property was in his possession after the mortgagor gave up his lease.

An unregistered document varying the mode in which rents and profits of the property are dealt with in a registered deed of mortgage is under the Indian Registration Act, inadmissible in evidence.

Where part of the property expressed to be mortgaged was withdrawn from the security in consequence of a successful claim by the mortgagor's sister but it appeared that when he took his security, the mortgagee was aware of the circumstance of the property and the position of the mortgagor's family;

Held that the Transfer of Property Act S.65 cl.(*a*) on which reliance was placed (whatever the construction on that section may be) could have no application when the mortgage was executed before the date of the Act, though there was a further charge later in date and the mortgagee was not entitled to damages for the dimunition of his security.

Two consolidated Appeals from the decree of the High Court at Allahabad one of which allowed and the other dismissed the respective cross appeals of the plaintiff-respondent and the appellant-

*29th November 1912.

Saiyed Abdullah Khan v. Saiyed Basharat Husain.

defendant from a judgment and decree of the Court of the Subordinate judge of Meerut.

De Gruyther, K. C. and *G. C. O'Gorman* for Appellant.

Sir H. Erle Richards, K. C. and *B. Dube,* for Respondents.

Their Lordships' judgment was delivered by

Lord Macnaghten:—The Respondents in these consolidated appeals are the representatives of the late plaintiff Saiyed Basharat Husain, now deceased, who was the owner of valuable Zamindari property, subject to a mortgage, dated the 25th of August 1880, and three further charges tacked to it. The mortgage of 1880 and these further charges are now vested in the appellant.

The controversy in this case arose out of these mortgage transactions. The original mortgagee was Husain Ali Khan, who made the advances to Basharat Husain, and took the securities in the name of his wife.

Basharat Husain brought a suit for redemption. His right to redeem was not disputed. The only question was as to the terms and conditions on which the decree for redemption should be made.

On the part of the appellant it was maintained that the rights of the parties must be governed by the provision of the mortgage deed of 1880, which was duly executed and duly registered. On the other hand the mortgagor contended, (1) that the real intention of the parties was to be gathered, not from the mortgage deed, but from negotiations and conversations alleged to have taken place before the mortgage was executed; and (2) that on the mortgagors relinquishing the mortgage property which had been leased to him immediately after the date of the original mortgage, an agreement was come to between the mortgagee and the mortgagor as to the mode in which the rents and profits of the property were to be dealt with. The only evidence produced in support of this alleged agreement was a letter or rukka, neither registered nor witnessed, purporting to be dated the 11th of June 1881, and to be signed by the mortgagee (who died in 1885, ten years before the institution of the suit). The Subordinate Judge of Meerut who was the trial Judge came to the conclusion that the document in question was a forgery. The learned Judges of the High Court considered it genuine and gave effect to it. It is not necessary for their Lordships to determine whether the document is genuine or not. By the provisions of the Registration Act (Act III of 1877) such a document being unregistered is inadmissible in evidence.

As regards the first contention on the part of the mortgagor, which appears to have been argued at great length in the Courts below, it seems impossible to support the decision of the High Court. It is no more permissible in India than it is in this country to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary nogotiations or previous conversations. The Indian Evidence Act is clear on the point.

The consideration for the mortgage of 1880 was the sum of Rs. 70,000. The mortgage was expressed to be for the term of eight years. The mortgage deed contains the following statement:— "It is agreed by mutual consent of the parties to this document "that the profits of the property mortgaged shall belong to the "aforesaid mortgagee in lieu of the interest on the mortgage money "and I, the mortgagee, shall have no claim for mesne profits. The "mortgagee also shall have no right to claim interest on the mort- "gage money advanced by him."

The mortgagee relied on this provision. The learned judges of the High Court refused to give it any effect, holding that the mortgage was usufructuary only in form, and that the security was intended to be a simple mortgage carrying interest at the rate of 6 per cent. per annum. In coming to this conclusion the learned Judges seem to have been influenced both by the preliminary negotiations to which the mortgagor and his witnesses deposed, and by the circumstance that by a deed practically contemporaneous with the mortgage, the property was leased to the mortgagor for the period of the mortgage on very favourable terms at a rent which worked out at 6 per cent. per annum on the sum secured. The net profits of the property in mortgage were apparently not less than Rs. 6,000. The rent reserved was only Rs. 4,200. Favourable as the terms were, the mortgagor very soon fell into arrear. The mortgagee brought a suit against him, and he then gave up possession to the mortgagee. It may be that if the mortgage deed means what it says it would have been better for him to have fought the case out. Such is evidently the view of the High Court. But after all, that is no concern of the Court. It was for the mortgagor to judge what was the wisest course for him to pursue.

Having regard to the eagerness of wealthy money-lenders to obtain security on Zamindari property, and the competition among them for a position though so advantageous, there does not seem to be anything strange in the apparently easy terms of the first mortgage transaction between the lender and the borrower.

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Their Lordships agree with the High Court in thinking that the mortgage and the lease were parts of one and the same transaction. But there is no inconsistency between the two instruments. Nor would there have been any inconsistency if the mortgage itself had contained a provision for granting a lease on the terms upon which the lease was actually granted.

One point was raised by the mortgagee before the Subordinate Judge on which he failed. It was not dealt with by the learned judges of the High Court because they were against the mortgage on the main question. The point was raised again before this Board; it was this. Part of the property expressed to be mortgaged was withdrawn from the security in consequence of a successful claim to it by the mortgagor's sister. The mortgagee claimed damages or compensatien for the diminution of his security. The Subordinate Judge rejected that claim, being of opinion that the mortgagee when he took his security was aware of the circumstances of the property and the position of the mortgagor's family. Their Lordships think that the Subordinate Judge was right. They consider that the Transfer of Property Act, Act IV of 1882, S. 65 (a), on which reliance was placed (whatever the construction of that section may be) can have no application to the present case where the mortgage was executed before the date of the Act, though one of the further charges was subsequent to it.

Their Lordships will humbly advise His Majesty that the appeals should be allowed, the orders of the High Court discharged with costs (any costs paid thereunder being repaid), and the order of the Subordinate Judge restored.

The respondents will pay the costs of the appeals.

Solicitors for Appellant:—*Ranken Ford, Ford* and *Chester*.

Solicitors for Respondent:—*Barrow, Rogers and Nevill.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at fort William in Bengal.]

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Dharani Kanta Lahiri Chowdhuri and another. *Appellants.*

v,

Garbar Ali Khan and others ... ... *Respondents.*

Ejectment-Landlord and Tenant—Tenant's claim to hold more land than mentioned in lease—Limitation—Onus—Limitation Act (Act XV of 1877 Sch. II Art. 142.

Dharani Kanta Lahiri *v.* Garbar Ali Khan.

Where the suit is for the ejectment of persons who admittedly are at the date of suit in possession of the land from which it is sought to eject them it lies upon the plaintiffs to prove not only a title as against the defendants to the possession but to prove that the plaintiffs have been dispossessed or have discontinued to be in possession within the 12 years immediately preceding the commencement of the suit.

In a suit in ejectment in respect of 7 puras of land, defendants claimed to be in possession under a Mukarari grant from the plintiffs' predecessors in title under a sanad of 1740 renewed in 1815. They also pleaded limitation. Plaintiffs impugned the genuineness of the sanad but its genuineness was found by the Courts in India and the finding was accepted by the Privy Council. In the sanad the land was stated to be 2 puras in extent. Boundaries which were capable of being ascertained on three sides were also mentioned in the sanad but the fourth (the eastern boundary) was stated to be an ail. The land in dispute was in 1740 and 1850 covered by jungle. Plaintiffs failed to prove that they or the zamindars whom they represented had possession of any portion of the land since the sanad was originally granted and further they failed to shew what was the ail which was the eastern boundary of the lands covered by the sanad if it was not the ail which the defendants contended was the eastern boundary and which if accepted would give the whole of the 7 puras to the defendants.

Held:—Plaintiffs having failed to prove that the lands were not covered by the Sanad (though their Lordships were not prepared to treat the extent given in the sanad as a mere misdescription) and they had been dispossessed or discontinued to be in possession within 12 years before the suit, the suit was properly dismissed.

Appeal from a decree and judgment of the High Court at Calcutta (July 3, 1908) which partly affirmed and partly reversed a Judgment and decree of the Court of the second Subordinate Judge of Mymensingh (March 19, 1906).

Sir H. Erle Richards, K.C. and *A. M. Dunne* for Appellants.

DeGruyther, K. C. and *B. Dube* for Respondents.

*5th December 1912.

Dharani Kanta Lahiri v. Garbar Ali Khan.

Their Lordships' Judgment was delivered by

Sir John Edge:—This is an appeal from two decrees of the High Court of Judicature at Fort William at Bengal, dated the 3rd July 1908, which were made in an appeal and cross-appeal from the decree of the second Subordinate-Judge of Mymensingh, dated the 19th March 1906.

The appellants are the Zamindars of Mauzah Sahildeo in Pergunnah Mymensingh. The respondents are in possession of seven puras or 592 bighas of land within Mauzah Sahildeo from the possession of which the Zemindars sought in the suit in which this appeal has arisen to eject them. The dispute as to the right to the possession of the seven puras of land arose out of an application which was made in 1891 under S. 103 of the Bengal Tenancy Act, 1885, by the then Zemindars of Mauzah Sahildeo to have lands in Mousah Sahildeo measured and a Record of Rights prepared. The Zamindars of 1891 are represented in this appeal by the appellants. Upon that application the Collector of Mymensingh deputed an Amin to make the necessary measurements and to prepare a Record of Rights. When the measurement papers and ground plans were submitted by the Amin to the Revenue officer, Gabar Ali Khan and Abdul Ali Khan, who are here represented by the Respondents to this appeal, filed objections to the Amin's report and claimed under a sanad of 1815 seven purahs of land, equivalent to about 592 bighas as their mokurari chuck at an annual rent of Rs. 9. The Amin had measured the seven purahs as land liable to the payment of ordinary rent to the Zamindars. The Zamindars disputed the claim. Thereupon the Revenue Officer proceeded under the provisions of the Bengal Tenancy Act, 1885 to hear and decide the dispute between the claimants and the Zamindars. The defence of the Zamindars was that the sanad, upon which the claimants relied, was a forgery, and that the claimants had no title to the lands in dispute. The Revenue officer on the 21st March 1892 found that the sanad was genuine and gave the claimants a decree for two purahs of land as their Mokurari.' The two purahs being epuivalent to about 156 bighas, and decided that the claimants must pay a rent to be fixed for the remainder of the 592 bighas which he found was in their possession. From that decree of the Revenue officer the claimants and the Zamindars respectively appealed to the special judge. The special judge, on appeal, found that the sanad was genuine. He was however, apparently in some doubt as to the extent of land which the claimants were entitled to

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hold under the sanad as their Mokurari. In the sanad the land was stated to be two puras, and boundaries which were capable of being ascertained on the North, South, and west of the land were mentioned in the sanad, but the eastern boundary was stated to be an ail, boundary ridge. To the eastward of the western boundary of the land the nearest boundary ridge which was formed was the boundary ridge between Mauzah Sahildeo and Dattagathi, but if the boundary ridge between Sahildeo and Dattagathi was the ail which was mentioned as the eastern boundary in the sanad, the Mokurari chuck comprised seven purahs or 592 bighas and not two purahs only. The special judge, however, found as a fact that the claimants had for more than 12 years been in possession of the land which they claimed to hold under the sanad, and gave them a decree on the 11th November 1893, establishing their right to hold the lands up to the boundary line between Mauzah Sahildeo and Dattagathi as their Mokurari at a rent of Rs. 9 per annum.

From the decree of the Special Judge of the 11th November 1893, the Zemindars appealed to the High Court at Calcutta. In that appeal it was contended on behalf of the Zamindars that they were entitled to eject the claimants from the land held by them in excess of that covered by the sanad, and alternatively that they were entitled to additional rent in respect of the excess land. The High Court construing the judgment of the Special Judge held that he had found as a fact that the whole of the land claimed by the claimants was held by them as a Mokurari grant under the sanad, and their title to the land had not been acquired by adverse possession. The High Court also held that the question as to whether the Zamindars had a right to eject the claimants did not properly arise in the proceedings. The High Court by its decree of the 9th July 1895 dismissed the appeal from the decree of the Special Judge.

The suit in which the present appeal has arisen was brought on the 8th July 1896 in the Court of the second Subordinate Judge of Mymensingh. The plaintiffs in this suit who claimed as or as representing the Zamindars of Mauzah Sahildeo, in their plaint referred to the previous litigation which had been determined by the decree of the High Court of the 9th July 1895, and alleged that there being no relationship of landlord and tenant between them and the defendants the decision in the previous proceedings was no bar to the suit; they further alleged that the sanad of 1815 was a fraudulent and forged document; that the defendants were wrongfully in possession of the seven puras odd of land; and they

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claimed a declaration of title to the land in dispute and a decree for possession and for mesne profits and other reliefs. The principal defendants, who were Gabar Alikhan and Abdul Ali Khan, in their written statement alleged that neither the plaintiffs nor their predecessors in title had been in possession of the lands in dispute within 12 years immediately preceding this suit or at any time; that in the previous proceedings it had been decided by a competent court that the lands in suit were the Mokurari chuck of the answering defendants, that that decision was upheld by the High Court, and the plaintiffs' claim was barred by S. 13 of the Code of Civil Procedure; they further alleged that the sanad of 1815 had been granted by the then *Zemindar* in renewal of a previous-sanad of 1740; and that the defendants and their predecessors had for a long time been in possession of the lands in suit in Mokurari chuck right under the sanad of 1815. In effect, according to the plaint, the defendants were mere trespassers in possession, claiming to hold the lands in dispute as their Mokurari chuck under a forged sanad and, according to the written statement, the plaintiffs' suit for possession was barred by limitation, and the defendants were entitled under the sanad of 1815 to hold the lands in dispute as their mokurari chuck at a rent of Rs. 9 per annum. Putting a reasonable construction upon the written statement, the case of the defendants apparently was that they had held all the lands in dispute under the sanad of 1815, that that question was concluded by the decision in appeal in the previous proceedings, and should it be held that they did not hold the lands under the sanad, they in that event and to that extent relied upon limitation as a bar to the suit.

The suit came on for hearing before the Officiating Subordinate Judge of Mymensingh, who held that it having been decided in the previous proceedings by a competent court that the defendants held the lands in suit as a mokurari chuck under the sanad set up by them, the principle of *res judicata* applied, and the suit was barred by S. 13 of the Code of Civil Procedure, and by his decree of the 29th August 1898 dismissed the suit. From that decree the plaintiff, Dharani Kanta Lahiri Chowdhuri, on his own behalf and as executor of Abhoya Kanta Lahiri Chowdhuri, appealed to the High Court at Calcutta. The High Court in appeal held that S. 13 of the Code of Civil Procedure did not apply, allowed the appeal and by their order of the 13th August 1902 remanded the suit to the Court of First instance to be decided on its merits.

On the hearing of the suit under the order of remand of the 13th August 1902, the Officiating Subordinate Judge of Mymensingh

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found that the sanad of 1815 was genuine and binding on the plaintiffs; that the sanad covered only two puras of land and nothing more, and that as to the lands lying to the eastward of those two puras he stated:—

"There is virtually no evidence to suppose that the eastern "portion or any portion of it was at all cultivated or otherwise "occupied by any one beyond 12 years of the institution of the "suit."

The Officiating Subordinate Judge, by his decree of the 19th March 1906, fixed the eastern boundary of the two puras and gave the plaintiffs a decree for possession of that portion of the land in suit which lay to the eastward of that boundary, and for mesne profits.

From the decree of the 19th March 1906 of the Officiating Subordinate Judge each side appealed to the High Court at Calcutta. The High Court on appeal found that the sanad of 1815 was genuine, that the two puras mentioned in the sanad were merely a misdescription of extent of the area covered by the sanad, and that the sanad covered all the lands in dispute up to the boundaries between the Mauzah Sahildeo and Dattagathi. In effect the High Court found that the seven puras or 592 bighas of land in dispute were held by the defendants under the sanad of 1815 as their mokurari at a rent of Rs. 9 per annum. The High Court also found that the plaintiffs had entirely failed to prove that they were ever in possession of any of the lands in suit or that they were dispossessed by the defendants. The High Court dismissed the appeal of the plaintiffs and allowed the appeal of the defendants. The result was that the suit was dismissed. From that decree of the High Court this appeal has been brought.

Their Lordships accept the concurrent findings of the High Court and the Officiating Subordinate Judge as to the sanad of 1815 being a genuine sanad as conclusive on that question. There can be no doubt that the defendants-respondents have under the sanad a Mokurari right in at least two puras of land bounded on the north by a cattle track, on the west by the Kalni Bil, on the South by the Utiarkona khal, and on the east by an ail, boundary ridge. There is also no doubt that the nearest boundary ridge to the eastward of the Kalni Bil is the boundary ridge between Mauzah Sahildeo and Mauzah Dattagathi. There is no reliable evidence to prove that between the Kalni Bil and the boundary ridge between Mauzah Sahildeo and Dattagathi there had ever existed any ail or boundary

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ridge. The defendants-respondents were for more than 12 years before the commencement of this suit in possession of the seven puras or 592 bighas of land in dispute which are bounded on the west by the Kalni Bil and on the east by the boundary ridge between Mauzah Sahildeo and Dattagathi, and there is no reliable evidence to show when the defendants-respondents, or those whom they represent as sanad-holders, first obtained possession of those seven puras of land. If the lands which it was intended that the sanad should cover, had not been described as two puras, there would have been no difficulty in holding that the seven puras of land were the mokurari-holdings of the defendants-respondents. Their Lordships have found it difficult to accept the conclusion of the High Court, that the mention of two puras in the sanad merely amounted to a misdescripiion which may be rejected for the purpose of interpreting that document,but the land in dispute was in 1740 and in 1815 covered by jungle, and it does not appear that it had ever been measured until it was measured by the Amin in consequence of the application of 1891, and the facts, so far as they can now be ascertained,. point strongly to the conclusion that the defendants-respondents and those whom they represent as sanad-holders have held the whole seven puras as their Mokurari, and the plaintiffs-appellants have failed to prove that they or the Zamindars whom they represent have had possession of any portion of those seven puras since the sanad was originally granted in 1740, and further they have failed to show what was the ail which was the eastern boundary of the lands covered by the sanad if it be not the boundary ridge between Mauzah Sahildeo and Dattagathi.

The suit is one for the ejectment of persons who admittedly were at the date of suit in possession of the seven puras of land from which it is sought to eject them. It lay upon the plaintiffs to prove not only a title as against the defendants to the possession, but to prove that the plaintiffs had been dispossessed or had discontinued to be in possession of the lands within the 12 years immediately preceding the commencement of the suit. Their Lordships find that the plaintiffs failed to prove a title against the defendants to the possession of the lands in dispute or any part of them ; they failed to prove that the lands, the possession of which they claimed, were not the lands covered by the sanad ; and they failed to prove that they had been dispossessed or that their possession had been discontinued within 12 years before suit. Under the circumstances, their Lordships do not consider it necessary to express any opinion as to whether the decision of the Special Judge of the 11th Novem-

ber 1893 in the previous proceedings did or did not, by reason of S. 13 of the Code of Civil Procedure, operate as a bar to the maintenance of this suit.

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Their Lordships will humbly advise His Majesty that this appeal should be dismissed, and the decrees of the High Court of the 3rd July 1908 be affirmed. The appellant must pay the costs of this appeal.

Solicitors for Appellants :—*Watkins* and *Hunter*.

Solicitors for Respondents :—*T. L. Wilson & Co.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

Present :—Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

*Majmudar Hiralal Ichhalal and others ... *Appellants.*

v.

Desai Narsilal Chaturbhujdas and others ... *Respondents.*

Limitation Act (XV of 1877) S. 19—Acknowledgment—Entry of payment and acknowledgment of receipt as mortgagee—Effect of—Redemption suit —Omission to provide interest after suit—Discretion—No application to trial court—Oversight of court not pleadable in appeal.

In 1793, the predecessor in title of the Plaintiff mortgaged to the defendants a certain Desaigiri Dastur (subsequently commuted by the British Government into a fixed money allowance) and certain lands in Broach. The mortgagees procured an entry of their names in the Collector's books and were receiving payments of the allowance. In the book of the Government agent entrusted with the payment of the allowance there was an entry of payment dated 8th June 1843 of their respective shares to the "mortgagees of Desai" with their signatures in acknowledgment of the receipt. *Held*: that this was clearly an acknowledgment by the mortgagees that they received the payments as parties interested in the mortgage and that their interest was that of mortgagees thereunder.—

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Held accordingly, that this created a new period of limitation starting from the 8th of June 1843 and as the suit was instituted within 60 years thereof the suit was in time.

Where the trial Court (which had a discretion in the matter) had failed to provide interest on the redemption money from the date of suit and no application was made to that Court to repair the alleged omission.

Held that it must be taken that the order made represented in all respects the decision of the Court plaint and no weight could be attached to the contention that the omission was by an oversight.

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*25th February 1913.

Hiralal Ichhalal v. Desai Narsilal Chaturbhujdas.

Appeal from a judgment and decree, dated the 21st January 1909 of the High Court of Judicature at Bombay, which affirmed with a slight modification a Judgment and decree, dated the 12th March 1906, of the Court of the District Judge of Broach.

DeGruyther, K.C. and *B. Dube,* for Appellants.

J. M. Parikh for Respondants.

Their Lordships' judgment was delivered by

Lord Moulton:—This is an appeal from a judgment and decree, dated 21st January 1909 of the High Court of Judicature at Bombay which affirmed with a slight modification, a Judgment and decree of the court of the District Judge of Broach, dated the 12th March 1906. The main question is whether the present suit is barred by the Indian Statutes of Limitation. The Courts below have held that it is not so barred, and from this decision the appellants (who were defendants in the suit) appeal.

The facts of the case so far as they are relevant to the present appeal are very simple. The mortgage in question was executed on the 4th November 1793. By that deed Desai Partibari—Mijatrai, the predecessor-in-title of the respondents, mortgaged with possession a certain Desaigiri Dastur and certain pasaeta lands situated in the District of Broach to the predecessor-in-title of the appellants. In 1803 the District of Broach finally came under British rule, and subsequently the Desaigiri Dastur in Broach was commited into a fixed money allowance, payable from the Treasury. Since that settlement the appellants have received the money allowance in lieu of the Desaigiri Dastur.

On the 16th October 1901, the plaintiff instituted the present suit for redemption of the said mortgage. The appellants pleaded that the suit was barred by limitation under the Indian Statutes of Limitation which provide a period of sixty years for a suit for redemption. In as much as more than sixty years had elapsed since the execution of the original mortgage, this plea must have succeeded in the absence of written acknowledgements sufficient to satisfy the provisions of S. 19 of the Indian Limitation Act, 1877, but the plaintiffs contended that certain documents signed by the predecessors-in-title of the appellants, constituted such acknowledgments and gave to the plaintiffs new periods of limitation, which brought the suit within the prescribed period.

It will suffice to examine one of such acknowledgments, namely, an entry in a receipt book relating, to the payment on the 8th of June 1843 of the fixed allowance above referred to in respect of the

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year ending the 1st of May 1843. The mortgagees of the Desaigiri Dastur had in ordinary course procured the entry of their names in the Collector's books as mortgagees under the mortgage in question, they being entitled to the payment of the annual allowance into which the original rights had been commuted. Consequently the payments of the periodical instalments of that allowance were regularly made to them as such mortgagees as they fell due. The rights of the mortgagees were at that time vested somewhat in unequal shares in two persons named respectively Lalita Kuvar Lallubhai and Mansukhram Nandkishoredas. The entry in the book of the Government agent entrusted with the payment of the allowance states that the payment is made to "the undermentioned mortgagees of Desai Partibai Mujatrai," and there follow the names of the two abovementioned mortgagees. The amounts of the shares belonging to each of these mortgagees are set against their names, and against these shares the mortgagees have in their own handwriting written their respective names in acknowledgment of the receipt of their shares. Their Lordships are of opinion that this is clearly an acknowledgment by them that they received these payments as being ther paties interested in the original mortgage, and that their interest in the property was that of mortgagees thereunder. It follows, therefore, that this created a new period of limitation starting from the 8th June 1843 and in as much as the present suit was instituted on the 16th of October 1901 it was brought within the prescribed period.

The only other point raised by the appellants on the hearing of this appeal related to the interest to be allowed on the redemption money for the period between the date of suit and the actual date of redemption. It was not contested that the rule of Damdupat applied in the present case and that therefore the amount of arrears of interest to be allowed up to the date of suit was limited to an amount equal to the capital sum. By his decree the Judge of first instance had given to the appellants no interest from the date of suit. The appellants admitted that it was discretionary whether he should grant any and what interest for that period, and that if he did exercise his discretion on the point they could not under the circumstances of the present case appeal against it. But they contended that the omission to give interest for that period had been by oversight. The only support for such contention was that in the Judgment of that Judge no reference was made to the point. On the hearing before the High court, that court refused to accept that contention and treated the District Judge as having declined to award any interest for the period in question and held

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that it was a matter left to his discretion, and that under the circumstances of the case that discretion had not been unreasonably exercised. Their Lordships agree with this decision and the grounds on which it rests. No application was made to the District Judge to repair the alleged omission before the order was perfected, or at all; and, therefore, it must be taken that the order made by him represents in all respects his decision on the matter in point and their Lordships see no reason to differ from the view of the High Court that the discretion was not unreasonably exercised.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed and that the appellants should pay the Costs of this appeal.

Solicitors for Appellants:—*Edward Dalgado.*

Solicitors for Respondents:—*T. L. Wilson & Co.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the Chief Court of the Punjab.]

Present:—Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Kanhaya Lal ... ... *Plaintiff—Appellant.*

v.

The National Bank of India, Ltd. *Defendant—Respondent.*

Contract. Act (Act IX of 1872) Ss. 72, 15.—Money paid to release property wrongfully attached——Suit against decree-holder—Involuntary payment—"Coercion", what is—C. P. C. (Act XIV of 1882) Ss. 278, 283—Permissive wrongdoer cannot prescribe mode of stopping the wrong—Preliminary Issue—Plea of no cause of action on the allegations in the plaint—Demurrer—Facts persumed to be true.

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Where property belonging to one person(here cotton mills)is attached in execution of a decree against another and in order to release the property from the attachment, the owner pays the decree-holder, under the English law, he is unquestionably entitled to demand the repayment of that sum as being an involuntary payment produced by coercion and he is equally entitled under S. 72 of the Indian Contract Act.

The word "coercion" in S. 72 I. C. A. is used in its general or ordinary sense as an English word and not in the special sense in which it is used in S. 15.

A person interfered with in his lawful enjoyment of his own property is entitled to rid himself of that unlawful interference by lawful means without thereby affecting his right to hold the wrongdoers liable for that which they have thus caused him to do.

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It is not open to the wrong doer to prescribe by which of two alternatives the injured man shall put a stop to the wrong under which he is suffering. His choice of any one alternative does not make it as between him and the wrongdoer a voluntary act or estop him from claiming that it was done under coercion.

There is nothing in the Indian Statute Law which precludes the application of this principle to a person whose property was been wrongfully attached.

The procedure prescribed by S. 278, C. P. C. (*i. e.* preferring a claim) is permissive and the fact that such procedure is open to a person whose property is unlawfully seized under attachment in no way interferes with his right to take any other alternative, *e. g.* payment.

Where the plea is taken that the plaint discloses no cause of action and the court is asked to try that issue first (which is essentially a demurrer) the defendants must be taken to admit for the sake of argument that the allegations in the plaint are true *modo et forma*. In so doing they reserve to themselves the right to show that these allegations are wholly or partially false in the further stages of the action, should the preliminary point be overruled.

Appeal from a Judgment and decree of the Chief Court of the Punjab, dated the 27th January 1911, affirming an order of the District Judge, Delhi, dated the 18th November 1902, dismissing appellant's suit.

De Gruyther, K. C. and *G. C. O. Gorman* for Appellant.

J. M. Astbury, K. C. and *A. Grey* for Respondent.

Their Lordships' judgment was delivered by

Lord Moulton :—In order to render plain the nature of the question involved in the present appeal, it will be necessary to make a short reference to the history of the litigation between the parties. It furnishes abundant matter for regret. The suit was brought on the 28th August 1902, and owing to the procedure adopted it will be found that at the present date the matter is but little more advanced than it was ten years ago in spite of the fact that large sums must have been expended in the costs of the proceedings in the meantime.

The facts of the case, so far as they are relevant to the question involved in the appeal are very simple. On the 15th August 1902, the defendant Bank which had obtained a decree against the Delhi Cotton Mills Co., Ltd., obtained an attachment against certain mills at Sabzi Mandi, and on the 20th August 1902 took possession of them to obtain satisfaction for a sum of Rs. 83,005, the balance then unpaid under such decree. In his plaint the plaintiff states that he was the sole proprietor of such mills and of their contents. On thus being ousted from his property he took the course of paying under protest the sum claimed. Having thus freed his property

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from the attachment he at once brought the present action claiming a return of the money so paid and damages for the alleged illegal acts of the defendants.

In reply to the above plaint the respondent Bank filed certain preliminary pleas relating to the claim for the return of the money paid under protest, of which it is only necessary to cite the first, which was "the suit as framed will not lie." It is admitted that this plea is in substance identical with the more useful form of plea, *viz.*, that the plaint discloses no cause of action."

The District Judge no doubt with the laudable intention of shortening the proceedings and thereby lessening the costs—heard an argument on these preliminary pleas before requiring any thing further to be done by the defendants, and on the 18th November 1902 he gave Judgment to the effect that so far as the recovery of the money was concerned the plaint disclosed no cause of action. He therefore dismissed with costs the claim for the recovery of the money and directed that the action should proceed on the question of damages for illegal attachment. The plaintiff, having in vain applied for the drawing up of an order embodying his decision, decided not to proceed with that part of the case which related to damages, and consequently did not appear on the further hearing, whereupon the District judge dismissed the whole case for default under S. 102 of the Civil Procedure Act. The plaintiff appealed to the Chief Court against this decision, and that Court dismissed the appeal on the ground that no appeal lay against an order dismissing a suit under S. 102. From the decision the plaintiff appealed to His Majesty in Council, and their Lordships held that the order of the 18th November 1902 was a final decision on the case as to the recovery of the money paid, and that therefore it was not competent to the judge to dismiss that part of the case under the powers of S. 102. They therefore remitted the case to the chief court in order that the appeal to that court, so far as it related to the recovery of the money paid, might be heard and decided on its merits.

The case having been thus remitted, the Chief Court rightly treated the appeal as an appeal from the order of the 18th November 1902, dismissing the case with regard to the recovery of the money on the ground that the plaint contained no valid cause of action with respect thereto. After argument the court decided in favour of the defendants, and dismissed the plaintiff's appeal with costs. From this decision the present appeal is brought.

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The question raised by this appeal is therefore a pure point of law. Both the District Judge and the Chief Court have clearly stated that the decisions which they have given are based on the allegations in the plaint, and that for the purposes of such decisions these allegations must be taken to be true in fact. This is a necessary consequence of the nature of the plea, and the same understanding must apply to the present judgment. In asking the Court to decide an issue like the present (which is essentially a demurrer by whatever name it may be called) the defendants must be taken to admit for the sake of argument that the allegations of the plaintiff in his plaint are true *modo et forma.* In so doing they reserve to themselves the right to show that these allegations are wholly or partially false in the further stages of the action should the preliminary point be overruled, but so far as the decision on the preliminary point is concerned everything contained in the plaint must be taken to be true as stated.

That being so it is only necessary to look at the plaint to see that according to English law the contention of the defendants is unsustainable. A wrongful interference with the plaintiff's lawful enjoyment of his own property is alleged. The plaintiff was clearly entitled to rid himself of that unlawful interference by any lawful means without thereby affecting his right to hold the defendants liable for that which they have thus caused him to do. It is true that paying under protest the sum demanded was not the only course open to him. He might have taken legal proceedings, by which sooner or later he might have rid himself of the interference. But to do so would have involved his submitting to the wrong for all the period necessary for those proceedings to be effective, and that might have been a serious aggravation of the wrong. To this he was in no wise bound to submit. He was free to choose a course which did not involve any such prolongation of the trespass. Accordingly he paid under protest the sum demanded and under English law he was unquestionably entitled to demand a repayment of that sum because it was an involuntary payment produced by coercion, viz., the wrongful interference of the defendants with his full and free enjoyment of his own property. By English law it is not open to the wrong doer to prescribe by which of two lawful alternatives the injured man puts a stop to the wrong under which he is suffering. His choice of any one alternative does not make it as between him and the wrongdoer a voluntary act or estop him from claiming that it was done under coercion.

The agreement before their Lordships accordingly turned chiefly on contentions that the Indian Statute Law precluded the

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application in India of these well-known principles of English common Law. These contentions were two in number. In the first place the respondents contended that in case the property, of a stranger is seized under an attachment, the Code of Civil Procedure requires him to proceed under the group of sections commencing with S. 278, and that this is his only remedy. Their Lordships have no doubt that the procedure referred to is merely permissive. It is analogous to the procedure by interpleader which in England would be open in similar cases to parties owning the goods seized. But the fact that such a procedure is open to him if he chooses to adopt it interferes in no way with his right to take any other lawful alternative.

The main contention, however, was that the allegations in the plaint did not show " coercion " according to Indian Law. It was contended that nothing could be " coercion " under Indian Law unless it satisfied the definition of " coercion " which is found in S. 15 of the Indian Contract Act and that the allegations in the plaint failed so to do because they did not show that the " unlawful detaining or threatening to detain " the property was " with the intention of causing any person to enter into an agreement. Their Lordships are of opinion that this argument is not sound and that it is based on a fundamental misunderstanding of the object and effect of S. 15 of the Indian Contract Act.

S. 15 forms part of a chapter which specially deals with the requisites of a valid contract. This chapter commences with S. 10 which may be regarded as the fundamental Section, and which reads as follows :—

" All agreements are contracts if they are made by the free " consent of parties competent to contract for a lawful consideration " and with a lawful object and are not hereby expressly declared to " be void."

The sections immediately following proceed to define the terms used in this fundamental section. Ss. 11 and 12 are devoted to the interpretation of the phrase " Competent to contract." S. 13 deals with the term " Consent." Ss. 14 to 18 deal with the phrase " Free consent." In so doing S. 14 commences by finding when consent is said to be " free " and lays down that it is so when it is not caused by " Coercion" as defined by S. 15, "or Undue influence, Fraud," &c. It will therefore be seen that S. 14 relates to " Free consent" as an element in the making of contracts. It is natural, therefore, that when " Coercion " comes to be defined in S. 15 for the purposes of S. 14 it is defined as follows :—

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" Coercion is the committing or threatening to commit any act " forbidden by the Indian Penal Code or the unlawful detaining or " threatening to detain any property to the prejudice of any person " whatever with the intention of causing any person to enter into an " agreement."

It is clear therefore that this definition of " Coercion" is solely a definition which applies to the consideration whether there has been " Free consent " to an agreement so as to render it a contract under S. 10. This explains why in the definition of " Coercion " it is limited to an unlawful act done " with the intention of causing the person to enter into an agreement." But it would be to make nonsense of the statute if it were to be taken to mean that " Coercion " in a legal sense could only exist if the object was to bring about a contract. Indeed such an interpretation would render the Act inconsistent with itself. S. 72, which is in Chapter 5, which deals with " certain relations resembling those created by contract reads" as follows :—

" A person to whom money has been paid or anything " delivered by mistake or under coercion must repay or return it," and illustration B to that section reads as follows :—

" A Railway Company refuses to deliver up certain goods to " the consignee except upon the payment of an illegal charge for " carriage. The consignee pays the sum charged in order to obtain " the goods. He is entitled to recover so much of the charge as was illegally excessive."

It is impossible to contend that the coercion referred to in this section or in the above illustration is " with the intention of causing any person to enter into an agreement." The word " Coercion" must therefore be there used in its general and ordinary sense as an English word, and its meaning is not controlled by the definition in S. 15. That definition is expressly inserted for the special object of applying to S. 14, *i.e.*, to define what is the criterion whether an agreement was made by means of a consent extorted by coercion and does not control the interpretation of " Coercion " when the word is used in other surroundings.

A further contention appears to have been put forward in the Court below to the effect that the Plaintiff's only remedy was to proceed against the Delhi Cotton Mills Co., Ltd. under Ss. 69 and 70, in order to recover from them the money paid, seeing that they would have had the benefit of the payments in the satisfaction of the decree obtained against them. It is not a matter of surprise

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that this contention was not passed before their Lordships. It is obviously unsustainable. Those clauses do not refer in any way to remedies against the wrongdoer and are therefore wholly irrelevent to the question in this appeal.

Their Lordships have thought it proper to deal specifically with the arguments raised on the hearing on account of the importance of the questions raised. But they are also of opinion that the matter is covered by authority. In the case of *Dooli chand* v. *Ram Krishna Singh* [1] the circumstances were very similar to those in the present case and on appeal to this Board their Lordships decided that money paid by the true owner to prevent the sale of his property under an execution could be recovered back.

In their Judgment their Lordships say:—

"The objections taken to the action were that the payment " was voluntary. It was made to prevent the sale which would " otherwise invevitably have taken place of the mouzah which the " respondents had purchased and was made therefore under " compulsion of law; that is under force of these execution proceed- " ings. In this country if the goods of a third person are seized by " the sheriff and are about to be sold as the goods of the defendant " and the true owner pays money to protect his goods and prevent " the sale he may bring an action to recover back the money he has " so paid: it is the compulsion under which they are about to be " sold that makes the payment involuntary."

The respondents sought to distinguish the present case from the case just cited by contending that the sale in the present case was not inevitable. But it is evident that the greater or less probability of a sale taking place does not affect the *ratio decidendi* of their Lordships in that case, which is that the payment was made under the force of the execution proceedings and that in India, as in England, such a payment is regarded by the law as being made under compulsion.

In their Lordships' opinion, therefore, the Chief Court ought to have given Judgment in favour of the plaintiffs in his appeal against the order of the 18th November 1902. The consequence of such a decision would have been that the case would have gone back to the District Judge to be tried on the facts.

As has already been stated, the decision of this Board does not affect or prejudice any contention of either party with regard to the

1. (1887) L. R. 8 I. A. 93.

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facts or any other contention of law not covered by the present Judgment.

Their Lordships will therefore humbly advise His Majesty to allow the appeal and to remit the case to the Chief Court in order that the case may be sent to the District Judge to hear and determine. The respondents must pay all the costs of the second hearing before the Chief Court and the costs of this appeal.

Solicitors for Appellant :—*T. L. Wilson & Co.*

Solicitors for Respondents :—*Sanderson, Adkin Lee* and *Eddis.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court of Judicature for the North Western-Provinces Allahabad.]

Present :—Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Richard Ross Skinner ... ... *Appellant**

v.

Kunwar Nannihal Singh and another ... *Respondents.*

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Will—Construction—Indian Succession Act, S. 84-Applicability of to wills prior to 1866—Rule of construction—Renewal of mortgage of testator by life tenant—Effect of conditional decree for possession.

By a will dated 22nd October 1864, one Thomas Skinner devised "his private Zamindari and additions thereto to his eldest son Thomas Brown Skinner and to his lawful male children according to the law of inheritance, in the event of his eldest son Thomas Brown Skinner dying without lawful issue to his (testator's) next male heirs and should all his (testator's) sons die without lawful male children, to his (testator's) female children, in the event of their death also to the female children born in wedlock of his sons in succession.

Held that the construction of the will was not governed by the Indian Succession Act.

That S. 84 of that Act did not therefore apply.

That the rule of construction to be applied was the rule laid down in *Skinner* v *Orde viz.* that the construction must be determined by principles of natural justice or to use the more familiar language, according to justice, equity and good conscience and that the English rules of interpretation in so far as they are artificial rules of construction cannot be applied.

That upon a proper construction of the will, Thomas Brown Skinner took only an estate for life.

Thomas Skinner, during his life-time had granted certain mortgages with possession. After his death, his son Thomas Brown Skinner had renewed them

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*4th March 1913.

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and had also granted some further mortgages. Suits were instituted by the mortgagees upon both these sets of mortgages and in execution of the decrees in those suits the properties were purchased by the respondent. Thomas Brown Skinner died without male issue. In a suit by his brother for possession, claiming under the will.,

Held that the mortgages effected by Thomas Brown Skinner himself were ineffectual to convey or give any right exceeding his own life estate and the plaintiff was entitled to an unconditional decree for possession in respect of them.

But *held* that mortgages granted by Thomas Skinner and renewed by Thomas Brown Skinner stood on a different footing and the plaintiff was not entitled to recover without paying the amount due under them. To hold that the right of the mortgagees was destroyed by the fact of renewal would be to operate a substantial defeat of the rights of those mortgagees and to imply what was not the intention of the parties, *viz.*, that by the renewal of a mortgage by a person with a limited interest the intention was to operate a discharge of debts effectually secured upon the radical right.

Their Lordships while expressing no surprise, looking to the state of the pleadings and particularly to the unqualified nature of the demand made in the plaint, that the High Court had simply dismissed the suit, to prevent future litigation made a decree in favour of the plaintiff conditional upon his paying within a time to be fixed by the court what is found due on the mortgages in default directing the suit to stand dismissed.

Consolidated Appeals (Nos. 95 and 97 to 106 of 1911) from eleven Judgments and decrees of the High Court at Allahabad reversing those of the Subordinate Judge of Meerut.

DeGruthyer, K. C. and *O'Gorman* for appellant.

J. M. Parikh and *J. K. Roy*, for Respondents.

Their Lordships' Judgment was delivered by

Lord Shaw :—These are consolidated appeals from eleven Judgments and Decrees of the High court of Judicature for the North-Western Provinces, Allahabad. The suits were for ejectment and were brought by the present appellant Richard Ross Skinner. The Subordinate Judge of Meerut passed ejectment decrees and the appellant was granted absolute proprietary possession with mesne profits, of certain villages situated in the District of Bulandshahr in the United Provinces. These Judgments and decrees of the Subordinate Judge were reversed by the High Court.

In the proceedings before the Subordinate Judge many issues were taken and questions investigated and discussed.

With the exception of those to be hereafter referred to, it is unnecessary to enter upon these questions. For as the resnlt of the discussion before the Board the appellant made a concession, which was (whatever may have been the nature of the other discussions before the courts below) no part of his original pleadings or case

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In the plaint he prayed "that a decree for full proprietary possession of the entire villages . . . . . . be granted to the plaintiff." He further prayed for mesne profits and for costs of the suit, with interests upon these mesne profits up to the date of realisation. It is true that the plaint also concluded "that any further relief which may be considered desirable and necessary be granted to the plaintiff," but in their Lordships' opinion, this conclusion was treated by the plaintiff himself throughout the proceedings as merely ancillary to or consequential upon the radical demand he made for "full proprietary possession." The case in the courts of India was throughout conducted upon the footing that he was entitled to this proprietary possession in a full and unconditional sense, that is to say, that any mortgages or duly constituted burdens granted even by Thomas Skinner over the properties were to be treated as wholly unavailing against him. Under the decree obtained no such rights were recognised. His position, in short, was that the whole of these burdens and mortgages might be ignored.

When, however, the case for the appellant to this Board was drawn an alternative view was submitted, which is contained in the seventh Reason. That Reason was in this form:—"In any event the High Court of Judicature, Allahabad should have dismissed the suits, but should have passed decrees for possession conditional upon the payment of the debts binding on the estate of Thomas Skinner." Their Lordships are of opinion that this case was never either openly or fully set up by the appellant before the Indian courts, and that great embarrassment to the learned Judges therein, and great delay and loss, have ensued to the Respondents by reason of the appellants action in this regard. The Board has experienced considerable difficulty in permitting the alternative to be the ground of Judgment now; and it is only because in their view, it may be possible out of a large wreckage of procedure, to construct the material for a just decision of the true rights of parties, and because upon the whole this may be in the parties' own best interests, that their Lordships refrain from simpliciter sustaining the appeals and dismissing the suits.

The villages were the property of one Thomas Skinner, a member of a family not unknown in the history of the Northern-Western Provinces. In 1863 Thomas Skinner mortgaged inter alia these villages for a sum of Rs. 50,000 with interest.

It is unnecessary to refer to other mortgages than that of the year 1863 which has just been mentioned for the principles of the Judgment which is to follow are meant to apply comprehensively to

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the mortgages granted by Thomas Skinner. Detailed reference need not, therefore be made, for instance to the mortgage of 1861 granted by him over the village of Ainchar to secure a sum of Rs. 4,000. On the 7th September of that year, this village was mortgaged to the Collector of Bulandshabr. The plaintiff's claim to this village, as to the other villages, has been dismissed. But although this procedure is to be corrected as the result of the Judgment of this Board their Lordships are entirely of the opinion expressed in the Judgment of the High Court of date 2nd March 1909 to "the effect that the "plaintiff is not entitled to oust the appellant without payment of "the amount which the predecessors-in-title of the appellant paid in "discharge of the mortgage in favour of the Collector."

The mortgage deed of 1863 abovementioned provided that the mortgagees should be put in possession if principal and interest were not paid in accordance with its terms. On the 22nd October 1864, Thomas Skinner executed a will. In the next month, namely November, 1864, he died. Under his will an important question to be immediately referred to arises as to what was the nature of the right conferred in the villages upon his son.

That son, Thomas Brown Skinner had possession delivered to him in the year 1867 by the Court of Wards. At that time the Board were informed that there was due on the mortgage for Rs. 50,000 granted by his father, Thomas Skinner, a sum of Rs. 43,000. The mortgagees were placed in possession by him, and he also himself borrowed further sums in that year, in 1869 and in 1872, and granted mortgages over the properties therefor. In 1872, Lachman Das purchased at a sale, in execution of decrees obtained against Thomas Brown Skinner, the rights under the mortgages both of the father, Thomas Skinner in 1863 and of the son Thomas Brown Skinner in 1869 and 1872. Other transacrions and some transmissions took place with regard to the villages, but these need not be entered upon. From this main sketch it is to be observed generally that Thomas Brown Skinner had in point of fact acted, on the footing that he was the owner of his father Thomas Skinner's estate in the villages and was the absolute owner. If this was the true view, all questions in the case are at an end, and the suit for possession must entirely fail. How does this question stand?

This depends upon the construction to be given to two clauses of destination occurring in Thomas Skinner's will of 1864. They are in these terms:—

(4) That my private Zamindary presented to me by Government as a reward for services rendered during the Rebellion of 1857, a

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well as all villages, houses, and other property added by me from time to time to the original grant may, at my demise descend to my eldest son, Thomas Brown Skinner, and to this lawful male children according to the law of inheritance.

(5) In the event of my eldest son, Thomas Brown Skinner, dying without lawful male children, the abovementioned private Zamindari &c., shall descend to my next male heir, and should all my sons die without lawful male children, the Zamindari &c., shall descend to my female children or in the event of their death, to the female children born in wedlock of my sons in succession."

It is strenuously contended that under this destination Thomas Brown Skinner (who, it may be mentioned, was an illegitimate child, and who was at the date of his father's death, about fourteen years of age) took an absolute estate as contradistinguished from an estate for his life. Reference is made to the Succession Act S. 84, "which provides that where property is bequeathed to a person, and "words are added which describe a class of persons but do not de-"note them as direct objects of a distinct and independent gift, such "person is entitled to the whole interest of the testator therein, un-"less a contrary intention appears by the will;" and one of the illustrations in the Section is especially founded upon, namely, "to A, and the heirs male of his body." The Act was passed in the year 1865. By S. 331 of the Act it is enacted that "the provisions of "this Act shall not apply . . . . to any will made or any in-"testacy occurring before the first day of January, 1866." But as stated, Thomas Skinner the testator died in 1864. It is contended, however, that, although this may be so, yet according to the law of India prior to the enactment "of that Act, a destination to Thomas "Brown Skinner and to his lawful male children according to the "law of inheritance" was, in point of fact, an effective form of conveyance of no less than absolute ownership.

In determining this question it is the opinion of their Lordships that the destination must be read in its entirety and together. Following "the words quoted there occur these;" "In the event of my "eldest son, Thomas Brown Skinner, dying without lawful male children, the above-mentioned private Zamindari, &c., shall descend to my next male heir." The argument of Richard Ross Skinner who, in point of fact, was the next male heir, is that his brother Thomas Brown Skinner, had only the interest of a tenant for life. On reading still further on in the destination it is found that the appellant is not entitled himself if his own argument the sound, to the position of absolute owner for the destination continues:

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"And should all my sons die without lawful male children "the Zamindari, &c., shall descend to my female children, or in the "event of their death, to the female children born in wedlock of my "sons in succession." His learned counsel, accordingly, conceded that the appellant is, as was his brother before him only a tenant for life. The event has not been ascertained whether the appellant shall or shall not die without lawful male children. If there should be such children, no doubt they would be the absolute owners of the properties, but if he should die childless, then the destination over to female children will it is argued, take place.

The question is full of embarrassment and difficulty. It is no doubt a temptation to be rid of the troublesome issues, with consequent accountings, by holding that the absolute ownership was in Thomas Brown Skinner, but—for this temptation must be put aside—the only question that their Lordships have to consider is whether it was the testamentary intention of Thomas Skinner, under the form of language adapted to create by his will an absolute ownership in Thomas Brown Skinner. From the case of *Barlow* v. *Orde*[1], (in which it may be observed, the history of the Skinner family is referred to in a Judgment of Lord Westbury) it is plain that English rules of interpretation—in so far at least as these are artificial rules of construction which have arisen in the administration at English courts of Equity—must not be allowed to govern the interpretation of Thomas Skinner's will. Questions affecting the construction of such a settlement as the present or the regulation of a succession under it, must be determined by the principles of natural Justice, or to use the familar language, according to "Justice, equity and good conscience."

So looking at this settlement their Lordships do not find themselves able to affirm that Thomas Skinner meant his son Thomas Brown Skinner to have an absolute ownership of these villages. So to conclude would be to affirm that the former a month before his death set forth an elaborate scheme of destinations, over while all the time he was really meaning that the boy of fourteen was to take the absolute ownership if he survived him. If the son was to be a tenant for life merely, then the detailed regulations for successive enjoyment and descent were entirely in place; they were natural and necessary. There are considerations either way; but it seems to their Lordships a more likely and more resonable conclusion to come to, that Thomas Skinner did mean to regulate the succession after the death of his son and addressed his mind to the consideration of what should be the steps and order of that subsequent enjoyment of his

1. (1810) L. R. 3 P. C App. 164.

property. In their Lordships' opinion, accordingly the possession of Thomas Brown Skinner of these villages was the possession of a tenant for life.

It follows that the mortgages granted by Thomas Brown Skinner were ineffectual to convey or give any rights over any estate exceeding the tenancy for life of which Thomas Brown Skinner was possessed. The appellant, accordingly, as the next male heir, is entitled to the enjoyment of this estate for life, as of an estate out of the corpus of which no rights could issue which proceeded from Thomas Brown Skinner, and that the respondents, in so far as they represent such rights and the succession thereto, have no title to interfere with his entry into possession.

But the case, in their Lordships' view stands in a very different position with regard to the rights of mortgagees and their successors under mortgages granted, not by the appellant's brother but by the appellant's father Thomas Skinner. With regard to the appellant's brother, it is decided by this Judgment that the estate which he possessed was that of a tenant for life, and that mortgages preceding in respect of debts incurred by him could not affect the estate beyond his life. Even if it be supposed that after he, Thomas Brown Skinner, came into possession he granted mortgages in renewal of those granted by his father and then outstanding, the rights of the mortgagees could not in justice or equity be prejudiced thereby. To do so would be to operate a substantial defeat of the rights of those mortgagees and to imply, what certainly, never was the intention of any of the parties to the transaction that by the renewal of a mortgàge by a person with a limited interest in the estate the intention was to operate a discharge of debts effectually secured upôn the radical right.

Their Lordships, accordingly have little difficulty in holding that such a result must be avoided, that full effect must be given to the mortgages granted by Thomas Skinner, and that the appellant can only enter upon possession of his rights qua-tenant for life of these villages now after satisfying the mortgage debts of his father upon the estate. Their Lordships are glad to observe that the substance of his equity is fully recognised in the Judgment appealed from. They express no surprise, looking to the state of the pleadings, and particularly to the unqualified nature of the demand made in the plaint, that these learned Judges should have dismissed the same *simpliciter* and they view the Judgment of the High Court as meant to leave open the determination of the rights of mortgagees of Thomas Skinner and their successors in some further suit or suits.

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Upon the whole, however, it does not appear to their Lordships that justice will be done between these parties if the present suit be dismissed, with the prospect of further litigations to determine a matter now substantially ripe for settlement. They are further of opinion that the appellant is not entitled, even under the present suit, to enter into possession until full satisfaction is first made of the rights of all mortgagees and their successors under the mortgage deeds granted by Thomas Skinner. Should this condition be not within what appears to the Court below to be a proper and sufficient time, satisfied, then in their Lordships' opinion a decree dismissing the suit in respect of this failure could then be pronounced.

Had the condition of a grant of possession which was conceded at their Lordships' Bar been made upon the plaint or the pleadings in the court below, the whole of this protracted litigation would have been saved, except to the extent of a simple determination of the point of the construction of Thomas Skinner's will.

In their Lordships' opinion, accordingly, justice to the parties will be most nearly approached if the appellant makes payment to the respondents of the costs of the proceedings in both courts of India, and if in regard to the appeal before this Board, neither party be found entitled to costs, their Lordships will accordingly humbly advise His Majesty that the appeals should be allowed that the causes should be remitted to the High Court to be dealt with upon the footing that the rights under mortgages granted by the late Thomas Skinner should be satisfied by payment being made to the mortgagees or their successors, that upon these payments being made and that within such reasonable time as shall be fixed in the court below a decree for possession shall be pronounced in favour of the appellant, and that, failing such payment within such time, the suits shall stand dismissed.

Solicitors for Appellant :—*T. L. Wilson & Co.*,

Solicitor for Respondents in Nos. 95, 99, 100 and 102 :—*The Solicitor India Office.*

Solicitor for Respondents in Appeal No. 101 S. C:—*Summerhays & Son.*

Solicitor for Respondents in Appeals Nos. 98 and 105 :—*Edward Dalgado.*

Solicitors for Respondents in Appeals Nos. 97, 103, 104 and 106 :—*Barrow Rogers and Nevill.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH].

Present :—Sir Charles Arnold White, Chief Justice, Mr. Justice Sankara Nair and Mr. Justice Tyabji.

The Secretary to the Commissioner of Salt Abkari and Separate Revenue. } *Petitioner.*

v.

The South Indian Bank Ltd. Tinnevelly. } *Counter Petitioner.*

Stamp Act II of 1899—Art. 5—Loan to be granted on terms—Declaration that borrower would not encumber "Memorandum of agreement" test of—Mere offer, not though accepted, if acceptance not in writing.

Under the stamp Act both in England and in India, a written proposal or a written offer does not become subject to stamp duty by reason merely of a subsequent acceptance which is not in writing. In order to make a document liable to stamp duty as "an agreement or Memorandum of agreement," it must be evidence of an agreement; the mere fact that it may be of assistance in proving a contract does not render it chargeable with stamp duty. The Board of Revenue. v. The South Indian Bank Ltd.

Carlill v. The Carbolic Smoke Ball Company[1], *Chaplin v Clarke*[2], *Clay v. Crofts*[3] *followed.*

Where, according to the course of business in a bank, before money is advanced on pronotes, the would be borrower has to sign a declaration in the confidential register of the bank that he will not member his property until the bank debt is discharged.

Held: in the absence of anything to indicate the existence of completed agreement imposing an obligation on the bank to make the advance the declaration did not amount to an agreement or memorandum of agreement within the meaning of Art. 5 of the stamp Act and did not require to be stamped.

Quaere. If the entries would not require to be stamped if it appeared on the face of the entries that the signing of the declaration, the making of the note, the advance of the money were parts of one and the same transaction.

Case stated under S. 57 of Act II of 1899 by the Secretary to the Commissioner of Salt, Abkari and Separate Revenue.

Government Pleader for Petitioner.

M. D. Devadoss for Counter-Petitioner.

*The Reference by the Revenue Board in this case is for an opinion whether a certain statement is a mere declaration or an agreement. The statement is as follows :—"I am worth Rs. . . . . I have debts to the extent of Rs. . I have encumbered my lands to the extent of Rs. . . . I declare that I will not further encumber this property until the debt to the bank is discharged."

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* R. C. No. 16 of 1911. 13th March 1913.

1. (1892) L. R. Q. B. 484. 2. 4 Ex. Reports 403.

3. (1881) 20 L. J. (C.L.) 361.

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Government Pleader.—The last sentence is not a mere declaration but an undertaking or agreement. It is on the faith of this agreement that the Bank advances the loan.

M.D. Devadoss :—It is only an affirmation and not an undertaking or agreement. Even after taking this declaration no contract may be concluded: it is a mere proposal—(*Tyabji J.*) when it is accepted your declaration becomes a part of the contract. There is no proof of that; and what stands in the paper does not show any accepted proposal [*C. J.* Then what is the point in mentioning the number of the hundi.] I suppose it is to show that a loan covered by the hundi was given]. No such inference necessarily arises; and there is no evidence as to whether any hundi was given. The declaration is merely to the effect that he will be in a position to pay.

Moreover this is not the contract; the contract which is the outcome of these negotiations is the pro-note or hundi which is regularly stamped. If the acceptance is by action no stamp is necessary. 7 Halsbury 536. *Carlill* v. *Carbolic Smoke Ball Coy.*[1] [*Tyabji J.* There is a qualification in that case to the effect that if something is done to indicate that the proposal is to be considered there after a contract, stamp is necessary] That portion is not a contract.

The Bank cannot have with this declaration larger rights than on the note or hundi; these preliminaries are merged in the note or hundi [*S. Nair* J. The fact that an agreement may not be of any use does not exempt it from liability to be stamped.] This is a declaration of an intention as in *In re Fickus. Farine* v. *Fickus*[2] *Appa Row* v. *Venkayamma*[3]. This is a fiscal enactment which ought to be strictly construed and in favour of Government Pleader in reply said that it was an agreement though it does not contain all the terms but contains only evidence of the terms. 7 Halsbury p. 535; Addison on Contracts p. 34 p. 1220. A Memorandum of agreement is equivalent to an agreement though the assent is oral, *Smith* v. *Neale*[4], *Warner* v *Willington*[5], *Reuss* v. *Picksley*[6] against *Clay* v. *Crops.*[7]

The Court delivered the following

Judgment :—*The Chief justice.*—The only evidence to which our attention has been invited as to the course of business of the Bank is the statement contained in the letter of the Secretary to the

1. (1892) 2 Q. B. 484, 490.
2. (1900) 1 Ch. 331.
3. (1909) 19 M. L J. 106.
4. (1857) 26 L. J. C. P. 143.
5. (1836) 25 L. J. Ch. 662.
6. (1866) L. R. 1 Ex. 342.
7. (1851) 20 L. J. Ex. 361.

Board of Revenue. In that letter, the course of business is thus prescribed: "The bank grants loans on promissory notes payable on demand or otherwise. Before advancing money, it requires the borrower to make a declaration in the confidential register in the form thereto annexed and to sign it." A translation of the form to which the Secretary refers is annexed to the letter. Reading the entries in the register by the light of the statement by the Secretary as to the course of business, I am unable to say that the entries in the register show that the signing of the declaration, the execution of the note, and the advance of money by the Bank were one and the same transaction. I express no opinion as to whether, if it appeared on the face of the entries that the signing of the declaration, the execution of the note, and the advance of the money were one and the same transaction the entries would require to be stamped as an agreement or a memorandum of an agreement.

For the purposes of the question we have to consider, I am quite prepared to accept the proposition that, if the document in question is evidence of an agreement. I do not say ' of an agreement and the terms thereof, but if the document is evidence of an agreement, evidence that the minds of the parties when the document was signed were *ad idem* with regard to the particular matter, in that case that document would require to be stamped. Now, can we infer from the statement as to the course of the business and the entries in the register that, when the declaration was signed, the minds of the parties were *ad idem* with regard to the matter in question? It has to be observed that, according to the course of business as stated by the Secretary, before the money is advanced the borrower is required to make a declaration. The Government Pleader has suggested that that implies that, if the declaration has been made the Bank will, as a matter of course, make the advance. I do not think that that implication necessarily arises.

Now can it be said that there is evidence of an agreement which imposes an obligation of any kind on the Bank. I think not. I do not think it can be said, reading these entries, that on the making of the declaration by the borrower the Bank were under any obligation forthwith or within a reasonable time thereafter, to advance money. What is it on which the suggestion is based that we can read in these entries an agreement imposing an obligation on the Bank? The Government Pleader concedes that the only words in the register are the words " Hundi No. 179." We have looked into the original register, and we find that it is arranged in a tabular form, The first column is headed " Hundi No. " The 2nd column is.

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headed "Date." The first entry in the 1st column is "179" that is there is a reference to a hundi of the number 179. Then as regards the date in the original register, the year and month are not given, but the day of the month which is stated appears to be the date on which the declaration was signed. Whether that is intended to be the date of the hundi or whether it is intended to be the date of making of the declaration, is not clear in the original register. Now, we are invited, on the strength of this reference to a Hundi (amount unspecified), to infer an agreement by the Bank to make an advance on the signing of the declaration and to infer the fact that an advance was made. I do not think that on such evidence, we should be warranted in making that inference—at any rate, for the purpose of deciding whether, under a fiscal enactment, this particular document is one which requires to be stamped. Then can it be said, that there is an agreement which imposes any obligation on the borrower? It had been suggested that it is an undertaking by the borrower that, in consideration the Bank advancing money he undertakes not to encumber the property mentioned in the register. I cannot read the entry in the registar as amounting to an agreement such as that. It seems to me, so far as I can see from what appears within the four corners of the document—I do not know whether we are entitled to go outside it—it seems to me that what the entry really represents is a statement by the would be-borrower of the property of which he is in possession in order that the Bank might be informed as to whether he is a man of substance, and an undertaking by the would-be borrower that, if the Banks advanced him money on his promissory note, he would not encumber the property mentioned in the declarations until the Bank debt was discharged; and that the entries were made but for the purpose of recording an existing agreement between the parties or any memorandum of an existing agreement, but for the purpose of enabling the Bank to decide, whether in the course of their business, they would make the advance which was contemplated at the time the declaration was signed. No doubt the execution of a promissory note was in the contemplation of the parties at the time. No doubt, the coming into existence of a Bank debt was in the contemplation of the parties at the time. But for the reasons I have stated I do not think that this document can be treated either as an agreement or as a Memorandum of an agreement. The Government Pleader suggested that 'until the Bank debt is discharged' should be read as indicating that the debt had already been incurred by the advance of the money on the promissory note at the time the decla-

ration was signed. That seems to me to be inconsistent with the statement of the course of business by the Secretary that, before advancing money, the Bank requires the borrower to make a declaration in the form prescribed.

For the purposes of the further argument that the Government Pleader addressed to us I will assume that on the signing of the declaration there was a "proposal" or an "offer." The Government Pleader has referred to us to several authorities with regard to the question as to what is sufficient by way of note or memorandum for the purpose of satisfying the 4th section of the English Statutes of Frauds. There can be, I think no doubt that there is a considerable divergence between the line of authorities with reference to S. 4 of the Statute of Frauds and the other authorities to which our attention has been called the authorities under the stamp law. It seems to me that, if there be any conflict between the principles held applicable in these two lines of authorities we ought to follow the divisions in connection with the matter which it is now before us, the stamp law. If we turn to the authorities under the Stamp Acts, I think it may be said to have been established that a written proposal or a written offer does not become subject to stamp duty by reason of subsequent acceptance which is not in writing. In the case of *Carlill* v. *The Carbolic Smoke Ball Company*[1], Mr. Justice *Hawkins* lays down the law thus: "No document requires an agreement stamp unless it amounts to an agreement or a memorandum of an agreement. The mere fact that a document may assist in proving a contract does not render it chargeable with stamp duty, it is only so chargeable when the document amounts to an agreement of itself or to a memorandum of an agreement already made. A mere proposal or offer until accepted amounts to nothing. If accepted in writing the offer and acceptance together amount to an agreement; but if accepted by part, such acceptance does not convert the offer into an agreement, unless, indeed after the acceptance, something is said or done by the parties to indicate that in the future it is to be so considered," and the learned judge cites several English decisions. Among the authorities which he cites is *Chaplain* v. *Clarke*[2]. In that case the action was brought by an allotter of shares in a joint stock company to recover the amount of deposits paid by him. The question arose as to whether a certain document required a stamp. Mr. Justice *Maule* at 407 in the course of the argument observed, "If the contract was made by the letter of allotment, coupled with the payment of the deposit, then it was not

1. (1892) 2 Q. B. 484, 490. 2. 4 Exchequer Reports 403.

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an agreement within the Stamp Act. An offer in writing accepted by parol does not require a stamp." Then we have another decision of the Exchequer Chamber in *Clay* v. *Crofts*[1]. That was the case of an action by a School-master who published a prospectus one of the terms being that a pupil should not be removed without three months' notice, subject to the payment of one term's fee if they were taken away without notice—a pupil was taken away without notice and the school-master sued for the fee. There it was held that the prospectus was a proposal, and not an agreement and that no stamp was necessary. *Parke*, B. in the course of the argument, said, "A memorandum does not require a stamp where, being a mere proposal in the first instance, it afterwards becomes binding by subsequent matter." Later on, he says: "This was only a proposal at the time the prospectus was produced to the defendant. It becomes an engagement only when it is qualified by an offer to reduce the terms. The defendant, then, makes a contract by his conduct. The defendant, by adopting the proposal, and sending his sons to school, makes it a contract. There was only a proposal in the first instance, and the case is not within the Stamp Act." The Government Pleader has invited us to say that the passage in the judgment of the Mr. Justice *Hawkins* to which I have referred does not represent the law. The conclusion at which I have arrived is that the document in question in the present case does not require to be stamped as an agreement or as a memorandum of an agreement.

Sankaran Nair J :—I agree.

Tyabji J : A declaration in the form appended to the letter of reference of the 21st September 1911 cannot, it is admitted, of itself constitute an agreement. In order that an agreement may arise between the parties such a declaration must be followed by some action on the part of the Bank, indicating an acceptance by it of the terms contained in the declaration. It was argued before us that, when subsequently to the declaration a loan is made by the Bank then there is a complete agreement ; the terms of which are represented by the declaration, and that the declaration then becomes an "agreement or memorandum of an agreement" within article 5 of the Stamp Act and must therefore be stamped as such. According to this contention, therefore, the agreement or memorandum of agreement consists, partly of the declaration and partly of its parol acceptance: the declaration is not, in itself the whole contract: the declaration when read together with its acceptance by the Bank (such acceptance being implied by the Bank making the

1. (1851) 20 L. J. Ex. 361.

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loan) forms the contract. The decision cited by the learned Chief Justice *viz.*, *Clay* v. *Crofts*[1] *Chaplain* v. *Clarke*[2] *Hudspeth* v. *Yarnold*[3] and *Carlill* v. *Smoke Ball Company*[4] show that the Courts in England have held that under such circumstances, no stamp is necessary in England. The English Stamp Acts under which the decisions were given are 54 and 55 George III Chapter 184 and 54 and 55 Victoria Chapter 39. The terms of those Acts are not materially different from the terms of the Indian Stamp Act, 1899. I therefore agree that the reference should be answered in the negative as indicated by the learned Chief Justice. The document in question need not be stamped.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair, and Mr. Justice Oldfield.

Syed Siliman Sahib and another. *Plaintiffs—Appellants.**

v.

Bontla Hussain Sahib and others. *Respondents.*

Syed Siliman Sahib .v Hussain Sahib.

Civil Procedure Code.—(Act V of 1908.) Order II. Rules 1, 2 & 3—Splitting cause of action—Suit for declaration of title—Subsequent suit for possession—Cause of action.

When a suit for declaration of title to some lands was dismissed on the ground that the plaintiffs were entitled to possession and ought to have sued for it also, *Held*: a subsequent suit for possession of the lands on the same title was not barred under Order II Rules 1, 2 and 3 C. P. C.

It is only when the cause of action is the same that Order II rr. 1, 2, and 3 bar the suit.

To determine whether the cause of action is the same one must look to the facts relied on in the plaint in the first suit as constituting the cause of action and if on those facts it was open to the plaintiffs to ask for the reliefs prayed for in the second suit, then only would the suit be barred.

Nannoo Singh Monda v. *Ananda Singh Monda*[5], *Jibunt Nath Khan* v. *Shib Nath Chukerbutty*[6], *Mohanlal* v. *B. Laro*[7], followed.

* Second appeal from the decree of the Court of the Subordinate Judge of Kurnool in A. S. No. 161 of 09 preferred against the decree of the Court of the District Munsif of Kurnool in O. S. No. 244 of 08.

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* S. A. No. 1994 of 1911. 28th January 1913.

1. (1851) 20 L. J. Ex. 361.
2. 4 Exchequer Reports 403.
3. (1850) 9 C. B. 624, 625.
4. (1892) 2 Q. B. 484, 490.
5. (1885) I. L. R. 12 C. 291.
6. (1882) I. L. R. 8 C. 819.
7. (1892) I. L. R. 14 A. 512.

Syed Siliman Sahib v. Hussian Sahib.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for Appellants.

V. C. Seshachariar and *K. Parthasarathi Aiyangar* for Respondents.

The Court delivered the following

Judgment:—This suit for possession of certain lands is dismissed on the ground that it is barred by the institution of a prior Suit O. S. No. 208 of 07. In that suit which was brought by the same plaintiffs against the same defendants, the plaintiffs prayed only for a declaration of title. It was dismissed because the plaintiffs were found entitled to possession.

The title alleged by the plaintiffs in both the suits is undoubtedly the same. The first suit for declaration was brought on the ground that it was necessary to remove some cloud on the plaintiffs' title. The facts which it is necessary for a plaintiff to allege in a suit for declaration are not the same as those in a claim for possession. In the declaratory suit there was no interference with possession alleged and it was not necessary to allege the same. In the suit before us title and deprivation of possession are alleged. The causes of action in the two suits are different.

To determine whether the suit is barred and the cause of action is the same we have to look to the plaint or the facts relied upon to constitute the cause of action in the first suit and if on those facts it was open to him to ask for the relief prayed for in the second suit, the latter would be barred. It is only when the cause of action is the same that Order II, Rules 1, 2 and 3 bar the suit. This has been settled by numerous decisions of this court.

The Calcutta High Court in *Nannoo Singh Monda* v. *Ananda Singhe Monda*[1] following another decision in *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty*[2], and the Allahabad High Court in *Mohan Lal* v. *Bilass*[3], have decided that a suit for possession in similar circumstances would not be barred. We agree with them. The Subordinate Judge refers to certain decisions of this Court in support of his conclusion that the suit is barred. *Ambu* v. *Vethiliamma*[4], held that S. 43 does not apply and is therefore, not in favor of the Respondent. In *Narayana Kavirayan* v. *Kandasami Gounden*[5], the fact relied upon in the plaint in the first suit, the contract of sale, entitled the plaintiff to possession, the relief prayed for in the subsequent suit. The decisions in *Muthu Narayana Reddi* v. *Rayalu Reddi*[6], and *Rangasami Pillai* v. *Krishna*

1. (1885) I. L. R. 12 C. 291.
2. (1882) I. L. R. 8 C. 819.
3. (1892) I. L. R. 14 A. 512.
4. (1892) I. L. R. 14 M. 23.
5. (1898) I. L. R. 22 M. 24.
6. (1896) 6 M. L. J. 51.

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Pillai[1], which proceed on the same ground may be said to be in favor of the Respondent. But the grounds on which they and certain other decisions proceeded were fully considered in *Ramasami Aiyar* v. *Vaithianatha Aiyar*[2], and disapproved. As to the observations on S. 43 see page 770 and as to *Rangasami Pillai* v. *Krishna Pillai* see page 777. In a later case however, this case relied upon by the Subordinate Judge was again followed and on account of this conflict, the question was referred to a Full Bench which followed the decision in *Ramasami Aiyar* v. *Vaithianatha Aiyar*[2], and overruled the judgment relied upon by the Subordinate Judge. *Thrikaikat Nadathil Raman* v. *Thirukiyil Krishna Nair*[3]. Nor is the decision in *Naganatha Aiyar* v. *Krishnamurthi Aiyar*[4], applicable. The scope of S. 43 was not considered there. The previous suit was dismissed by an order which did not mention the section under which it was made and the learned Judges held that it was dismissed under S. 102 read with S. 157 rather than under S. 158 and the question which they had to consider was whether that dismissal was a bar to the second suit, not under S. 43 but another section of the Code. They had however to consider whether the cause of action was the same, and they held that in the first suit "the cause of action was the denial of the plaintiffs' right to the property accruing on the death of Sellathammal and Srinivasa taking possession of the property on the strength of the order of the authorities, though he claimed that such order of the Government and the action taken under it should not affect his title nor the possession he had by virtue of the leases." So the plaint in the first suit disclosed the fact that the plaintiff had been deprived of actual possession. He should have therefore claimed possession. The learned Judges also refer to the Judgment of the Judicial Committee in *Chand Karan* v. *Pertab Singh*[5], to the effect that the cause of action refers entirely to the grounds set forth in the plaint.

We are therefore of opinion that the decrees of the Lower Courts should be set aside and the Munsif be directed to restore the suit to his file and dispose of it according to law. Costs will be provided for in the final decree.

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1. (1898) I. L. R. 22 M. 259.
2. (1902) I. L. R. 26 M. 760.
3. (1905) I. L. R. 29 M. 153.
4. (1910) 20 M. L. J. 535.
5. (1888) I. L. R. 16 C. 98. (P.C.)

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On appeal from the Madras High Court.]

Present:—Lord Atkinson, Lord Shaw, Lord Moulton, Sir John Edge, and Mr. Ameer Ali.

Joopoody Sarayya and others ... ... *Appellant.**

v

Palavarti Lakshmanaswamy ... ... *Respondent.*

Joopoody Sarayya *v.* Lakshmanaswamy.

Partnership—Hindu joint family, a partner—Partition, effect of—Dissolution, natural incident of—Presumption of dissolution from ceasing of annual accounts and making of final account—Limitation Act, art. 106.

Where a Hindu joint family is partner in a business, a dissolution of the partnership is a natural incident of the division of the joint family interests. By the division, different personae arise in law and with these it is open to the stranger partner to say whether he should be allied in partnership or not.

When in a partnership annual accounts cease to be rendered and a final account showing division of both capital and revenue is made out the presumption is that there is a dissolution as at the definite date of the year in the account thus closed.

In a suit for winding up of a partnership in which the plaintiffs alleged their family had a share, it appeared that in 1891 there was a division in respect of some other family property and that in respect of the partnership also in that year a final account was taken and there was no further rendering of yearly accounts as was previously the case, or any interposition of the family in the partnership business. It also appeared that some time in 1901 the dispute between the plaintiffs and the defendant was arranged by a letter signed by the plaintiffs in which there was reference to a verbal arrangement by which they agreed to divide properties acquired with the partnership funds equally. Defendant's case was that there was a dissolution and a settlement of accounts in 1891 and that the plaintiffs' claim was barred.

Held, that the dissolution of the partnership in 1891 was made out and the suit having been instituted more than 3 years from that date, was barred by limitation under art. 106 of the Limitation Act.

Appeal from a judgment and decree of the High Court reversing that of the Subordinate Judge of Rajahmundry.

Mr. Dunne for Appellant.

Messrs. DeGruyther K. C., and *Brown* for Respondent.

Their Lordships' judgment was delivered by

Lord Shaw:—This is an appeal against a decree of the High Court of Judicature at Madras, dated the 10th December 1908, which reversed a judgment of the Subordinate Judge of Rajah-

* Appeal No. 79 of 1911. 19th March 1913.

mundry, dated the 16th September 1905. The suit as brought included a claim for partition of certain family property. That part of the suit has been settled. What remains constitutes the subject of the present appeal. The assertion is that the plaintiff's family had a half share, along with the defendant (the present respondent) in a partnership business carried on in Akuvidu. The High Court has held that this claim is barred by limitation and has dismissed the suit.

It is unnecessary to refer to various other pleas in the case, including those founded on an alleged misjoinder of causes of action because, in the opinion of their Lordships, the conclusion reached by the High Court on the plea of limitation was clearly correct.

In or about the year 1868 a partnership business was started in Kottapally. At a later date a business was started at Akuvidu. This latter was throughout under the management of one Venkanna, the adoptive father of the Respondent. The position of Venkanna (who was the second defendant in suit) was this: He maintained that in both business he had a half share; that in, or shortly before, the year 1891, an arrangement was made under which the joint family represented by the appellants made a partition of their family property; and it cannot be denied that, with regard to the Kottapally business, this partition became an accomplished fact. Venkanna, however, further maintained that there were cross-claims; that he was entitled to a certain share of the assests of the Kottapally business; that, on the other hand, the joint family was entitled to a certain share in the Akuvidu business; that these claims were set against each other, and that from 1891 the joint family has had no share in the Akuvidu business.

It has to be admitted that, if a partition has taken place of the joint family property, it is at least not unlikely that that would have extended to all the businesses which the joint family shared; and it must further be conceded that, if the joint family's interests were divided, a dissolution of the Akuvidu partnership with Venkanna was naturally incident to the situation thus created. Different *personae* had arisen in law, and with these it was open to Venkanna to say whether he should be allied in partnership or not. What Venkanna does say is, that the dissolution—thus not unnatural in the situation of the joint family affairs in 1891—did in fact take place. If this is so, the suit which was initiated 11 years after that event, is of course, barred by the three years' limitation established by S. 106 of the Limitation Act.

Joopoody Sarayya v. Lakshmanaswamy.

In the opinion of their Lordships, the High Court has come to a correct conclusion, and it is quite unnecessary to enter upon the details of the case, which, in the view taken by the Court, amply confirm the result which has been reached.

Four salient points may simply be noted. (1) Prior to 1891, and year after year, detailed accounts, suitable as those of a current partnership business, were rendered as between the joint family, on the one hand, and Venkanna on the other. After that year these accounts entirely ceased. But (2) in the year 1891 an account was furnished of a different character. That account, in their Lordships' opinion, was to all intents and purposes not a revenue but a capital account, showing a complete division of the partnership shares. It was, in short, in form and in substance an account entirely suited to the event and purposes of a dissolution of partnership. (3) From that time forward Venkanna managed the Akuvidu business without any interposition or interference by the joint family or any representative thereof in their interest. It is true that certain requests were made to Venkanna for payment, but these were requests, not for a share of profit, but for the payment of the balance due upon the dissolution account. Finally (4) Venkanna having been apparently throughout maintaining that his liabilities under the Akuvidu business were balanced by his share of the assests in the Kottapally business, the dispute was arranged by a letter of the 3rd May 1901, the authenticity and importance of which is not denied. It was written to Venkanna by the first three plaintiffs and by Lakshmanaswamy who is called as the first defendant. In fact, it is the letter of the members of the joint family; and in this letter, signed by them, they admit to Venkanna "You are singly carrying on business," and they refer to the "verbal arrangement before this among ourselves that the property acquired by you by carrying on business at Akuvidu, and the property acquired by us by carrying on business at Kottapally, should be duly divided and taken according to shares." They then narrate their unanimous request for a settlement, and agree to take from Venkanna a sum according to his wishes. Serious questions might be raised as to whether the writers of such a letter were not barred from thereafter instituting the present suit, but for the purpose of the point of this decision it is sufficient to say that it completely confirms the idea of a dissolution of partnership having been effected at a previous date, and it squares with the events on that footing which took place in the year 1891.

Mr. Dunne presented a careful argument, in which he strongly insisted that, as the Akuvidu partnership was one at will, it must be presumed to last till now, unless a definite date of dissolution could be put forward and made out. But, in their Lordships' opinion, this has been done, and in a substantially conclusive manner. When annual accounts ceased, and a final account, showing the division of both capital and revenue was made out, the presumption was for dissolution as at the definite date of the year in account thus closed. The cessation of the annual accounts points to some radical change having taken place, and the other circumstances above noted leave little doubt upon the mind that that change was the dissolution of the firm as in the year mentioned. Joopoody Sarayya v. Lakshmanaswamy.

All other questions in the case are thus at an end. Their Lordships will humbly advise his Majesty that the appeal should be dismissed and the judgment of the High Court affirmed. The appellants will pay the costs of this appeal.

Solicitors for Appellants :—*Messrs. Sanderson, Atkin, Lee* and *Eddis.*

Solicitor for Respondent :—*Mr. Douglas Grant.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.]

Present :—Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Lala Soni Ram ... *Plaintiff—Appellant.**

v.

Kanhaiya Lal and others ... *Defendants—Respondents.*

Limitation Act (Act XV of 1877) S. 19 and S. 9—Acknowledgment by widow or daughter—No saving of limitation against reversioner—Fusion of mortgagor and mortgagee's interest—No suspension—Limitation Act applicable, that at the date of institution—General Clauses Act S. 6 cl. (a)—"Thing done"—Acknowledgment, not—Res judicata—C. P. C. S. 13—Suit for possession by usufructuary mortgagee—Right to redeem no defence—Pleading—Conversion of suit in ejectment into one for redemption by defendant—Privy Council practice—New point in appeal. Lala Soni Ram v. Kanhaiya Lal.

A usufructuary mortgage was executed in 1841 in favour of one K (a Hindu). No date for redemption having been specified in the document, the mortgage was immediately redeemable. K died shortly before 1855. In 1866, the widow of K who had succeeded to a Hindu widow's estate on her husband's death sold one

*6th March 1913.

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moiety of the mortgage interest and hypothecated the other to D. and Y. In 1867, the daughter of K who had succeeded the widow executed also a sale of the other moiety. None of these transactions was binding against the reversioner. The interest acquired by D and G was transferred to M in 1883. He had already acquired the interest of the mortgagors. The daughter died in 1898. In 1904, her sons as next reversioners sued M's son treating the sales as not binding against them, obtained a decree and got possession. The present suit was instituted by M's son in 1907 to redeem the mortgage of 1842. Reliance was placed on acknowledgments contained in the deeds of 1866 and 1867 to save limitation. It was urged that Act XIV of 1859 applied to the suit failing which it was contended that the acknowledgments would suffice even under Act XV of 1877. It was also contended that limitation under art. 148 of Act XV of 1877 was suspended during the whole period between 1883 and 1898 as no suit could have been brought during that time by M or M's son by reason of the fusion of the interest of the mortgagor and mortgagee in them : *held* that Act XV of 1877 and not Act XIV of 1859 applied to the case.

Unless there is a distinct provision to the contrary the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding.

That an acknowledgment of liability only extends the period of limitation and does not confer title and is not a thing done within the meaning of S. 6 of the General Clauses Act.

That as the plaintiffs derived title through their grandfather who was the mortgagee and the last full owner and not through the widow and daughter who though for certain purposes they did represent the estate were not persons who could be deemed to have admitted for the benefit of the mortgagee's estate, acknowledgments by them were ineffectual to give a new period of limitation against the reversioners under S. 19 of Act XV of 1877. To hold otherwise would be to extend the power of the Hindu woman in possession for her limited estate to bind the estate to an extent which has not been sanctioned by authority.

Held further that limitation having commenced to run in 1842, could not be suspended by the subsequent fusion of interests the suit not being one to which proviso to S. 9 of Act XV of 1877 applied.

Held, however, that the suit was not barred by S. 13 C.P.C. as the plea that the plaintiff was entitled to redeem was irrelevant to a suit by the usufructuary mortgagee for possession and as he could not have as a defendant converted that suit into one in which he could have obtained a decree for redemption.

At the hearing of the appeal, two contentions involving consideration of facts and of law were raised. But neither of these contentions having been raised in the Courts below or suggested in the application for leave for appeal to the Privy Council or in the case before the Board, the appeal also having been heard *exparte* their Lordships refused to depart from the established practice of not allowing new cases to be made on appeal.

Exparte Appeal from a Judgment and decree of the High Court at Allahabad dated the 7th August 1909, reversing a Judgment and decree of the Court of the District Judge of Aligarh, dated the the 24th March 1908, affirming those of the Court of the Subordinate Judge of Aligrah dated the 6th September 1903.

Lala Soni Ram v. Kanhaiya Lal.

George Cave K. C. and *J. M. Parikh* for Appellant.

Their Lordships' Judgment was delivered by

Sir John Edge:—The suit in which this appeal has arisen was brought on the 4th March 1907 by Lala Soni Ram, the appellant here for the redemption of a mortgage which had been made on the 2nd January 1842 by the then owners of Mouza Kheria Buzurg in favour of Khushwatt Rai, who was on the making of the mortgage put in possession by the mortgagors. The mortgage was usufructuary, the profits except Rs. 80 per annum were to be taken by the mortgagee in lieu of interest and the mortgagee was to pay to the mortgagors annually Rs. 80 as malikana.

By the mortgage it was provided that the mortgagors should be entitled to redeem and to obtain possession of the mortgaged property on payment of Rs. 4,000, which was the amount advanced to them. No date for the redemption of the mortgage was specified, and consequently the mortgage became liable to be redeemed immediately after it was made. The whole 20 biswas of Kheria Buzurg were included in the mortgage, but the original mortgagors or some of them redeemed the mortgage so far as it affected 6 biswas 17½ biswanis of Kheria Buzurg, and this suit relates to the right to redeem the mortgage so far as it affects the remaining 13 biswas 2½ biswanis of the property which was mortgaged in 1842, if that right could at the date of the suit have been enforced by suit.

In order to understand the issues which were raised and were tried in the court of first instance, or on appeal below, it is necessary briefly to refer to the title of Lala Soni Ram the plaintiff (appellant), as representing the original mortgagors, and to the title of the defendants (respondents) as representing the original mortgagee Khushwat Rai, and to refer to a suit which was brought on the 18th May 1904 by the present defendant (rsespondent) Babu Charan Behari Lal, and his brother Lala Shaib Shankari Lal, against the present plaintiff (appellant), Lala Soni Ram. Lala Shib Shankar Lal was a defendant to this suit and is represented here by the respondents to this appeal.

Between the years 1880 and 1883 Nannu Lal, since deceased, who was the father of the plaintiff (appellant), acquired the rights and interests of the original mortgagors in the 13 biswas 2½ biswanis of Kheria Buzurg to which this suit relates. These rights and interests so far as they can be enforced are now vested in the plaintiff (appellant), Lala Soni Ram.

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Khushuvatt Rai, the original mortgagee died shortly before 1855, leaving surviving him his widow Musammat Jamna, who died on the 10th May 1866, and a daughter Musammat Janki, who died on the 30th May 1898. Babu Charan Behari Lal and Lal Shib Sankar Lal, who were the plaintiffs in the suit of 1904, were the sons of Musammat Janki.

On the 31st March 1866 Musammat Jamna, who had succeeded to a Hindu widow's estate on the death of her husband Khushwat Rai executed a sale deed by which she transferred a moiety of her interest as mortgagee of Kheria Buzurg to Debi Pershad and Gulab Rai, and on the same date by deed hypothecated to them the other moiety of her interest as mortgagee. On the 29th April 1867 Musammat Janki executed a sale-deed in favour of Debi Pershad and Gulab Rai, by which she transferred to them her interest as mortgagee in the moiety of Kheria Buzurg which had been hypothecated to them by Musammat Jamna in 1866. The mortgagee's interest in Kheria Buzurg which by the sale deed of 1866 and 1867, had vested for the lives of Musammat Jamna and Musammat Janki in Debi Parshad and Gulab Rai, vested by assignments in or before 1883 in Mannu Lal, and from 1883 until Musammat Janki's death in 1898 Mannu Lal or his son, Lala Soni Ram, the plaintiff (appellant), who succeeded him, enjoyed the rights of the mortgagors and the mortgagee in the 13 biswas 2½ biswanis.

In the deeds of 31st March 1866 Musammat Jamna had described herself as a mortgagee and had acknowledged the existence of the mortgage of 1842, and in the deed of the 29th April 1867 Musammat Janki had similarly described herself as mortgagee and acknowledged the existence of the mortgage. Neither of those deeds is before this Board, but that is the inference which their Lordships draw from the proceedings and the judgment in the courts below.

After the death of Musammat Janki her Sons, Babu Charan Behari Lal and Lala Shib Shankar Lal, brought a suit on the 18th May 1904 against Lala Soni Ram, the present plaintiff (appellant), to obtain possession as mortgagees of the 13 biswas, 2½ biswanis of Kheria Buzurg on the ground that the transfers which were made in the life-time of Musammat Jamna and Musammat Janki became ineffectual as against them on the death of those ladies. In that suit Babu Charan Behari Lal and Lala Shib Shankar Lal on the 12th October 1904 obtained a decree for possession.

So far as appears from that part of the record which is before this Board, Babu Charan Behari Lal and Lala Shib Shankar Lal

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did not in the suit of 1904, allege or admit that the mortgagor's interest has vested in Mannu or was vested in Lala Soni Ram the present plaintiff-appellant: their case apparently simply was that the title to the mortgagee's interest which had been transferred by Musammat Jamna and Musammat Janki had determined so far as Lala Soni Ram was concerned, on the death of Musammat Janki, and that they became entitled as representing Khushwat Rai, the mortgagee on her death to. possession as mortgagees. Their case was, that after the death of Musammat Janki, Lala Soni Ram was a trespasser, as in fact he was, and they claimed mesne profits. It does not appear that Babu Charan Behari Lal and Lala Shib Shankar Lal alleged, or otherwise admitted, in the suit of 1904, that a right to redeem the mortgage of 1842, which could be enforced by suit was vested in any one, nor was it material to their cause of action that a right to redeem which could be enforced by suit should be vested in any one. Their title to possession on the death of Mussamat Janki, which was the title they claimed, related back to and was based on the mortgage of 1842 whether the right to enforce by suit redemption of that mortgage had or had not been extinguished before the 18th May 1902 by limitation. The mortgage had not been redeemed and nothing had happened between the death of Mussamat Janki and the 18th May 1904 to disentitle Babu Charan Behari Lal and Lala Shib Shankar Lal to a decree for possession based on that original title. As a matter of fact if Lala Soni Ram had desired, on the death of Musammat Janki in 1898, to redeem, he could have brought his suit within sixty years from the date of the mortgage, as the sixty years did not expire until January 1902, but apparently he hoped, by holding on to the possession of the 13 biswas 2½ biswanis to escape from having to pay the Rs. 4,000 redemption money. When the suit of 1904 was brought, the period of 60 years computed from the 2nd January 1842, had expired.

In this appeal, which is *exparte* the plaint and other pleadings in the suit of 1904 are not before their Lordships, but they draw the inference which they have expressed from the Judgment of the 12th October 1904 and from the Judgments of the Courts below in this suit. The effect of the suit of 1904 was to give by process of law to Babu Charan Behari Lal and Lala Shib Shankar Lal the possession as mortgagees to which they had become entitled on the death of their mother Musammat Janki on the 30th May 1898.

Lala Soni Ram the present plaintiff (appellant), on the 4th March 1907 brought in the Court of the Subordinate Judge of

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Aligarh this suit against Lala Shib Shankar Lal and Babu Charan Behari Lal for the redemption of the mortgage of the 2nd January 1842 so far as it affected the 13 *biswas* 2½ *biswanis* of Kheria Buzurg. Other defendants were subsequently added. In their written statement Lala Shankar Lal and Babu Charan Behari Lal admitted that the mortgage of the 2nd January 1842 was made, and so far as is now material pleaded that the suit was not brought within 60 years of the date of the mortgage, that no admission of the right of the mortgagor was made within 60 years from the date of the mortgage, and consequently that the suit was barred by limitation. They also alleged that in the suit of 1904 Lala Soni Ram had pleaded that he had a right to redeem, but that the Court in that suit had decreed their claim for possession and they relied upon S. 13 of the Code of Civil Procedure. They further pleaded that in the suit of 1904 it had been decided that the deeds which had been executed by Musammat Jamna and Musammat Janki were not binding upon them the answering defendants after the deaths of those ladies.

The Subordinate Judge held and rightly as their Lordships consider that the suit of 1904 did not by the operation of S. 13 of the Code of Civil Procedure bar the present suit. The suit of 1904 was a suit by Lala Shib Shankar Lal and Babu Charan Behari Lal for possession as mortgagees. The mortgage had not been redeemed and the plea of Lala Soni Ram that he was entitled to redeem was irrelevant to a suit by the usufructuary mortgagee for possession. Lala Soni Ram's title as mortgagor was not in question in that suit nor could he as a defendant to that suit have converted that suit into one in which he could have obtained a decree for redemption. The Subordinate Judge, however, applying S. 15 of Act XIV of 1859 to the case held that the acknowledgments of the existence of the mortgage by Musammat Jamna and Musammat Janki in their respective deeds brought this suit within time and he gave the plaintiff a decree for redemption.

The District Judge of Aligarh on appeal from the decree of the Subordinate Judge, affirmed the Judgment of the Subordinate Judge, and by his decree of the 24th March 1908 dismissed the appeal. From the decree of the District Judge the defendants appealed to the High Court at Allahabad. The High Court, rightly holding that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary held that Act XV of 1877, and

not Act XIV of 1859, was the Limitation Act which was applicable to the suit. By S. 19 of Act XV of 1877, it is so far as is material for present purposes enacted as follows :—

"If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowldgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by some person through whom he claims title or liability a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed."

This is a suit to redeem, and the period prescribed by article 148 of the second schedule of Act XV of 1877 within which a suit against a mortgagee to redeem or to recover possession of immoveable property mortgaged is 60 years from the time when the right to redeem or to recover possession accrues.

The learned Judges of the High Court held that there could not be any doubt that the mortgage of 1842 was in terms admitted by Musammat Jamna and Musammat Janki in their respective deeds, but they also held that the defendants derived title through their grandfather Khushwat Rai, who was mortgagee and the last full owner of the rights of the mortgagee, and did not derive title through Musammat Jamna or Musammat Janki who, although for certain purposes they did represent the estate, were not persons who could be deemed to have admitted for the benefit of the mortgagee's estate a right of redemption in the mortgagor and that in making such acknowledgments they had no power to bind any interests except their own. To have held otherwise would, in their Lordship's opinion have been to extend the power of a Hindu woman in possession for her limited interest to bind the estate to an extent which has not been sanctioned by authority.

It was also contended in the High Court on behalf of the plaintiff that there had been a fusion of the interests of the mortgagee and the mortgagor in the same person between the years 1883 and 1898 ; and that no mortgage was in existence during that period and that Aricle 120 of the second schedule of Act XV of 1877, and not Article 148 applied ; and that the suit was within time. The learned Judges of the High Court pointed out one obvious answer to that contention. It was that if article 120 applied, the suit was not within time, as Musammat Janki had died more than six years

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before the suit was brought. They also pointed out that the mortgagee's interest which became vested in Mannu was only the limited interest of a Hindu lady, and consequently there had been no merger. The High Court, by its decree of the 7th August 1909, allowed the appeal on the ground that the suit was barred by limitation and dismissed the suit with costs in all Courts. From that decree the plaintiff Lala Soni Ram has brought this appeal.

In this appeal it has been contended that the Limitation Act applicable to this case is Act XIV of 1859, and consequently the acknowledgments of the existence of the mortgage of 1842 which were contained in the deeds which were executed by Musammat Jamna and Musammat Janki brought this suit within time. As to that contention it is sufficient for their Lordships to say that they agree with the High Court that Act XIV of 1859 does not apply to this suit and that the Limtation Act which does apply is Act XV of 1877, and further that the acknowledgments which were made by Musammat Jamna and Musammat Janki were not acknowledgments within the meaning of S. 19 of Act XV of 1877 made by a person or persons through whom the defendants derived title or liability. Their Lordships consequently consider that these acknowledgments were ineffectual to give a new period of limitation. The contention in this appeal which is based upon S.6 of the General Clauses Act and S. 2 of Act XV of 1877 was pressed upon the High Court. Their Lordships agree with the High Court that an acknowledgment of liability only extends the period of limitation within which a suit must be brought and does not confer title, and is not a "thing done" within the meaning of S. 6 of the General Clauses Act.

In this appeal it was also contended that the operations of Act XV of 1877 was suspended during the whole period 1883-1898 when Mannu or his son Lala Soni Ram, the plaintiff, were in the position of mortgagors and mortgagees, the contention being that period should be excluded from the computation of the 60 years provided by Article 148 of the second schedule of Act XV of 1877, as between 1883 and 1898 no suit for redemption could have been brought by Mannu or after his death by the plaintiff Lala Soni Ram. Their Lordships are by no means certain that this particular contention was raised in the High Court, the contention there apparently was not that the operation of article 148 was suspended during the period 1883–1898 but that by reason of the fusion of the interests of mortgagor and mortgagee, article 148 did not apply to this case and the article which did apply was article 120. In support of the contention in this appeal this Board was urged to apply in

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this suit the principle which Lord Langdale, Master of the Rolls applied when construing S. 40 of 3 and 4, William IV. Chap. 27, in *Burrell* v. *The Earl of Egremont*[1], their Lordships are unable to accede to that contention as article 148 of Act XV of 1877 is essentially different in its language and intention from S. 40 of 3 and 4, William IV Chapter 27, and the facts upon which Lord Langdale acted were not in any way similar to the facts in this suit. Under S. 40 of 3 and 4 William IV Chapter 27, no suit could be brought to recover money secured on a mortgage or otherwise charged upon land, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or a release of the same, unless in one or other of the events specified in the section. The 60 years, period of limitation allowed by article 148 of Act XV of 1877 begins to run in such a case as this "when the right to redeem or to recover possession accrues." In *Burrel* v. *The Earl of Egremont* [1] there was a charge upon an estate which no assignable person was liable to pay in respect of which no person was capable of making an acknowledgment that it was due. In this case the right to redeem the mortgage of the 2nd January 1842 accrued to the mortgagors the moment the mortgage was executed, and the 60 years' period of limitation must be computed as having begun on the 3rd January 1842. There is nothing in Act XV of 1877 which would justify this Board in holding that once that period of limitation had begun to run in this case, it could be suspended. Their Lordships consider that if they were to hold that, by reason of the fusion of interests between 1883 and 1898, the period of limitation was suspended they would—this not being a suit to which the proviso to S. 9 of Act XV of 1877 applies—be deciding contrary to the express enactment of that section " that when once time has begun to run, no subsequent disability or inability to sue stops it."

At the hearing of this appeal two other contentions, each of which involved the consideration of facts and of law as applied to these facts, were raised. Neither of those contentions, so far as appears from the record which is before this Board, had previously been raised by any one at any stage of this suit either in the Court of first instance or on either of the appeals, and consequently had not been considered either by the Subordinate Judge or the District Judge or the learned Judges of the High Court. Further, neither, of these contentions is even suggested by any of the grounds of appeal which were set out in Lala Soni Ram's application to the

1. (1899) 49 E. R. 1093. s. c. 7 Beav. 205.

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High Court for leave to appeal to His Majesty in council, nor is either of them suggested in the reasons contained in the case for the appellant here, and it must be remembered that this appeal has been heard *ex parte*, neither the respondents nor any counsel on their behalf having appeared. Their Lordships are not disposed to depart from the established practice of this Board not to allow on appeals to His Majesty in Council new cases to be made which were not made below.

The result is that their Lordships will humbly advise His Majesty that this appeal should be dismissed, and the decree of the High Court should be affirmed.

Solicitor for Appellant:—*Edward Dalagado.*

The Respondents did not appear.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present:—Lord Atkinson, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Tekait Krishna Prasad Singh ... *Appellant**

v.

Moti Chand ... ... *Respondent.*

C.P.C. (Act XIV of 1882) Ss. 2, 311, 312, 588, 594, 595—Orders setting aside sale under Ss. 311 and 312—Orders in appeal against—Appealability of—Irregularities—Gross undervaluation and irregular service—Natural guardian—Competency to act—Court of Wards taking charge of other properties—Court guardian refusing to act on transfer of decree—Opinion as to value—Admissibility of.

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The definition of "decree" in S. 2 C.P.C. is not applicable to S. 595 where S. 594 provides that the expression "decree" includes "also judgment and order." Consequently orders declared final by S. 588 may nevertheless be appealed against to the King in Council under S. 595.

Where, therefore, the High Court reversed the order of the court below setting aside a sale under Ss. 311 and 312,

Held: an appeal lay to His Majesty under that section.

Where it appeared that while the order for proclamation of sale directed that the sale proclamation should be served on each of the 109 mauzas by announcement to the public with beat of drum and that a copy of the proclamation should be fixed at a conspicuous place on each property, the proclamation was in fact read out without beat of drum in one only of the mauzas and the copy of the proclamation was affixed to a tree in that village alone, and it

*Appeal No. 57 of 1912. 6th March 1913.

further appeared that the schedule of property attached to the proclamation did not contain a statement of the incumbrances to which the property was liable and it also appeared that the decree holder had fraudulently procured the insertion of Rs. 2000 as the value of the property when the property was really worth 2 lacs for the purpose of making possible a purchase by him at this low figure (the permission to bid which he obtained from the Court having been subject to the condition that the sale should not take place below the estimated value) and at the sale no bidder was present except the decree holder and the Collector and the property was knocked down to the former for Rs. 2020, the Government bid being for 2000, the amount of tax due from the property notice of none of the proceedings in the attachment having been served at any time on any person representing the infant representative of the judgment-debtor who died pending attachment.

Held: the matters above referred to constituted material irregularities in the publishing and conducting of the sale and the judgment-debtor having sustained substantial injury the sale ought to be set aside.

Held further: Application to set aside the sale made by the natural guardian when the interests of the infant, were not in fact represented by the Court of Wards who had at the time taken charge of the other properties of the minor but had not decided to take charge of this property (which they also ultimately declined to take charge) and the Court Nazir who had acted as guardian *adlitem* in the suit for the minor had refused to act for him when the decree was transferred for execution to another Court which held the sale, was competent and could not be objected to.

Where a letter written in the course of certain negotiations for a compromise contained statements by some official of the Court of Wards that he was not prepared to advise that a sum of Rs. 9000 should be paid to get rid of the sale unless the estate was wound up with the assistance of the Encumbered Estates Act.

Held, the statement would not be evidence as to the value of the estate unless the writer was called and his source of information disclosed.

Appeal from the decree of the High Court, dated the 18th May of 1908, reversing an order of the Deputy Commissioner of Hazaribagh, dated the 16th February 1906, setting aside the sale of an impartible *Zamindari* descending by primogeniture.

De Gruyther, K. C. and *Eddis* for Appellant.

Sir E. Richards. K. C. and *Grey* for Respondent.

Their Lordships' judgment was delivered by

Lord Moulton:—This is an appeal from an order of the High Court of Judicature of Fort William in Bengal, dated the 18th May 1908, reversing an order of the Deputy Commissioner of Hazaribagh, dated the 16th February 1906, which set aside the sale of a property known as Gadi Sandey, which is an impartible *Zamindari*, descending by primogeniture situated in that district.

The prolonged legal proceedings in relation to this matter give rise to many important questions of law, but in the view taken by

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their Lordships as to the rights of the parties, it will not be necessary to decide more than one or two of such questions. To appreciate the points necessary to be so decided, it will be convenient to state first the facts of the case so far as they relate to the sale and then to deal with the legal proceedings that have been taken with regard to it.

The property originally belonged to the father of the infant appellant, against whom the respondent on the 27th November 1900, obtained a decree in the court of the Subordinate Judge of Benares for Rs. 6,599-9-6 and costs. Two years later this decree was transferred for execution to the Court of the Deputy Commissioner of Hazaribagh and the respondent applied to that court for execution of the same by attachment and sale of the property. While these proceedings were going on the appellant's father died. The respondent continued the attachment proceedings and on the 28th October 1903 applied for and obtained the issue of a sale proclamation fixing the sale for the 2nd January 1904. It does not appear that notice of any of the proceedings in the attachment was served on any person representing the infant.

The property consisted of 109 *mauzahs* or villages and the order for the proclamation of sale directed that the sale proclamation should be served on each of the *mauzahs* by announcement to the public with beat of drum, and that a copy of the sale proclamation should be fixed at a conspicuous place on each property What was actually done was as follows. The proclamation was read out without beat of drum in one only of the mauzahs, and the proclamation affixed to a tree in that village alone. The evidence as to this is perfectly clear and it shows not only that no drum was beaten, but that in the record of the proclamation it was originally so stated. That record has subsequently been altered—evidently fraudulently—to make it appear that it was done with beat of drum.

In addition to these serious irregularities, there is another, which, as it appears on the documents, their Lordships consider that they are entitled and bound to notice. The schedule of the property attached to the proclamation ought to have contained the particulars set out in S. 287 of the Code of Civil Procedure, 1882. As a matter of fact, it contained no statement of the encumbrances to which the property was liable. It stated the annual income to be Rs. 4,953—7—3, and then stated the value as being Rs. 2,000. To this last matter their Lordships attach importance, because the permission to bid which the decree-holder

obtained from the Court was subject to the condition that the sale should not take place below the estimated value, and inasmuch as their Lordships are of opinion on the evidence that this was a gross undervaluation, their Lordships cannot doubt but that the decree-holder had procured the insertion of this valuation (which corresponded to the amount due to the Government in respect of unpaid taxes, etc.) for the purpose of making possible a purchase by him at this low figure.

What happened on the occasion of the sale is what might have been expected. With the exception of the Collector and the decree-holder no bidder was present The Government bidding was Rs. 2,000, the amount due for taxes, etc., from the property. The decree-holder then bid Rs. 2,020 and the property was, of course, knocked down to him.

Their Lordships have no doubt whatever that the matters above referred to constitute material irregularities in the publishing and conducting the sale within the meaning of S. 311 of the Code of Civil Procedure, 1882. There is abundant evidence that the infant—appellant sustained substantial injury through such irregularities. The evidence of Moulvi Syed Ejabat Hossain, who was a manager under the Court of Wards, and who had occasion to examine into the property shortly subsequent to the sale, shows that in his opinion the property was sufficiently valuable to pay all the debts due to the judgment-creditors. At a later stage of the proceedings it became necessary to ascertain the value of the property and the amount of the encumbrances thereon, and the court referred the matter to a special rèferee. He heard evidence on both sides and reported that the property was worth more than two lacs of rupees after allowing for all the incumbrances. Against this evidence nothing has been cited to show that the valuation on the sale proclamation was a fair one or that the price obtained was adequate. It is true that Counsel for the respondent called their Lordships' attention to a letter written in the course of certain negotiations for a compromise, in which it would appear that some official of the Court of Wards was not prepared to advise that a sum of Rs. 9,000 should be paid to get rid of the sale, unless the estate (which was, no doubt, heavily encumbered) could be wound-up with the assistance of the Encumbered Estates Act. But the statements in such letter, even if they supported the contention of the respondent, would not be evidence unless the writer were called and his source of information disclosed. As it stands it is merely an expression of opinion by a person who, presumably, had no personal knowledge of

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the matter, and this can have no evidential value. Even if accepted it would point to the property being of a value of more than four times the sum which the decree-holder paid for it under the sale in question.

The above facts establish a clear case for setting aside the sale. The sole question, therefore, is whether the legal proceedings for setting aside the sale have been regular, so that their Lordships have jurisdiction to give the relief prayed for in this appeal.

For the purposes of this part of the case it will be necessary to give in some detail an account of the legal proceedings that have taken place in the matter. The original action was in the Court of Subordinate Judge of Benares. In 1903 the suit was remitted to the Court of the Deputy Commissioner at Hazaribagh for the purpose of execution, and on the 11th June 1903, he issued an attachment order against the property. The decree-holder applied for the issue of a sale proclamation which for some reason was ineffective. A fresh sale proclamation was then applied for which was directed to issue fixing the 1st September for the sale. The report relating to the service of this sale proclamation was submitted on the 6th August. In the meantime the judgment-debtor had died on the 27th July 1903. At that date an order had been made for the issue of a sale proclamation for sale on the 1st September, but the sale proclamation had not been served. On the 30th July the decree-holder applied for the issue of notice on the heir of the deceased judgment-debtor, and the record states that an order was made for that issue but there is nothing to show that anything was done under it. It is probable that the decree-holder tried to effect service on the Nazir of the Court of Benares, but that the latter refused to accept it. The sale could not be held under the sale proclamation of the 27th July 1903, and the decree-holder applied for the issue of a fresh one on the 7th September and obtained the issue of a sale proclamation fixing the sale for the 2nd November. The service of this sale proclamation was however, irregular and on the 28th October he applied for and obtained one fixing the sale for the second January 1904. Subsequently, he obtained permission to bid at the sale, but such permission was coupled with the condition that the sale should not take place below the estimated price. This permission was only obtained on the day of the sale, and on that day he purchased the property for Rs. 2,020.

It would appear that the whole of the proceedings subsequent to the death of the original judgment-debtor were without notice to any one representing the infant. It is true that in the original

proceedings in the local Court of Benares, in the life time of his father, he and three other minors were added as defendants, and the Nazir of that court was appointed *proforma* guardian to them for the purposes of the suit. When, however, the proceedings were transferred to the Court of the Deputy Commissioner of Hazaribagh, it was obviously impossible for him to act in this capacity, and he refused so to do. From and after the death of the judgment-debtor and down to the time of the actual sale, there was, therefore, no effective representative of the infant heir. On the day of the sale Narayan Kumari, the mother of the infant applied for a postponement, but it was refused, and on the 26th January 1904, she, as the natural guardian of the infant and on his behalf, presented a petition for setting uside the sale, alleging adequate grounds for so doing. The proceedings on this petition continued for some months. At this date, the Court of Wards had taken possession of some portion of the infant's property (but not of Gadi Gandey), and the mother of the infant tried to induce them to intervene with regard to the sale. This led to proceedings in the Court which are difficult to understand. The Deputy Commissioner appears to have provisionally invited the manager of another portion of the infant's property to appear and file objections to the sale of Gady Gandey, and for sometime it was doubtful whether or not the Court of Wards would take charge of that property, and, if so, whether they would intervene in the legal proceedings, or would take steps to bring about a compromise with the decree-holder. But all this ultimately came to nothing, and on the 5th December 1904, finding that the Court of Wards did not appear at the hearing fixed for that date, the Deputy Commissioner made an order confirming the sale.

The mother of the infant who had presented the petition only learnt of the making of this order after the event. She was in ignorance that the Court of Wards had declined to interfere in the matter.

On learning what had happened she presented a petition for a review of the order confirming the sale and praying to have it set aside. After protracted proceedings, for the purpose chiefly of taking the necessary evidence, the Deputy Commissioner on the 16th February 1906 allowed the prayer of the petition having previously decided that sufficient cause had been shown to justify the delay in presenting it. From this decision an appeal was brought to the High Court of Judicature at Fort William. That Court set aside

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the decision of the Deputy Commissioner and from that decision the present appeal is brought.

The first contention against the competency of this appeal is based on the provisions of Chapter XLV of the Code of Civil Procedure, 1882, which was in force at the date of the appeal. This chapter regulates appeals to the King in Council. S. 594 provides that in that chapter the expression "decree" includes also "judgment" and "order" unless there be something repugnant in the subject or context. But it is argued that orders for confirming or setting aside a sale made under Ss. 311 and 312 are nevertheless excluded from the expression "decree" in this chapter, because they are included in the orders mentioned in S. 588. The reasoning is as follows:—In the definition of "decree" in S. 2 "orders" specified in S. 588 are not included in the word "decree." Moreover S. 588 provides that "the orders passed in appeal under this section shall be final." It is, therefore, contended that it would be repugnant to give to the word "decree" in chapter XLV a meaning which would include "orders" under S. 588. "Orders" setting aside or refusing to set aside sales of immoveable property are, therefore, not appealable to the King in Council.

Their Lordships are unable to accept this contention. The Code in express terms adopts for the purposes of Chapter XLV a definition of "decree" which is special and differs from the meaning that it bears elsewhere in the Act. The definition of "decree" in S. 2 is, therefore, not applicable and the word "decree" in this chapter must be read as equivalent to "decree" judgment or order." As so read there is no difficulty in construing S. 595, which determines when an appeal lies to the king in Council. If this substitution be made it is evident that final orders may be appealed against, and therefore the provision at the end of S. 588 providing that orders passed in appeal under that section shall be final cannot restrict the provision that appeals may be brought to the King in council from them. It should be added that appeals of this nature have frequently been heard by this Board in times past, so that the consistent practice of the Board is at variance with this contention of the respondent Moreover no reason can be given why orders of so important a character as those made under Ss. 311 and 312, which deal finally with the rights of parties, should be excluded from the privilege of an appeal.

But the main contention of the respondent was to the effect that the mother of the infant could not represent him in these

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proceedings. It is so obvious that the Nazir of the Local Court of Benares did not in fact represent the infant during any portion of the proceedings in the Court of Hazaribagh that neither before their Lordships nor in the courts below was there any substantial contention that he continued to represent the infant after the removal of the proceedings to that court. But it was contended that the only representative of the infant at the time of the sale and subsequently was the Court of Wards. It appears that on the 23rd December 1903 the Court of Wards made an order taking over the management of some part of the property of the infant. That order is not in evidence, and there is nothing in the record which enables their Lordships to ascertain its terms, but it is clear that the court of Wards did not in fact take over Gadi Gandey at any time. There are concurrent findings to this effect in the Court below and their Lordships have independently arrived at the same conclusion. Their Lordships are, therefore, of opinion that inasmuch as the interests of the infant with regard to this property were not in fact represented by the Court of Wards it was open to the mother as natural guardian to appear in the name of the infant to protect this property from sale, and that it was the only way of preventing his interest with regard thereto being sacrificed. The proceedings taken by her were, therefore, in order and the appeal from them is properly before their Lordships.

Their Lordships will, therefore, humbly advise His Majesty that the appeal be allowed and the order of the High Court be discharged with costs and the order of the Deputy Commissioner restored and that the respondent be ordered to pay the costs of this appeal.

Solicitors for Appellant:—*Messrs. Dollimore, Quilbrow & Co.*

Sclicitors for Respondents:—*Messrs. Watkins* and *Hunter.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Present :—Lord Shaw, Lord Moulton, Sir John Edge, and Mr. Ameer Ali.

Raja Debi Bakhsh Singh ... ... *Appellant.**

v

Habib Shah ... ... *Respondent.*

Procedure—Inherent power of Court—Mistake of Court inadvertently made—Power to rectify—C. P. C. S. 151—" Abuse of process"—C. P. C. order 9 —Inapplicability of, to deceased person—Dismissal for default—Principle of —Punishment—Death of plaintiff unknown—Power to restore suit on application by representative.

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Rules and orders dealing with the case of the non-appearance of a suitor are inapplicable to the situation which arises when the suitor is deed. The principle of forfeiture of right in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default and can have no application to a dead person who cannot be said to commit default by not appearing.

When a suit was called on for hearing plaintiff was not present and the suit was accordingly dismissed for default. At the time the plaintiff was dead, a fact not known to the Court. Subsequently within six months of the death (the period limited by art. 176 of the Limitation Act, V of 1908), application was made by the plaintiff's son under O. 22 r. 9 to have his name substituted in place of his deceased father. The Court granted the application and directed the suit to proceed.

Held:—In view of the death of the plaintiff subsequently made known to the Court, the order of dismissal for default was wrong and to prevent an abuse of the process of the Court had ample power both under S. 151 C.P.C. and under its inherent powers to set the matter right.

Quite apart from S. 151 C. P. C. Courts have inherent power to rectify mistakes inadvertently committed by them.

Appeal from a judgment and a decree of the Court of the Judicial Commissioner of Oudh, affirming on review a Judgment and Decree, which had reversed an order of the Court of the Deputy Commissioner of Bahraich.

Messrs. De Gruyther, K. C., and *Kyffin*, for Appellant.

Respondent unrepresented.

Their Lordships' judgment was delivered by

Lord Shaw :—The Appellant's father, Raja Muneshar Bakhsh Singh, instituted a suit against the Respondent for payment of sums amounting to Rs. 15,908. The plaint was filed on the 3rd May 1911, in the Court of the Deputy Commissioner of Bahraich. The respondent filed his written statement on the 31st May

*29th April 1913.

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1911. On the 4th July the following occurred before the Deputy Commissioner:—" On the case being called to-day the Plaintiff was not present. I, therefore, dismiss the claim. Costs upon plaintiff."

The fact unknown to the Deputy Commissioner, was that the plaintiff was dead. He had died about a fortnight before, namely, on the 21st June. It is plain to their Lordships that, upon this being pointed out, it was the duty of the Deputy Commissioner to rectify the situation. This duty Mr. Clarke, the Deputy Commissioner, seems fully to have recognised. It requires no words of their Lordships to show the inapplicability of Rules or Orders dealing with the case of the non-appearance of a suitor to the situation which arises when the suitor is dead. The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default, but the punishment of the dead, or the ranking of death, under the category of default, does not seem to be very stateable.

The deceased plaintiff's son took the proper steps to have his name substituted in place of his deceased father under order XXII, rule 9, of the Civil Procedure Code. He did so on the 3rd August, which was well within the period of six months' limitation under Article 176 of the first Schedule of the Indian Limitation Act 1908. Some question arose as to the application being timebarred, but the latter was very properly accepted by Mr. Clarke. The appellant had also taken the proper steps to have a report of his succession made under S. 34 of the Rent Act.

On the 11th September 1911 the Deputy Commissioner pronounced the following order:—" The case was dismissed as no one appeared on the previous hearing. This was due to the death of the Rajah of Mallanpur. The other side claim that the re-hearing is barred under S. 34 of the Rent Act, but that Section clearly requires a report of the succession, which has already been made. It is argued that the application is timebarred, but it was filed and accepted under my order within time. But I cannot allow any technicality to obscure the fact that the case was only not heard because of the calamity which prevented applicant's putting up this case. Under these circumstances, I accept this application, and fix 27th October for hearing of issues, if necessary, and proof."

The order by the Deputy Commissioner is so manifestly sensible and correct that their Lordships are of opinion that it ought to be reverted to, and the case proceeded with accordingly on the 5th December 1911, however, the Judicial Commissioner of Oudh

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reversed the Deputy Commissioner's order, and on the 20th February 1912, on review, that judgment was affirmed. In their Lordships' opinion these judgments cannot stand, being vitiated by applying to a dead man orders and rules applicable to a defaulter By the Code of Civil Procedure, S. 151, it is provided that " nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court". In their Lordships' opinion such abuse has occurred by the course adopted in the Court of the Judicial Commissioner. Quite apart from S. 151, any Court might have rightly considered itself, to possess an inherent power to rectify the mistake which had been inadvertently made. But S. 151, could never be invoked in a case clearer than the present, and their Lordships are at a loss to understand why, apart from points of procedure and otherwise, it was not taken advantage of.

Their Lordships have humbly advised His Majesty that the appeal be allowed, the order appealed from set aside and the order of the Deputy Commissioner of the 11th September 1911 restored, and that the appellant be found entitled to the costs of the proceedings since the 3rd August 1911. in India, and to the costs of this appeal. The suit will be remitted to India to be disposed of on the merits.

Solicitors for Appellant :—*Messrs. T. L. Wilson & Co.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the Madras High Court].

Present :—Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Ganesh Row ... ... *Appellant.**

v

Tulja Rama Row ... ... *Respondent.**

Ganesh Row v. Tulja Rama Row.

C. P. C. S. 462 Act XIV. of 1882.—Manager or father, guardian for the suit—Compromise without leave—Incompetent.

Where the father or managing member of a joint Hindu family is himself the next friend or guardian *ad litem* of a minor co-parcener his powers as such father or managing member are controlled by the provisions of S. 462 C. P. C. and he cannot do any act in his capacity as father or managing member which he is debarred from doing as next friend or guardian without leave of the Court.

* 8th April 1913.

Ganesh Row
v.
Tulja
Rama Row.

In a suit for partition to which the plaintiff, his father and the defendant (members of a Hindu joint family) were parties, a decree was made making the defendant liable for Rs. 86,000 to plaintiff's father (as representing plaintiff's branch, though not expressly so stated). Pending appeal against the said decree by the defendant plaintiff's father acting for himself and for his minor son (the plaintiff) entered into an agreement with the defendant whereby on the latter consenting to withdraw his appeal he relinquished his claim to the amount. Leave of the Court had not been taten for the said agreement.

Held: that the satisfaction entered up by the father in pursuance of the said agreement was not binding on the plaintiff and that he was remitted to his rights under the decree.

That even if he had not expressly purported to act for the minor and had acted in his capacity as father, as he himself was the guardian for the suit he could not bind the minor by any compromise of his without obtaining the leave of the Court.

The question whether if the father or managing member is not himself the guardian or next friend, he would still be subject to the provisions of S. 462 left open.

Appeal from a judgment and decree of the High Court affirming that passed in its Original Side.

Messrs. De Gruyther, K. C. and *Brown* for Appellent.

Sir, E. Richards, K. C., and *Mr. Dunne for* Respondents.

Their Lordships' judgment was delivered by.

Mr. Ameer Ali :—This is an appeal from a judgment and decree of the High Court of Madras, dated the 28th of September 1909, which, affirming a decree made in the exercise of its Original Civil Jurisdiction on the 2nd of September 1908, dismissed the plaintiff's suit.

The facts which have given rise to the present action relate back to the year 1886. The defendants Tuljaram and Rajaram are two brothers, being the sons of one Venkata Row, who died in 1871. Tuljaram and Rajaram, with two other sons of Venkata Row named respectively Ramachandra Row, since deceased, and Luchmana Row, formed a joint undivided Hindu family. In 1881 there was a dissolution of the joint family and a partial division of the family property. A large proportion of the assets was, however, left undivided in the hands and under the control of Tuljaram, the first defendant, who seems to have been the managing member of the family in respect at least of the business or businesses in Madras.

In 1886 a suit was brought on the original side of the High Court of Madras by Atmaram, the son of Lutchmana Row, against Tuljaram for ascertainment of the remaining undivided family assets in his hands, for accounts and partition and other reliefs. This

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seems shortly to have been the general scope of the action instituted in 1886, in which Rajaram, the present plaintiff's father, and other surviving members of Venkata Row's family were parties. The plaintiff, Ganesha Row, who as not born at the time of the institution of the suit, was added as defendant on his birth in December 1887, and by an order dated the 20th November 1888, his father Rajaram was appointed his guardian *ad litem*.

On the 14th of January 1892 a preliminary decree was made declaring the rights of the parties and directing accounts against Tuljaram.

By the final decree made on the 21st of October 1896 and a subsequent order of the 17th of August 1897, he was declared accountable to the family for a considerable sum of money, the share of the plaintiff's branch in the total sum being, according to the High Court, about Rs. 86,000. Tuljaram appears to have filed an appeal from the final decree of the first Court, and during its pendency he entered into agreements with the adult parties to the suit by which they either abandoned their claims, as in the case of the plaintiff's father, or compromised them for smaller sums.

Rajaram's agreement, which is dated the 21st of November 1897, recites that he "acting for himself and as guardian for his minor son Venkat Row" (another name for the plaintiff) "with a view to terminate the litigation that had been going on in the family for the past eleven years and more, and to make an amicable settlement of all matters in dispute between the several members of the family" and in consideration of the defendant Tuljaram consenting to withdraw his appeal, Rajaram agreed to "relinquish and disclaim for himself and for his minor son Venkata Row" the several sums of money for which Tuljaram was found liable to Rajaram's branch, and "to release and discharge Tuljaram from all liability in respect thereof to himself and to his minor son Venkat Row." And on the 25th of November 1897, Rajaram "instructed the Registrar of the High Court to enter up satisfaction of the decree" in respect of the several sums which amounted in the aggregate to something like Rs. 86,000. Tuljaram also on his side withdrew the appeal he had preferred against the decree. Admittedly no leave was either applied for or obtained from the Court in regard either of the agreement or the entering up of satisfaction of the decree.

Matters remained in this condition until the plaintiff attained his majority. After some preliminary proceedings to which it is unnecessary to refer for the purposes of this judgment, he brought this suit on the 7th of November 1906 to recover from the defendant

Tuljaram on the basis of the decrees in the suit of 1886 a sum of Rs. 1,60,000 principal and interest.

Rajaram was also made a defendant in this action, and his acts relating to the agreement and the satisfaction entered under it were challenged as fraudulent, without consideration and not binding on the plaintiff, having been made without leave of the Court.

The learned judge on the original side of the High Court who tried the case was of opinion that the suit was not maintainable in view of the provisions of Section 244 of the Code of Civil Procedure. Treating it, however, as an application under that section he dealt with the matter on its merits.

He held that the compromise entered into by Rajaram was binding on the plaintiff, and that it was supported by consideration which consisted in the withdrawal by Tuljaram of his appeal. The principal ground of his judgment is to be found in the following passage :—

"In this case under the terms of the decree, the money in respect of which the agreement AA was arrived at and satisfaction entered up, was made payable to the third defendant personally and not to the minor sixth defendant. If the minor had been represented by another guardian *ad litem*, the third defendant could just as well have made the compromise and entered up satisfaction of the amount payable to him under the decree and it could not have been suggested that S. 462 was applicable to the case. It makes no difference in my opinion, that the third defendant happened to be the guardian *ad litem* of the sixth defendant because in making the compromise and entering up satisfaction he was not acting as guardian *ad litem* on behalf of the minor sixth defendant but as the third defendant in the suit."

The learned judge accordingly dismissed the plaintiff's suit, and his judgment has been affirmed on appeal by the High Court in its appellate jurisdiction. With regard to the invalidity of Rajaram's acts as affecting the plaintiff's rights, the learned judges in the appellate Court have taken the same view as the first Court, that Rajaram, in entering into the compromise, acted in his personal capacity, which they considered him competent to do as "his appointment as guardian *ad litem* would not deprive him of his capacity to act on his own behalf". They were further of opinion that "as the money was made payable to him only as the representative of the family of which he is the head, the compromise he entered into will be binding on the other members, including the plaintiff, only if it is a *bonafide* compromise of a disputed claim."

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It seems to their Lordships that there is a fallacy underlying the reasoning on which the Courts below have proceeded. No doubt a father or managing member of a joint Hindu family may, under certain circumstances and subject to certain conditions, enter into agreements which may be binding on the minor members of the family. But where a minor is party to a suit and a next friend or guardian has been appointed to look after the rights and interests of the infant in and concerning the suit, the acts of such next friend or guardian are subject to the control of the Court. S. 462 of the Code of Civil Procedure expressly provides that "No next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian."

The Courts in India seem to think that because Rajaram was a party to the suit of 1886 and was also guardian *ad litem* for his minor son, who was a member of the joint family whom Rajaram was representing, it was open to him to enter into the compromise in his personal capacity, and as it was a *bona fide* settlement of a disputed claim, it became binding on the minor by virtue of his having acted as the managing member of the family. How far the acts of a father or managing member may affect a minor, who is a party to the suit represented by another person as next friend or guardian *ad litem*, is a question which does not arise in the case, and their Lordships are not called upon to express an opinion on it. But they consider it to be clear that when he himself is the next friend or guardian of the minor his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment.

The learned judges, however, seem to have lost sight of the facts that the agreement, which is challenged in this case, was entered into by Rajaram not only on his own behalf but also on behalf of his minor son, for whom he was guardian in the suit. Their Lordships are of opinion that, in view of the provisions of S. 462, he had no authority to enter into any compromise or agreement purporting to bind the minor.

In their Lordships' Judgment the fact that the monies were made payable to Rajaram, who was admittedly representing his branch of the family, makes no difference in the duty which lay on him to obtain the leave of the Court to an agreement which was clearly intended to affect the rights and interests of his son.

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Their Lordships are of opinion that there should be a delearation in this case that the agreement of the 21st November 1897 and the satisfaction entered thereunder are not binding on the plaintiff and that he is remitted to his original rights under the decrees in the suit of 1886.

Their Lordships will, therefore, humbly advise His Majesty that the decree and judgment of the High Court should be set aside, that a declaration should be made in the terms stated, and that the case should be returned to the High Court to deal with the other questions covered by issues Nos. 6 and 7 arising between parties.

The respondent, Tuljaram, will pay the costs of the appeal to the High Court in its appellate Jurisdiction and the costs of the appeal. The costs of the trial on the original side of the High Court and those which will be incurred in the future proceedings will abide the result of those proceedings.

Solicitor for Appellant :—*Mr. Douglas Grant.*

Solicitor for Respondent :—*Mr. John Josselyn.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Sadasiva Aiyer.

J. Subba Row ... ... *Appellant in both cases.*

v.

J. Rama Row and another ... *Respondents.*

Subba Row v. Rama Row

Pensions Act (XXIII of 1871) S. 6—Certificate of Collector to sue—Cancellation by Board of Revenue—Leave to sue to establish annual payment from the Jaghir—Construction—Rules issued by Government—Board's standing Order—Ultra vires—Presumption of regularity of official acts—Application of.

The Board of Revenue has no power to revoke a certificate issued by the Collector under Section 6 of the Pensions Act.

Gotghandi v. *Bhikambhat*[1] followed.

Where a certificate was in these terms viz. "R is authorised to file a suit to establish the annual payment due to him from the net income of the Jaghir".

Held that the certificate authorised the plaintiff to institute a suit to declare his share in the profits but that it did not authorise a suit for the recovery of arrears or for accounts.

Per *Sadasiva Aiyar* J.—S. 14 relates to the framing of rules or bye-laws in connection with mere formalities of procedure and does not give the Government power to control the discretion of the Collector under S. 10 to issue a certificate.

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* A. No. S. 79 and 184 of 1910. 6th January 1913.

1. (1899) I. L. R. 23 B. 676.

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Held, accordingly, that the rules issued by the Government and printed at p. 125 of the Board's Standing Orders are *ultra vires* of the Government.

Held also that the said rules cannot be considered as framed by the Board with the consent of the Government.

In the absence of a statement in the rules themselves to that effect and in the absence of any words in the section that the rules should be issued by the Government after they consent to the rules framed by the Board there is no scope for inferring by the application of the presumption that all official acts have been done in accordance with law that the rules were issued by the Board with the consent of the Government under S. 15 of the Act.

Appeals against the preliminary of final decrees of the Court of the Subordinate Judge of Bellary in O. S, No. 17 of 1908.

A. *Krishnaswami Aiyar* for Appellant.

L. A. Govindaraghava Aiyar for Respondent.

The Court delivered the following

Judgment :—*Miller* J :—The plaintiff claimed in the suit out of which this appeal arises one-half of the income of the Jaghir which, it is admitted, is a pension within the meaning of the Pensions Act. The first question to be determined is whether the certificate by the Collector justifies the Court in entertaining the claim of the plaintiff and making the decree it has made. The certificate Exhibit G is in the following terms. "Jangamakoti Rama Rao...is authorized to file a civil suit to establish the annual payment due to him from the net income of the Jaghir." The certificate is granted in accordance with the orders of the Government contained in G. O. No. 668 Revenue dated 18—8—03. The appellant contends first that the certificate is to be considered as authorizing only a suit for maintenance and that "payment due to the plaintiff from the net income" means the allowance which the first defendant as the manager of the Jaghir ought to have given him when he was managing it and that it does not justify the court in entertaining a claim for a certain share of the profits of the Jaghir. The contention is that as in this certificate the Government order is referred to, the terms of that Government order ought to be read into the certificate. If we do so, we must take it, having before us the Government order and the recommendation of the Collector on which it was made. That it authorised in 1890 a certificate to file a suit for maintenance; that is what the Collector recommended. As a matter of construction, I do not think that contention can be allowed. The words "the certificate is granted in accordance with the orders of Government" cannot, I think, mean that we ought to read the words "annual payments" as meaning

Subba Row v. Rama Row.

Miller J.

"annual payments as defined by the Collector's letter which is accepted by the Government." I take it that "granted in accordance with the Government order" properly means "I am by that order to which I refer authorised to issue a certificate to this person and I issue it accordingly," and that "annual payments due to him from the net income of the Jaghir" meant, and must be taken, as the words stand, to mean either a share in the profits or an allowance for maintenance; the words are certainly capable of both meanings. The question then arises assuming that the Court is right in holding that on that certificate the plaintiff is entitled to sue to establish his share, whether having regard to the Government order, the Collector had any power to issue a certificate which would have that effect. The order of the Government is found in Exhibit II and is merely to the effect that "the Board's recommendation in paragraph 5 of its proceedings is approved." The Board's recommendation in paragraph 5 of its proceedings is "The Collector recommends that Rama Rao may be allowed to sue the managing member for his maintenance allowance for two years." And the Collector's recommendation was that he should "be allowed to sue for his maintenance for two years and to have it fixed for the future" and the Collector's certificate as I understand it, merely allows the plaintiff to sue for a declaration as to how much should annually be paid to him out of the net profits of that estate. Whether that is strictly authorized by the G. O. or not, is, I think doubtful. Reading Ex. II along with Ex. I and Ex. E (which refers to a fair division of the collection, it seems to me that the Government never considered the question from any point of view except this, that the Jaghir was not to be divided, there was to be no dual control in respect of the management and consequently it is difficult to say that the Government when it accepted the recommendation that the plaintiff should be allowed to sue for maintenance—would not have accepted as within that recommendation this suit in which the plaintiff claims only a share of the net profits from the Manager of the Jaghir. The family we are given to understand is a divided family: it is so stated in the plaint, and it is divided in respect of all of its possessions except the Jaghir. Consequently it seems unlikely that the Government really contemplated that the Jaghir should be treated on the footing of an undivided family property, the manager distributing maintenance and utilizing the remainder for family purposes. So I am not prepared to say in the circumstances of the case that though the recommendation on which the Government order is based in terms authorises

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only a suit for a maintenance, the Collector might not have without departing from the true intent of the G. O. authorized a suit to have it declared; at any rate as between the first defendant and the plaintiff, how the profits of the Jaghir are to be distributed by the 1st defendant. In one respect however the Collector's certificate does not, as I understand it, go so far as was intended by Government. It does not permit the Court to entertain a claim for the recovery of anything. It authorizes the Court to establish, that is, to declare formally what is the share of the profits to which the plaintiff is in law entitled and does not authorize or purport to authorize any claim to past accounts or to the collection of arrears or to the recovery of anything. I admit I have taken with some hesitation, the view that the certificate is covered by the Government order. But finding myself able to take that view and to hold that the Government by the word maintenance did not intend to restrict the certificate further then to see that the Jaghir was not divided I do not think it necessary to decide whether the rule published in the Board's Standing Orders p. 124 is or is not within the competence of the Government. The result of the view I have taken on this preliminary matter is that the Collector's certificate justifies the Court in deciding what share of the profits of the Jaghir the plaintiff is entitled to and in making a decree declaring the extent of that share.

Then, it is said that the suit is barred by limitation, because the plaintiff's claim to a share in the income of the *Jagir* was refused by the 1st defendant more than 12 years before the suit. The reply to that is this, that there was an agreement between the plaintiff and the 1st defendant that the latter should be allowed to retain possession of and manage the *jaghir* unmolested until the family debts were discharged. The proof of that arrangement rests mostly upon the oral evidence and we have not been asked to believe the evidence of the 8th witness for the plaintiff, one Mr. Seshagiri Rao. His evidenee proves that there was an agreement of the kind, though it may be, it does not go so far as the plaintiff alleges. This witness does not say whether there was an actual agreement as to what was to be done after the debts had been paid. But he does say, I think without doubt, that there was agreement between these two parties that there should be no quarrel about the *jaghir* until the debts had been paid off, that the defendant was to remain in possession and management, and the 1st defendant, he says, consented to this and whenever he went to the village he learnt that the parties were acting up to his advice. Therefore, I think that for that period, that is, a period up to a point within 12 years before

the suit, at any rate the first defendant was in possession by virtue of an agreement with the plaintiff that there should be no contest about the *jaghir* until the debts were paid off. And, consequently this suit for declaration being brought within 12 years from the date the debts were discharged (that is not disputed) is not barred by limitation. These are the two principal questions in the case. But, further, on behalf of the appellant it is suggested that by the documents which are marked Exhibit V series the Board of Revenue cancelled the Collector's certificate Exhibit G, and substituted another for it and that being so, the certificate on which the Court has acted must be held to be no longer valid. The decision in *Bhimbhat Gotkhandi* v. *Bhikambhat*[1] which was brought to our notice by Mr. Krishnasami Iyer, is, he admits, against him. And there is certainly nothing either in any rule or in the Pensions Act itself to suggest that a certificate once given by the Collector can be cancelled by the Chief controlling Revenue authority. It is said that it is within the general powers of supervision of the Board of Revenue to control the issue of the certificate, but there is nothing to support that, and it is perhaps unlikely, at any rate, that the Board of Revenue should be given the power to cancel a certificate which, according to their Standing Order, can only be given with the sanction of the Local Government. Certainly there is nothing in the Act to suggest this power. Therefore, it seems to me that Exhibit V (c) should not be taken to cancel Exhibit G. and we do not know, as a matter of fact, from the papers filed in the case, whether the Board directed the Collector to withdraw Exhibit G. and substitute Exhibit V (c) or what the terms of the order sent down to him are. I think, therefore, that, both as regards the fact and as regards the law, it is not shown that Exhibit G. has been withdrawn by the Board of Revenue or superseded. The result will be that this appeal will have to be dismissed; but the decree will have to be modified by striking out so much of it as relates to claims which are not authorised by the certificate.

APPEAL NO. 184 OF 1910.

This is an appeal from the final decree in the same matter. This decree will have to be modified to the extent that anything more than the declaration of the plaintiff's right to part of the net income will be struck out and the appeal will be allowed to that extent.

As regards costs, I think, that the plaintiff should be allowed half his costs in the lower court and each party should bear his own costs in this Court.

1. (1899) I. L. R. 23 B. 676.

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APPEALS NOS. 79 AND 184 OF 1910.

Sadasiva Aiyar, J.—As regards the Certificate, Exhibit G, I agree in thinking that it only authorizes a suit for a declaration of the amount which the plaintiff is entitled to get out of the net income of the *Jaghir* annually from the 1st defendant and does not authorize a suit for the recovery of arrears or for accounts or for the appointment of a Receiver and the like reliefs contained in the plaint. As regards the Government's power to control the discretion given to the Collector by statute to issue a certificate, I do not think that S. 14 of the Pensions Act relating to the framing of rules or bye-laws in connection with mere "formalities of procedure", keeping of registers and records and such like matters authorizes either the Board of Revenue or the Government to reduce the Collector to the position of a mere clerk registering the orders of the Government in each particular case in which the Collector would have to excercise his statutory discretion under S. 6 of the Act whether to issue a certificate or not. I am also inclined to hold that the rules issued by Government and printed at page 125 of the Board's Standing Orders could not be considered as rules framed under S. 14, and they do not state that they were framed by the Board of Revenue with the consent of the Government. Of course, there is a presumption that all official acts have been done in accordance with the law, and if those rules declare that they were framed by the Board of Revenue under S. 14, we might presume that the consent of Government had also been obtained for the rules so framed. Or if S. 14 says that, after the Government has given its consent to the rules framed by the chief controlling Revenue Authority, that is, the Board of Revenue, they should be issued by the Government, then if the Government issues some rules, we might presume that they were framed by the Board of Revenue with the consent of the Government and issued according to the statute. But when S. 14 is silent as to the issuing of any rule by the Government, the mere recitation in the Board's Standing Orders that certain rules have been issued by the Government cannot raise a presumption that they were framed by the Board of Revenue with the consent of the Government. I am, therefore, inclined to hold that these rules are *ultra vires* and the Collector's certificate is valid without the sanction of the Government.

Then, as regards the question of the share which is due to the plaintiffs under the law I agree that he must be held entitled to half the net-income after deducting all usual charges.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Munro.

U. C. Krishna Bhatta. ... *Appellant—Plaintiff.**

v.

The Secretary of State for India in Council represented by the Collector of S. Canara. } *Respondent (Defendant.)*

South Canara—Ownership in bed of natural stream—Burden of proof—Ownership of land on both sides of the stream, dealing with bed as property, and slight diversion—Insufficiency of.

Krishna Bhatta *v.* Secretary of State for India.

In South Canara, the burden lies upon the person who alleges that the bed of a natural stream that passes through his land is his property to prove that it is so.

The circumstances relied upon, viz., that the plaintiff happened to have lands on both sides of the stream, that he had dealt with the bed of the stream as his property in documents to which the Government was not a party and that at a point in the stream outside his lands, there had been a slight diversion were held to be insufficient to establish his ownership.

Second appeal from the decree of the District Court of South Canara in A. S. No. 40 of 1907 presented against the decree of the District Munsif of Mangalore in O. S. No. 99 of 1905.

The facts of the case are these :—

Plaintiff sued for a declaration that plaint lands belonged to him and were not Government poramboke. He got a decree. The defendant appealed. Plaintiff claimed as his property the beds of 2 channels which passed through his lands and other people's from the hills where they rise to the river where they disappear. Government said the channel-beds were poramboke. The Judge dismissed the suit.

B. Sitarama Rao for Appellant.

The Government Pleader (C. F. Napier) for Respondent.

The Court delivered the following.

Judgment:—The burden is upon the plaintiff in this case to prove that the bed of the thodu is his property. The District judge has not referred to the evidence relied upon by the District Munsif in support of his finding in the plaintiff's favor, but we have considered that evidence and are clearly of opinion that it fails to make out the plaintiff's case. Admittedly the plaintiff has no grant from the Government nor has it been shown that he pays assessment on the bed of the thodu. We do not think it proved that the channel

*S. A. No. 1113 of 1908. 7th April 1910.

Krishna Bhatta v. Secretary of State for India.

is not a natural water-course, nor do we think the circumstances relied upon, viz., that the plaintiff happens to have lands on both sides of the thodu as his property in documents to which the Government was no party and that at a point in the thodu outside his lands there had been a slight diversion, are sufficient to establish his ownership.

The Second Appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar. and Mr. Justice Tyabji.

Kariadan Kumber ... *Appellant.** (*Plaintiff*).

v.

The British India Steam Navigation Company Limited, by agents Messrs. Aspinwall & Co. } *Respondent.* (*1st Defendant*).

Bill of lading—Cesser of liability clause—Construction—Carriers by sea for hire—Whether common carriers—Law applicable to them—Whether English Common law or the Indian Contract Act—Decision of the Privy Council in an appeal not from an Indian Court, if binding.

Kariadan Kumber v. The British India Steam Navigation Co., Ltd.

A bill of lading contained the following condition viz., "in all cases and under all circumstances, the liability of the company shall absolutely cease when the goods are free of the ship's tackle and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee." Goods were lost by the sinking of the boats in which they were put after being taken out of the ship and before they were delivered to the consignee. The cause of the sinking was that the boats were overloaded. In an action for damages for the loss of goods *Held*: that the defendant Company was protected by the cesser of liability clause in the bill of lading and that they were not liable.

Held further: that carriers by sea for hire are common carriers (to whom the Carriers Act, 1865 however, does not apply).

(2) That the English common law relating to carriers by sea applies to them and not the provisions of the Indian Contract Act relating to bailees.

(3) That the clause in the bill of lading absolving the defendants as soon as the goods were free of the ship's tackle protected the defendants from whatever happened afterwards whether it was negligent overloading by or fraudulent dishonesty of, the landing agents.

(4) That the clause excluded liability for unseaworthiness of the boats employed in landing the cargo.

The Chartered Bank of India Australia and China v. *The British India Steam Navigation Company*[1] followed.

Sheik Mahomed Rowther v. *B. I.S. N. Co., Ltd*[2] not followed.

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*S. A. No. 935 of 1912. 2nd May 1913.

1. (1909) A. C. 369.
2. (1908) I. L. R. 32 M. 95.

Kariadan Kumber v. The British India Steam Navigation Co., Ltd.

A decision of the Privy Council is binding on the Courts in India though delivered in an appeal not coming from an Indian Court.

Per Sadasiva Aiyar J : There is no implied warranty of seaworthiness for the lighters and boats employed by a ship to land its goods.

Cases relating to the question whether delivery into the owner's boat is equivalent to landing so as to terminate the assurer's liability (on a policy of marine insurance) have no relevancy on the liability of a ship owner who he has protected himself from all liability after the goods have left the ship's tackle.

Sparrow v. *Carruthers*[1] doubted. *Hurry* v. *Royal Exchange Assurance Co.*[2] referred to.

Second appeal against the decree of the District Court of South Malabar in appeal suit No. 203 of 1911, preferred against the decree of the Court of the Subordinate Judge of Cochin in original suit No. 34 of 1909.

T. V. Seshagiri Aiyar for Appellant.

M. O. Parthasarathi Aiyangar for Respondent

The court delivered the following

Judgments:—*Sadasiva Aiyar J.*—Though my learned brother has prepared a separate judgment dealing fully with the facts and the law, I thought that I should add a judgment of my own as the questions raised are important and as I am differing from the conclusions arrived at by the majority of the Full Bench in *Sheik Mahomed Ravuther* v. *The British India Steam Navigation Co. Ltd.*[3] The defendant in this case is the powerful company well known as the British India Steam Navigation Co. The legal questions we have to consider are:—

(*a*) whether they are common carriers,

(*b*) whether the English common law relating to carriers by sea applies to them or the provisions of the Indian Contract Act relating to bailees,

(*c*) if the English common law applies to them, whether the defendants are wholly absolved from liability for the loss caused by the negligence of their agents employed to carry in boats the goods of the plaintiff (consignee) from the mooring place of the steamer to the plaintiff's jetty in the port of Cochin, owing to the defendants' having protected themselves from liability from such loss by appropriate clauses in the Bill of Lading.

1. (1807) 93 E.R. 1153 s. c. 2 Strange 1236. 2. (1801) 126 E. R. 1367.
3. (1908) I. L. R. 32 M. 95.

Kariadan Kumber *v.* The British India Steam Navigation Co., Ltd.

Sadasiva Aiyar J.

(*d*) whether those general clauses could not legally absolve the defendants because the Bill of Lading did not contain an express provision declaring that defendants shall not be liable even if the boats procured by their agents to take the cargo from the steamer to the plaintiff's jetty were unseaworthy.

As regards the first question, the case of *Hajee Ismail Sait* v. *The Company of the Messageris Maritimes of France*[1], clearly decides that carriers by sea for hire are common carriers. The Carriers Act, 1865, does not, however, apply to them, as in that Act the term "common carriers" is confined to denoting "a person other than the Governnment engaged in transporting for hire property............. *by land or inland navigation*" and is not extended to carriers by sea. The next question is "are common carriers by sea governed by the English Common Law or by the Contract Act ?" In the Full Bench case of *Sheik Mahomad Ravuther* v. *The British India Steam Navigation Co.* Ltd.[2] the learned Chief Justice and *Wallis* J. evidently hold as unquestionable that, where the English Common Law and the Indian Contract Act differ, the former and not the latter applied to common carriers by sea. *Wallis*, J. referred (at page 108) to the argument of the appellant's learned vakil in that case, (Mr., now Mr. Justice, *Sundara Iyer*) that section 23 of the Indian Contract Act applied and that the clause in the Bill of Lading absolving the carriers by sea (the same British India Steam Navigation Co., who is the defendant in this case) from all liability arising from whatever cause, is opposed to public policy and hence is void under S. 23 of the Indian Contract Act. The learned Judge, however, did not accept this argument of the learned vakil and says at page 109 " As regards the second point, I am of opinion that it is not open to us to hold that contracts exempting a carrier from liability for the negligence of his servants are void as opposed to public policy. As pointed out by *Walton, J.*, in *Price and Co* v. *Union Lighterage Co*[3]., 'the law of England, unlike the law of the United States of America, does not forbid the carrier to exempt himself by contract from liability for the negligence of himself and his servants ; but if the carrier desires so to exempt himeslf, it requires that he shall do so in express, plain and unambiguous terms.' So far as the general question goes, this is the law which has been received and applied by the Indian Courts, (*Jellicoe* v. *The British India Steam Navigation Company*[4] and *Hajee Ismail Sait* v. *The Company*

1. (1905) I. L. R. 28 M. 400.
2. (1908) I. L. R. 32 M. 95.
3. (1903) 1 K. B. 750.
4. (1884) I. L. R. 10 C. 489.

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of the Messageries Maritimes of France[1]. Contracts have been made and business has been carried on for many years in India on this footing, and if the law is to be altered now it must be by the legislature." *White* C. J. says on this point at page 107 " Mr. *Sundara Aiyar* contended that a contract which purported to relieve a ship-owner from his liability as a carrier for negligence was contrary to public policy and should not be enforced. As pointed out by *Walton* J., in *Price & Co.*, v. *Union Lighterage Company*[2], the law of the United States of America forbids a carrier to exempt himself by contract from liability for negligence whilst the law of England does not. I am of opinion that on a question of this character courts in India ought to follow the law of England." Mr. Seshagiri Aiyar who argued the present appeal before us, contended that *White* C. J. and *Wallis* J. did not, in their judgments in *Sheik Mahomed Ravuthar* v. *The British India Steam Navigation Co. Ltd.*[3] consider the question whether the Indian Contract Act applied or not, but I am unable to accept this argument. It is no doubt true that *Sankaran Nair* J. in that case elaborately considered the provisions of the Contract Act, which he assumed to be applicable to common carriers by sea even when such provisions conflicted with the English common law (see page 121.). Mr. Seshagiri Aiyar invited us to refer this question to a Full Bench, as, though *White* C.J. and *Sankaran Nair* J. agreed in their ultimate conclusion in that case, they differed on this question of the applicability of the provisions of the Indian Contract Act and the agreement between the views of the Chief Justice and *Wallis* J. about the non-applicaability of the provisions of the Contract Act did not affect the result of that case, as the learned Chief Justice differed from *Wallis* J. also as to the result of applying the English Common Law. As I am myself always inclined not to travel beyond Indian cases and Indian Statutes unless I am convinced that they are clearly not applicable, I would have gladly referred the question of the applicability of the Contract Act, where it differs from the English Common Law, to a Full Bench, if I did not feel that I am concluded by the pronouncement of the Privy Council on this question. In *The Irrawady Flotilla Company* v. *Bugwandas*[4], their Lordships have clearly approved of the decision of the Full Bench in *Moothora Kant Shaw* v. *The India General Steam Navigation Co.*[5] and disapproved of the contrary decision in *Kuverji Tulsidas* v. *The Great Indian*

1. (1905) I. L. R. 28 M. 400.
2. (1903) 1 K. B. 750.
3. (1908) I. L. R. 32 M. 95.
4. (1891) I. L. R. 18 C. 620.
5. (1883) I. L. R. 10 C. 166.

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Peninsula Railway Company[1]. The effect of their Lordships' decision in *The Irrawady Flotilla Company* v. *Bagwandas*[2], seems to me to be "that the duties and liabilities of a common carrier are governed in India by the principles of the English Common Law on that subject" (except where they have been departed from in the case of some classes of common carriers by the Carriers Act of 1865 or by the Railway Acts of 1878 and 1890) and "that notwithstanding some general expressions in the chapter on Bailments, a common carrier's responsibility is not within the Indian Contract Act of 1872."

Taking it, then, that the English Common Law applies to the rights and liabilities of the defendant company, the Bill of Lading (Exhibit B B.) in this case contains the following two clauses;

1. "accidents, loss or damages from any *act, neglect or default whatsoever* of the pilot......*or other servants of the company excepted* and the company is to be at liberty to tranship the goods either on shore or afloat and reship or forward the same at the company's expense but *at shipper's or consignee's risk.*"

2. "In all cases and under all circumstances, the liability of the company shall absolutely cease when the goods are free of the ship's tackle and thereupon the goods shall be at the risk *for all purposes and in every respect of the shipper or consignee.*"

As regards these very wide clauses, *White* C. J. and *Sankaran Nair* J. held in *Sheik Mahomad Ravuther* v. *The British India Steam Navigation Co., Ltd.*[3], that they did not absolve the company from liability for loss occasioned by the negligence of their servants before delivery and after landing. *Wallis* J. held otherwise. (I might remark that Sir *S. Subramania Aiyar* J. and *Miller* J. similarly differed in the earlier stage of the same case, reported in *Sheik Mahomad Ravuther* v. *The British India Steam Navigation Co., Ltd.*[4] I am bound, of course, by the judgment of the majority unless it is opposed to a judgment of the Privy Council, not brought to the notice of the majority, or reported after the Full Bench decision. Such a judgment of the Privy Council, it seems to me, has been pronounced in *Chartered Bank of India, Australia and China* v. *British India Steam Navigation Co. Ltd.*.[5] The defendant in that case was this very same British India Steam Navigation Co. The bill of lading which had to be

1. (1878) I. L. R. 3 B. 109.
2. (1891) I. L. R. 18 C. 620.
3. (1908) I. L. R. 32 M. 95.
4. (1906) I. L. R. 30 M. 79.
5. (1909) A. C. 369.

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construed in that case contained this very same clause about the liability of the company ceasing absolutely when the goods were free of the ship's tackle &c., and the defendants' landing agents (as in this case) received the goods into lighters to be carried to jetties. The only difference between the facts of this case and the facts of that case is that, whereas the goods were lost in the present case through the negligent overloading of the lighter by the defendants' landing agents, the goods were lost in the other case by the misfeasance and fraud of the landing agents. Their Lordships of the Privy Council applied the English Common Law relating to common carriers by sea in that case as we have to do in this case. I shall just quote the concluding sentences of their Lordships' judgment:—" Now it may be conceded that the goods in question were not delivered according to the exigency of the bills of lading by being placed in the hands of the landing agents, and *it may be admitted that bills of lading cannot be said to be spent or exhausted until the goods covered by them are placed under the absolute dominion and control of the consignees.* But their Lordships cannot think that there is *any ambiguity* in the clause providing for cesser of liability. *It seems to be perfectly clear.* There is no reason why it should not be held operative and effectual in the present case. They agree with the learned Chief Justice that it affords complete protection to the respondent company." It seems to me that this decision of the Privy Council pronounced on the 31st March 1909 (about 3½ months after the pronouncement of the Full Bench decision in *Sheik Muhamad Ravuther* v. *The British India Steam Navigation Co., Ltd.*[1], on the 15th December 1908,) clearly over-rules the decision in the latter case, unless we are to accede to the ingenious argument of Mr. Seshagiri Iyer that we are not bound by the decision of the Privy Council unless it was given in a case which went up on appeal from an Indian tribunal. (The appeal case of 1909 was an appeal from the decision of the Supreme Court of the Straits Settlements). I am wholly unable to hold that the binding nature of a decision of the Privy Council depends on the locality of the tribunal which pronounced the decision from which the appeal was preferred to the Privy Council, any more than the binding nature of a decision of this Madras High-Court upon a Madras District Court depends on the question whether the High Court's decision was pronounced in an appeal preferred in a case which arose in that particular district. (The tribunal which decided the case in *Chartered Bank of India*

1. (1908) I. L. R. 32 M. 95.

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Australia and China v. *British India Steam Navigation Co., Ltd.*[1] consisted of *Lord Macnaughten Lord Atkinson Lord Collins* and *Sir Arthur Wilson* who have taken part in deciding many Indian appeals). The last question I have to consider is whether this case can be distinguished from the case decided by the Privy Council by reason of the fact that the boat in which the goods were placed by the defendant's landing agent was unseaworthy. Having regard to the language of their Lordships of the Privy Council that the clause in the bill of lading absolutely absolving the defendant as soon as the goods are free of the ship's tackle protects the defendant from liability *for whatever happens afterwards*, I do not think the question whether what happened afterwards was negligent overloading by, or fraudulent dishonesty of, the landing agents is of the least importance. If it is necessary to decide this question, I should be inclined to follow the English Law on this question also, whatever may be the American Law. (See, as to the American Law, Carver's Carriage by Sea, section 251(*a*), last paragraph). Arnould on Marine Insurance (Vol II) says. " The warranty of seaworthiness which is implied as to the ship *does not extend to lighters employed to land the cargo.* It is enough to satisfy this warranty (of seaworthiness) that the ship be *originally seaworthy* for the voyage insured *when she sails on it*; the assured makes no warranty that the ship *shall continue seaworthy in the course of it*"." Every ship" says *Lord Mansfield* " must be seaworthy *when she first sails on the voyage insured but she need not continue so throughout the voyage*" (Arnould in footnote (*b*) at p. 848 refers to the cases decided by *Lord Mansfield* and *Lord Eldon* establishing the above proposition).

In *Lane* v. *Nixon*,[2] it was clearly held by *Erle C. J*, *Byles J. Keating* J, and *Montagu Smith* J. that the warranty of the ship's seaworthiness does not extend to lighters employed to land goods. *Keating* J, says, "the employment of lighters to land the goods seems to be a usual and ordiary incident of such a voyage, and *has no reference whatever to the implied warranty of seaworthiness.* I think it would be a dangerous step to extend that warranty". *Montagu Smith* J. said " There is nothing to justify the extension of the implied warranty of seaworthiness to lighters so employed as in a fresh stage of the voyage. It would, I think, be extremely inconvenient if it could be done." If there is no implied warranty of seaworthiness for lighters and boats (or catamarans or coolies or elephants, as *Erle* C. J. put it) the clause about negligence

1. (1909) A. C. 369

2. (1866) 1 L. R. C. P. 412.

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in the bill of lading is "express, plain and unambiguous" and clearly exempts the defendants from liability, even if we adopt the "artificial rule of construction" (as *Wallis*, J., puts it at page 109 in *Sheik Muhamad Ravuther* v. *The British India Steam Navigation Co., Ltd.*[1] "enunciated by *Walton*, J", in *Price and Co*, v. *Union Lighterage Company*[2].

Mr. Seshagiri Aiyar quoted several English cases relating to the question whether, when the safety of the goods was insured till landing, the assurer is liable :—

(*a*) in the case when the boat which goes to the ship's side for landing belongs to some person other than the owner of the goods and the goods are lost before landing.

(*b*) in the case when the said boat belongs to the owner of the goods and hence delivery to him may be said to be complete *though the goods are not then actually landed.*

I think these cases whether belonging to class(a)or class (b) have little relevancy as they are concerned with the question whether delivery into the owner's boat is *equivalent to landing so as to terminate the assurer's liability* and not to the question of the shipowner's liability when the shipowner has protected himself from all liability after the goods have left the ship's tackle. (I may, however, state that I find it difficult to accept the decision in *Sparrow* v. *Carruthers*[3], as correct and the correctness of that decision has been, a in manner, doubted in *Hurry* v. *Royal Exchange Assurance Co.*[4]) For all these reasons I would dismiss the second appeal with costs.

Tyabji J :—The question to be determined in this appeal is whether or not the respondent shipowners are liable to the plaintiff for the loss of the goods mentioned in the bill of lading Exhibit BB. The goods were lost by the sinking of the boats in which they were put after being taken out of the ship; the cause of the sinking was that the boats were overloaded. The shipowners claim to be protected by the following clause in the bill of lading : "In all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee." This clause in itself

1. (1908) I. L. R. 32 M. 95.
2. (1903) I. K. B. 750.
3. (1801) 2. Strange 1236.
4. (1801) 126 Eng. Reports 1367,

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seems to be sufficiently clear and unambiguous to save the shipowners from any liability after the goods are free of the ship's tackle; and it is admitted that the loss occurred after they were so free. The point does not seem to arise here whether, when the cause of loss is such as we have to deal with, the liability imposed by law upon the shipowners can be limited only by an express and specific stipulation referring in direct terms to the cause of the loss or whether general words limiting the liability will suffice provided their terms are wide enough clearly and unequivocally to include the cause of loss in question; because in the clause before us the liability of the shipowners is limited by reference to a point of time, after which the shipowners are no more responsible for the loss of the goods. It is not contended that any doubt arises, with reference to the facts of the present case, as to the point of time when the clause must come into operation having been reached when the loss occurred, nor is it questioned that after the clause comes into operation its terms in their natural meaning remove all responsibility from the shoulders of the shipowners. The rules of law and construction which prevail when the clause is so framed as to limit the liability of the shipowners against particular causes of damage by providing exceptions to the general responsibility of the shipowners, which general responsibility is to survive subject to the excepted cases, can have but a remote bearing where the clause is so framed as to purport to leave no responsibility whatever on the shipowners after a particular point of time has been reached, after which it is stipulated in effect that the voyage must be taken to have been completed so far as the responsibility of the shipowners is concerned. In the first mentioned clauses the cases in which the shipowners are saved from liability consist of exceptions to the general rule; in the latter the relative functions of the rule and the exception are interchanged.

It seems, however, necessary to refer to two decisions which were cited to us. The shipowners rely on *The Chartered Bank of India, Australia and China* v. *British India Steam Navigation Company, Limited*[1], where their Lordships of the Privy Council had to determine the liability of the same shipowners, who are the present respondents, under a clause in identical terms. The cause of the loss there was that the goods has been taken away without their production of the bill of lading or delivery order through the fraud of the representatives of a third party acting in collusion with the representatives of the landing agents of the shipowners.

1. (1909) A. C. 369.

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The arguments before us were, first, that the present case is distinguishable from the decision of the Privy Council above referred to inasmuch as the cause of the loss in the present case, it was contended, falls under the denomination of the unseaworthiness of the boats, and that though the clause in question must (in accordance with the said decision of the Privy Council) be taken to be sufficient to protect the shipowners against the fraud of their agents, it is not sufficient to protect them against the unseaworthiness of the boats in which the goods are placed when they are taken out of the ship in order to be carried to the jetties.

Assuming that the overloading of the boats could, in such circumstances as we have before us, be considered to render the boats unseaworthy—and that assumption requires us to apply the word "unseaworthy" in a rather unusual sense—there is nothing to prevent the shipowners from limiting their liability against the unseaworthiness of the ships, any more than there is anything to prevent their limiting their liability against the fraud of their agents. The principle in the one case seems to have features common with the principle in the other case. In the case of unseaworthiness, it is assumed that the parties enter into the contract on the basis that the carriers are in a position to carry the goods and that their ships are capable of doing so—to use the words of Lord Blackburn in *Steel* v. *State Line Steamship Company*[1], there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a "warranty," not merely that they should do their best to make the ship fit, but that the ship should really be fit." If, therefore, the shipowners wish to enter into a contract in which they do not warrant that their ships are seaworthy, they must make it clear to the persons with whom they contract that they do not so warrant; similarly the carriers would, ordinarily, be supposed to be responsible for the honesty of their agents who are under their own control, and if they wish to restrict their liability so that they are not responsible for loss caused by the dishonesty or the fraud of their agents, equally must they make that restriction plain. It seems, however, unnecessary in this case to consider whether the duty cast upon the shipowners to employ honest agents and the duty (if any) cast upon the shipowners to prevent loss arising from the causes

1. (1877) 3 A. C. 72 at p. 89.

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with which we have now to deal, are each, or either of them a warranty properly so called or whether the duty in either of the cases consists merely in that the shipowners should do their best to prevent loss. We have primarily to deal with the words of the clause and the facts of this case; and not much help is obtained in construing a clause by the circuitous method of reasoning which has to be followed before any aid can be had from the fact that the Privy Council considered a similar clause to save the shipowners from liability in the particular case before them. For if we wish to follow this method of reasoning we should have to determine the further questions whether the liability under the circumstances which were before the Privy Council is of the same extent and nature as the liability under the facts now before us, and in order to do so, it will be necessary to determine whether the cause of loss with which we are dealing falls under the head of unseaworthiness.

It has, however, seemed necessary to refer to the Privy Council decision, as it was been pointed out to us that in *Sheik Mahomed Rowthar* v. *The British India Steam Navigation Company Limited*[1] bench consisting of the*Chief Justice, Wallis* and *Sankaran Nair*. JJ. held that a clause in the same terms as the one that is before us did not protect the shipowners against loss by sweat damage through the neglect of the shipowners after the goods were free of the ship's tackle. That case is not a decision of a Full Bench of this court, and Mr. *Justice Wallis* dissented from the view taken by the other two judges. On the other hand we are of opinion that we are bound by the decision of the Privy Council so far as that decision is applicable, notwithstanding that it was not pronounced in appeal from an Indian Court.

The next head of argument before us was that the clause in question is of no effect inasmuch as the Indian Contract Act, section 151, lays down the liablity of bailees in express terms and that it does not permit the parties to contract themselves out of such liability: section 151 does not contain the words " in the absence of special contract " as the next section does, and as are contained in a great number of other sections of the Contract Act-not less than 25, as the learned pleader for the appellant pointed out to us. In *Sheik Mahomed Rowther* v. *The British India Steam Navigation Company Limited*[1] to which reference has already been made, Mr. Justice *Sankaran Nair* expressed the view that the term ' bailee' in Section 151 of the Indian Contract Act must be taken also to refer

1. (1708) I. L. R. 32 M. 95.

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to carriers. But that view was not alluded to and, apparently, not accepted by the other Judges composing the bench. Assuming that the clause we have to deal with does not end the relationship of the ship-owners as carriers of the goods after the goods are free of the ship's tackle, and that the bill of lading is not spent or exhausted until the goods covered by it are placed under the absolute control and dominion of the consignee (See *Chartered Bank* v. *British India Steam Navigation Company Limited*[1].) It is not open to this Court to say that the liability of such carrier as we have to deal with in this case is governed by section 151 of the Indian Contract Act after the decision of the Privy Council in the case of *Irrawaddy Flotilla Company* v. *Bagwandas*[2]. In that case the Privy Council had to decide whether the view of the Bombay High Court as expressed in *Kuverje Tulsidas* v. *The Great Indian Peninsula Railway Company*[3] was correct or the view of the Calcutta High Court in *Moothora Kant Shaw* v. *The Indian General Steam Navigation Company*[4], and they said that they were "compelled to decide in favour of the view of the Calcutta High Court and against that of the High Court of Bombay," In deciding against the view of the High Court of Bombay, they decided against the argument on which the appellant relied. They decided that the liability of carrier such as we have to deal with is not governed by the sections of the Indian Contract Act, relating to bailees.

Under these circumstances there is no reason why the plain meaning of the clause should not be given effect to, and why the shipowners should be held to be responsible for the loss of the goods, after the time when it was stipulated that the goods should for all purposes and in every respect be at the risk of the shipper or consignee.

We therefore dismiss the appeal with costs.

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1. (1909) A. C. 369
2. (1891) I. L. R. 18 C. 620.
3. (1878) I. L. R. 3 B. 109.
4. (1883) I. L. R. 10 C. 166.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Abdur Rahim.

Arunachellam Chetti and others... *Appellants* (*Plaintiffs*)*

v.

Prabhayya Chetti and another ... *Respondents* (*Defendants*)

Aruna-chellam Chetti *v.* Prabhayya Chetti.

Limitation Act (Act XV of 1877) S. 22—Plaintiff described minor, while major—Presentation not shown unauthorised—Ratification—Description due to mistake—No addition of new party—Amendment, permissible.

One of the plaintiffs was wrongly described in the plaint as a minor suing by his mother as his next friend. When application was made to correct the error by amending the plaint, limitation period for the suit had expired. There was nothing to show that the plaint was presented without his authority; on the other hand he was willing to proceed with the suit, thus ratifying the mother's act even if he did not authorise it before. There was no reason to suppose that the description as minor was due to anything but a mistake.

Held in the circumstances the amendment prayed for did not involve the addition of a new party within the meaning of S. 22, Limitation Act and ought to have been allowed.

Appeal from the decree of the District Court of North Arcot in O. S. No. 5 of 1908.

The suit was on a pro-note executed by defendants 1 and 2 in favour of plaintiffs' father one Lakshmana Chettiar. The plaintiffs, his sons, four in number were described in the plaint as minors by their next friend their mother. The suit was instituted on the last day of limitation. The 1st defendant contended that as plaintiffs 1 and 2 were not minors at the time of the institution of the suit they could not be represented by a next friend and that as they had attained majority before the institution of the suit, the suit was not maintainable. Plaintiffs 1 and 2 were summoned and they put in statements. 1st plaintiff stated that he had attained majority at the time of the institution of the suit and that he was described as a minor under a bona fide mistake and that he was willing to prosecute the suit. It was contended before the District Judge that all of them were necessary parties and 1st plaintiff being a major ought to have signed the plaint himself and that the omission to do so was fatal to the maintainability of the suit and that the suit would be barred by limitation if amendment was allowed. The District Judge held that the description was not a mere misdescription which may be treated as a surplusage, that 1st plaintiff could not be taken to have been named as a plaintiff, that no other person was entitled to represent 1st plaintiff and that all being necessary parties the suit

*A. No. 200 of 1909. 28th October 1912.

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could not be maintained and he dismissed the plaintiffs' suit on this preliminary point. Plaintiffs appealed.

L. A. Govindaraghava Aiyar for Appellant.

B. Narasimha Rao for Respondent.

L. A. Govindaraghava Aiyar for appellants contended:—The plaintiffs' father was a Nattukottai Chetty and the businees of money lending was carried on by their agent who was not aware of the age of the plaintiffs. He relied on *Mohini Mohun Das* v. *Bungsi Buddan Das*[1]; that was a case of defective, verification and signature. It is an authority for the position that a person is none the less a party because he does not sign or verify the plaint. The names of all the parties were on the plaint. The words 'as minor' are a mere misdescription and cannot affect the substance of the thing. He cited *Kamalalakshmi* v. *Ramasami Chetti*[2], *Tacquigan* v. *Obirdulla*[3], *Netlalsahu* v. *Karim Baksh*[4].

B. Narasimha Rao for respondent cited *Sheorania* v. *Bharat Singh*[5]. He submitted that there was nothing to show that the next friend had any authority to act for the major. The plaint by the next friend is no act of the major party either in fact or in substance. An unauthorised act of this nature cannot be ratified so as to validate it from the commencement. The P. C. case was only one of defective verification and bore no analogy to the present.

The Court delivered the following

Judgment:—We are unable to take the view taken by the District Judge.

The 1st plaintiff was wrongly described in the plaint as a minor but was described as a plaintiff and though he has not himself signed and verified the plaint he is not merely on that account to be considered as no party (*Mohini Mohun Das* v. *Bungsi Buddan Saha Das*[1]). Want of signature or verification does not entail the rejection of the plaint under Order VII rule 11 of the Civil Procedure Code and such verification and signature can be supplied at any stage of the proceeding under Order VI Rule 17 and S. 153 of the Code. Unless then it can be held that so far as the 1st plaintiff is concerned there is really no plaint, the respondents cannot succeed, for it is only in the view that the 1st plaintiff was not on the record as plaintiff that his addition now could be considered as

1. (1889) I. L. R. 17 C. 580.
2. (1895) I. L. R. 19 C. 127.
3. (1894) I. L. R. 21 C. 866.
3. (1896) I. L. R. 23 C. 760.
5. (1891) I. L. R. 20 A. 190.

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the bringing of a new plaintiff and so attract to the case the provision of S. 22 of the Limitation Act; and but for those provisions it is obvious that any amendment of the plaint that might be necessary would have to be made in this case.

To succeed we think the respondents ought to show that the 1st plaintiff did not consent to the suit in his name; that so far as he was concerned it was certainly unauthorized as was held to be the case in *Sheorania* v. *Bharat Singh*[1] and there is nothing to show this and on the other hand he has come forward stating that he is willing to proceed with the suit thus ratifying his mother's act, if he did not authorise it before.

There is no reason to suppose that his description as a minor was due to anything but a mistake, as he has said, and we find no ground for holding that his prosecution of the suit will be prosecution by a new plaintiff within the meaning of S. 22 of the Limitation Act.

We allow the appeal and remand the suit to the District Judge for disposal according to law.

The costs in this Court will be costs in the suit.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the Chief Court of the Punjab.]

Present:—Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Kidar Nath ... ... *Defendant. Appellant.**

v.

Muthu Mal ... ... *Plaintiff. Respondent.*

Evidence—Statement by widow of last male owner (Hindu) as regards husband's relations—Value to be attached to—Improvements—Compensation for—Principle of assessment—Extent of enhancement of value as marketable subject—Amount of expenditure immaterial—Temple—No improvement.

Kidar Nath v. Muthu Mal

Where the question was whether the plaintiff was the daughter's son of the last male owner (through his first wife), reliance was placed upon a statement contained in the will of the second wife that he was related to her as her daughter's son and so related to her husband as to be the first in order of capacity to perform funeral ceremonies.

Held, the statement being by one who was of all people the most competent person to make a statement with regard to her husband's history, his relationship and his succession, was entitled to great weight.

1. (1891) I. L. R. 20 A. 90.

* 14th February 1913.

In awarding compensation for improvements the real question is to what extent the value of the property as a marketable subject, has been enhanced and not the amount of expenditure actually incurred on the property.

It was accordingly held that no allowance could be made for the erection of a temple which admittedly did not add to the selling value of the property.

Appeal from a judgment and decree of the Chief Courf of the Punjab, dated the 7th July 1905, reversing a judgment and decree of the District Judge, Delhi, dated the 7th September 1905, dismissing the plaintiff's (respondent's) suit.

Ross. K. C. and *A Grey*, for Appellant.

De Gruyther, *K. C.* and *G. C. O. Gorman* for Respondents.

Their Lordships' Judgment was delivered by

Lord Shaw :—This is an appeal from a judgment and decree of the Chief Court of the Punjab. The decree was dated the 7th of July 1906. It reversed a decree of the District Judge of Delhi. The respondent, as plaintiff, sued the appellant for possession of a house and compound in Delhi. The first Court dismissed the suit, and on appeal, the Chief Court gave the plaintiff a decree for possession of the property on certain terms. Nine issues were raised, and evidence was adduced with regard to them in the Court of first instance ; the questions have now, however, been limited to the issues upon which the Chief Court proceeded, and which are now to be referred to.

The first of those questions is, has the relationship of the plaintiff, which is in issue in this suit, been proved ? The proof is denied. One Bishan Lal, the former owner of the property, was twice married ; by the first wife the allegation is, that he had a daughter who was the mother of the plaintiff, Mathu Mal. The oral evidence upon the point is meagre and conflicting. Under these circumstances the Chief Court looked for assistance to any deeds or documents under the hand of the second wife, Munia, of the plaintiff's grand-father. That second wife executed a will, and the particular provisions of that Will are to be found on pages 15 and 16 of the record. The Will was executed on the 22nd of November 1899. In that will this lady, who of all people, was the person to make a statement of fact with regard to her husband's history, his relationship, and his succession, at two different parts of the document declares that she has no issue nor any near relative. She says : " Hardeo Sahai *alias* Mathu Lal, "is related to me as my daughter's son. " Then, after mentioning a further relative she says : "These are my relatives on my husband's side" She repeats the statement, to a similar effect, in the same document, and she puts

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forward Muthu Lal, so related to her husband as the person who is first in order of choice for performing the funeral religious ceremonies of Kiryakaram, that circumstance being one, in regard to these Indian relationships of great value.

In this situation, their Lordships are of opinion that, in the most solemn form, this lady had declared facts which must have been within the scope of her own knowledge; and, if her version of the facts be sound, there can, in their Lordships' view, be no doubt that the judgment appealed from is correct. Their Lordships put to the learned Counsel, who argued the case with conspicuous moderation, the point whether, if this lady, being alive, had testified in a Court of law in the same sense as this Will declared, there could have been any answer; and it was admitted that such testimony, unshaken in cross-examination, would have been conclusive on the matter of fact. Their Lordships are accordingly of opinion that the Chief Court was justified in attaching great weight to the contents of this Will, and that the conclusion, upon this matter of fact, reached by them, is a conclusion which now cannot be successfully assailed. Their Lordships desire to add that they do not think it is open to this Board to entertain, in lieu of evidence a suggestion to the effect that the Will—made five years before her death—was part of a scheme which was to emerge in favour of one party to the present suit, after that suit was brought. These were conjectural efforts made in argument, but they do not amount to anything which would weigh with the judgment of the Board on the point of evidence. Their Lordships conclude their judgment upon this portion of the case by remarking that the person who drew this document was himself a witness. He was open to cross-examination, and no suggestion, in favour of these conjectural considerations was made while the witness was in the box.

There now only remains one question to be determined and that is as to the amount of the allowances which are to be made as a condition of taking possession of this house and compound. It appears that in the course of the possession of the last holder, a temple was erected upon the ground, and other expenditure was incurred to a considerable amount. The Chief Court assessed the sum of Rs. 1,400 as a fair sum to the extent of which the property as a vendible subject has been enhanced in value by the operations of the last holder. Their Lordships are of opinion that the grounds upon which the Chief Court proceeded are sound. In such a case it is always to be borne in mind that the amount of the expenditure made has occasionally very little to do with the real issue; and that issue

is, to which extent has enhancement of the subject been produced ? Their Lordships agree with the Chief Court in thinking that it has been produced to the extent of Rs. 1,400. But with regard to the difference between that sum and the Rs. 7,000 claimed, a large part of that difference stands to the account of the erection of the temple upon the land. It has not been contended in argument before the Board that the erection of the temple would of itself add to the selling value of the property, and the real question is, was the property, as a marketable subject enhanced in value or not ? Their Lordships are of opinion that it was enhanced, but only to the extent stated in the judgment appealed from. Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed, and that the decree of the Court below should be affirmed. The appellant must pay the costs of the appeal. Kidar Nath v. Muthu Mal

Solicitors for Appellant :—*Soulter* and *Fox*.

Solicitors for Respondent :—*T. L. Wilson & Co.*,

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[Appeal from the Court of Judicial Commissioners, Central Provinces, Nagpur.]

Present :—Lord Atkinson, Lord Shaw, Lord Moulton, Sir John Edge, and Mr. Ameer Ali.

Gulab Singh and others ... ... *Appellants.**

v

Raja Seth Gokaldas and others ... *Respondents.*

Central Provinces Government Wards Act, (XVII of 1885) S. 7 *cl.* 4—*Superintendence of joint family property, by Court of Wards—Hindu Law—Manager—Powers of,—S. 18—Sanction to mortgage—Nature of—Not to the terms of.*

Under S. 7 (c) Cl. 4 of Act XVII of 1885 (Central Provinces Government Wards Act), it is competent for the Chief Commissioner to sanction the assumption by the Court of Wards of the Superintendence of joint family property on the application of the managing members of the family. Gulab Singh v. Raja Seth Gokaldas.

Maharaj Singh and Dulichand who were brothers were the senior and managing members of an undivided Hindu family consisting of themselves, their children and grand children. Being involved in debts and unable to pay, they applied to the Deputy Commissioner of Hoshangabad stating that they were unable to arrange for the liquidation of the debt or to manage the estate and if the villages should be lost on account of the indebtedness "our children will have no estate left to them" and prayed that "if under S. 7 of Act XVII of 1885, you be pleased to assume the management of our Malguzari villages and

* Appeal No. 91 of 1911. 8th April 1913.

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to arrange for the discharge of our debt in any way possible, our estate will be saved and our children will thereby be able to maintain themselves''.

Held: that in making the application Maharaj Singh and Dulichand were acting in their capacity as managing members of the joint family and not merely as two members of the family applying only in their own individual interests and were acting within their powers and authority as the managing members of the family.

It is not necessary under S. 18 of Act XVII of 1885 that the actual mortgage to be made by the Court of Wards should be submitted to the Chief Commissioner for sanction or that the Court of Wards should have sanction for the precise terms of the mortgage provided sanction has been obtained for effecting a mortgage.

The interest of a member of an undivided Mitakshara family in the family property is not individual property of which the Court of Wards could take charge under the Act.

Appeal from the decree of the Judicial Commissioner of the Central Provinces, dated the 7th May 1907, affirming that of the District Judge of Hoshangabad, dated the 4th April 1906.

Mr. Lowndes, for Appellants.

Mr. De Gruyther, K. C. with him *Mr. Parikh*, on behalf of the Respondents.

Their Lordships' judgment was delivered by

Sir John Edge.—This is an appeal from a decree, dated 7th May 1907 of the Judicial Commissioner of the Central Provinces which affirmed with slight modification a decree dated the 4th April 1906, of the District Judge of Hoshangabad.

The suit in which the appeal arose was brought on the 22nd September 1904 in the Court of the District Judge of Hoshangabad by mortgagees upon a mortgage of immoveable property which was made on the 10th December 1891 by the Deputy Commissioner of the District of Hoshangabad as and being the Court of Wards for that district. The suit was one for possession of the mortgaged property including the Sir lands, or alternatively for a decree for sale. Certain other alternative reliefs were claimed.

The defences to the suit, so far as they are now material, were that the mortgage had, it was alleged, been made by the Deputy Commissioner without the previous sanction of the Chief Commissioner and was void ; that the property mortgaged was the undivided ancestral property of a joint Hindu family under the rules of the Mitakshara, and that the Court of Wards had no right or authority to mortgage the shares, rights, or interests of those members of the family who are not Government wards or who were minors ; and that no decree for sale, for possession, or for any of the alternative reliefs could be made.

The District Judge on the 4th April 1906, having found that there was then due on the mortgage Rs. 2,32,403 for principal and interest, made a conditional decree for sale. From that decree only the defendant, Gulab Singh, Tikaram, Sitaram, Dulichand son of Perusha, and Himmatsingh, who are the appellants here, appealed to the Court of the Judicial Commissioner. The Judicial Commissioner on the 7th May 1907, on appeal slightly varied the decree of the District Judge and added a declaration that the defendants will not be personally liable for any sum by which the sale-proceeds of the mortgaged property may fall short of the amount due for the time being on the mortgage, and in other respects affirmed the decree for sale of the District Judge with costs of the appeal to his Court against the then appealing defendants. On the 25th August 1903 the then District Judge of Hoshangabad, finding that the defendants had not paid into court or to the plaintiffs Rs. 2,67,871-10-8, principal, interest and costs, made a decree absolute for sale of the mortgaged property specified in a schedule to that decree, and allowed interest on the decreed sum from the 24th July 1908 until liquidation, adding the declaration which had been made by the Judicial Commissioner.

For the purposes of this appeal it is necessary to refer as briefly as may be to the facts antecedent to the commencement of this suit. On or shortly before the 1st July 1890 Maharaj Singh, now dead, and his brother, Dulichand, a defendant to this suit who described themselves as *zamindars* of Bahera khedi, Bagalkhedi, Patlai Punwasa, Bamuria and Serora, *Pargana* Hoshangabad, made a written application to the Deputy Commissioner of Hoshangabad, in which they stated that they were indebted to the extent of about Rs. 1,14,358-11-9 ; that they were neither able to arrange for the liquidation of the debt nor to manage the estate ; and that if the villages should be lost on account of the indebtedness :—

" Our children will have no estate left to them ; " and prayed that " if, under S.7 (c) clause 4, of Act XVII of 1885, you be pleased to assume the management of our Malguzari villages of Baherakhedi and others, and to arrange for the discharge of our debt in any way possible, our estate will be saved and our children will thereby be able to maintain themselves, for which they will ever remain grateful to you. The rest lies with you. "

The villages mentioned in the petition were the undivided ancestral property of a joint Hindu family governed by the rules of the Mitakshara, and Maharaj Singh and Dulichand, who were brothers were the senior and managing members of that family. At that time the joint family consisted of Maharajsingh, his son Gulab

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Singh then about thirty-six years old, Tikaram then about twenty-one years old, and Sitaram then about nine years old, and Dulichand and his sons Himmatsingh then about twenty-two years old, Bajilal then about sixteen years old, Fatichand then about eight years old, and Jagannath then about five years old, and a son of Gulabsingh named Dinanath, who was then about eight years old. The indebtedness of the family in respect of which the property was liable to be lost amounted to about Rs. 1,20,000. As will later appear, the petition was duly forwarded to the Chief Commissioner for his sanction to the Court of Wards assuming the superintendence of the property mentioned in the petition ; that sanction was given, and in the result the mortgage was made upon which this suit was brought.

Having regard to the defences which were set up in this suit, it is necessary to consider with what object that petition was presented to the Deputy Commissioner, and what authority, if any, Maharajsingh and Dulichand had to bind the other members of the joint family by their action in presenting the petition. It has been contended on behalf of the appellants that Maharaj Singh and Dulichand had power to bind only their own individual interests in the joint property, and that if their object was to get the Court of Wards to assume the superintendence of the joint family property, they acted without authority and their action could not and did not bind the other members of the joint family.

Maharajsingh and Dulichand were zemindars and were the *Malguzars* of the property mentioned in their petition, and were, as their Lordships have said, the senior and managing members of the joint family of which the property mentioned in their petition was the ancestral property. The application was made under the Central Provinces GovernmentWards Act, 1885, (Act XVII of 1885.)

The application was not drawn up with the precision with which it probably would have been drafted by a trained lawyer, but as has been pointed out by this Board in more than one appeal the art of conveyancing is but little understood in the country parts of India. It must, in their Lordships' opinion, be taken that in making the application to the Deputy Commissioner, Maharaj Singh and Dulichand were acting in their capacity as the managing members of the joint family and not merely as two members of the family applying only in their own individual interests.

It appears to their Lordships to be obvious that the intention of Maharajsingh and Dulichand in making that application was that

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diture." It is obvious that from the first it was on the security of a mortgage of the ancestral property of the family that it was intended to obtain a loan from the plaintiffs.

On the 1st July 1890 the Deputy Commissioner of Hoshangabad forwarded to the Commissioner of the Nerbudda-Division the application of Maharajsingh and Dulichand, praying that their estate might be taken under the management of the Court of Wards, and having mentioned his estimate of the then indebtedness as Rs. 1,14,358-11-9, the annual income of the property and the outgoings, and that it was proposed to borrow Rs. 1,00,000 from the plaintiff's firm, he recommended that the Chief Commissioner should be asked to sanction the assumption of the management of the property by the Court of Wards until the liabilities of the family should be liquidated. There was some further correspondence between the Deputy Commissioner, the Commissioner of the Nerbudda and the Secretariat of the Central Provinces, and ultimately, on the 28th January 1891, the Commissioner of the Nerbudda Division was informed by the Secretariat that the Chief Commissioner had sanctioned the assumption by the Court of Wards, Hoshangabad, of the management of the estate of Maharajsingh and Dulichand, *Malguzars* of Baherakhedi and other villages in that district, and had also sanctioned an allowance of Rs. 883 per annum being made for the maintenance of the proprietors, and accepted the proposals for the liquidation of the debt. What were the precise terms of those proposals does not appear from the papers which are before the Board, but it may be assumed from the papers which are before the Board that the proposals which were approved by the Chief Commissioner included a proposal to obtain from the plaintiff's firm, on the security of a mortgage of the ancestral property, a sum sufficient to liquidate the then indebtedness of the family.

On the 31st January 1891 the following official notification appeared in the "Central Provinces Gazette":—

"No. 609,—Declaration by the Chief Commissioner under S. 7 (1) (c) of the Central Provinces Government Wards Act. (XVII of 1885).

"The Chief Commissioner is pleased to declare Maharajsingh and Dulichand, *Malguzars* of Baherakhedi, in the Hoshangabad District, on their own application, incapable of managing their property, and has sanctioned the assumption of its superintendence by the Court of Wards of that district."

The property referred to in that notification must, in their Lordships' opinion, be deemed to have been all the immoveable property which constituted the ancestral estate of the joint family which was under the management of Maharjsingh and Dulichand

the Court of Wards should in the interest of all the members of the joint family assume the superintendence of the immoveable property which was the ancestral property of the joint family, and not merely the management and superintendence of the then unascertained and unpartitioned shares in the joint property, which on a partition of that property, not then in contemplation, might possibly come to Maharajsingh and Dulichand. Neither Maharaj Singh nor Dulichand had more than the mere co-parcenary interest of a member of the joint family in the family property. Neither of them had any defined share. It was held by this Board in 1903 in *Gharibullah* v. *Khallakh Singh*[1] that the interest of a member of an undivided *Mitakshara* family in the family property is not individual property. It had previously been held by this Board in 1866 in *Appovier* v. *Rama Subba Aiyen*[2] that no member of a joint Hindu family, whilst it remains undivided, can predicate of the joint or undivided property that he has a certain definite share. It has not been shown to their Lordships that it was the practice of the Court of Wards of the Central Provinces to assume the superintendence of the unpartitioned interests of some only of the members of a joint Hindu family in the family property, nor has it been explained in this appeal how a joint family property could be preserved for the members of a joint family by a Court of Wards assuming the superintendence of the unpartitioned interests of some only of the members of the family. Under the circumstances of the family, Maharaj Singh and Dulichand acted prudently and in the best interests of the joint family in applying to the Deputy Commissioner of Hoshangabad to have the family property taken under the management of the Court of Wards, and in the Lordships' opinion Maharaj Singh and Dulichand in making that application acted within their powers and authority as the managing members of the joint family.

Before, apparently, that formal application was made, the Deputy Commissioner had been in communication with the plaintiffs' firm to ascertain the terms upon which they would advance the money required for the liquidation of the then indebtedness of the family on the security of the immoveable property of the family, which he described in a letter of the 21st June 1890 as consisting of five whole villages, a 12 annas share in another village, and 20 plots held on absolute occupancy tenures in different villages. In that letter the Deputy Commissioner enclosed " a list of the property it is proposed to hypothecate, with particulars as to income and expen-

1. (1903) I. L. R. 25 A. 407. 2. (1866) 11. M. I. A. 75.

and was referred to in their application. It was that ancestral property which it had been proposed by the Deputy Commissioner should be taken under the superintendence of the Court of Wards until the liabilities of the family should be liquidated. It was by a mortgage of that property that it was intended to raise a sum sufficient to liquidate the indebtedness of the family. It could not have been intended that the Court of Wards should take over the management and superintendence of the family property so far only as the unpartitioned interests of Maharajsingh and Dulichand in the joint family property were concerned; if that had been the object, it would have frustrated the intention with which the proposal was made that the superintendence of the property should be assumed by the Court of Wards.

One effect of the notification was expressly to disqualify Maharajsingh and Dulichand to manage the family property. It could not have been intended that they should be disqualified so far only as their own unpartitioned interests in the property were concerned, and that they should be qualified to manage the property so far as the interests of the other members of the family were concerned; nor could it have been intended that the Court of Wards and the members of the joint family other than Maharajsingh and Dulichand should jointly manage the unpartitioned family property.

Act XVII of 1885 was not as precisely worded as it might have been, but it obviously was intended to apply to the superintendence by the Court of Wards of the family property of Hindu joint families as well as to the superintendence of separate property of Hindus and others situate within the territories for the time being administered by the Chief Commissioner of the Central Provinces. In passing Act XVII of 1885 the Indian Legislature could not have been unaware that much of the immoveable property held by Hindus within these territories was family property of joint Hindu families. It is difficult to see how the Court of Wards could exercise some of the powers entrusted to it under the Act, as, for example, the power of letting the whole or any part of the property of Government wards under its superintendence, or could perform the duties of superintendence, which included the management and collection of rents, unless in such a case as this the Chief Commissioner was entitled under the Act to sanction the assumption by the Court of Wards of the superintendence of the family property of the joint Hindu family, whether the application that the property should be taken under the management of the Court of Wards was made by all the members of the family or by the managing members only.

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Their Lordships are of opinion that the Chief Commissioner had power to sanction the assumption by the Court of Wards of Hoshangabad of the superintendence of the joint family property which was the property mentioned in the application of Maharajsingh and Dulichand.

It must, in their Lordships' opinion, be inferred from the letter of the 28th January 1891 from the Secretariat to the Commissioner of the Nerbudda Division that the Chief Commissioner of the Central Provinces had given his sanction to the proposal that the Court of Wards of the District of Hoshangabad should mortgage the property of the family in order to raise a sum sufficient for the liquidation of the indebtedness. It was not in their Lordships' opinion necessary under S. 18 of Act XVII of 1885 that the actual mortgage to be made by the Court of Wards should be submitted to the Chief Commissioner for his sanction, nor was it necessary that the Court of Wards should have his sanction to the precise terms of the mortgage. The sanction which is to be inferred from the letter of the 28th January 1891 empowered the Court of Wards to mortgage the property under S. 18 of Act XVII of 1885.

It having been agreed between the Court of Wards and the plaintiffs' firm that they should advance Rs. 1,20,000 on the security of a mortgage of the family property, the plaintiffs' firm in March 1891 advanced the Rs. 1,20,000, and by the 25th March 1891 the Court of Wards with the money so advanced discharged the then indebtedness of the family. On the 10th December 1891 the Court of Wards of Hoshangabad in the exercise of its statutory power made the mortgage upon which this suit has been brought. In their Lordships' opinion the Court of Wards had obtained from the plaintiffs' firm most favourable terms for the loan, although owing to then unforeseen circumstances the object of saving the property for the family has not been obtained.

By the mortgage all the rights, title, and interest of the mortgagors in the property mentioned in the first schedule to the mortgage, together with all actual and reputed rights, easement, and appurtenances to the same, and all cultivated and uncultivated land, groves, *abadi*, *sir*, rents, and profits, by whatever name the same should be known, were hypothecated by way of mortgage to the mortgagees. The mortgage money was to be repaid with interest by annual instalments extending over more than 30 years.

It was agreed that in the event of Rs. 30,000 becoming overdue the Court of Wards should recover such sum by sale or otherwise of sufficient portion of the hypothecated property.

The mortgage did also contain the following important clauses:—

"And it is further agreed that the Court of Wards shall continue to manage this estate so long as there is any prospect of the debt being repaid from income of the same, and that if from any cause this should appear impossible, that the Court of Wards shall, if the mortgagors so desire, either sell up the entire property or so much as may be necessary and devote the proceeds to liquidation of the debt, or make the estate over to the mortgagees if they prefer this course in satisfaction of their claims, and that upon such sale or transfer all further liabilities on the part of the Court of Wards towards the mortgagees shall cease."

"And it is further agreed that it will not relinquish management of the estate till such time as the debt is liquidated in ordinary course, or in the event of management being relinquished before such time, liquidate the debt remaining due by sale of such portion of the property as may be necessary or otherwise."

During the years 1892 and 1893 the Court of Wards paid to the mortgagees Rs. 16,000. Since then no instalment has been paid. The Court of Wards, owing to unforeseen circumstances, found it impossible to pay the balance of the mortgage debt or any other instalments on interest, and on the 10th December 1901 the plaintiffs called upon the Court of Wards either to put them in possession of the mortgaged property or to pay the sums due under the mortgage. On the 13th March 1902 the Deputy Commissioner of Hoshangabad, who was the Court of Wards, by letter of that date, gave the plaintiffs notice that the relinquishment of the management of the estate by the Court of Wards had been sanctioned, and offered to make over to them the mortgaged portion of the estate—

"in full satisfaction of your claims with all outstanding rental arrears and debts, excepting the cultivating rights in *Sir* land which are to be reserved for the maintenance of the Wards."

It is to be observed that in that letter the members of the joint Hindu family were treated as Government Wards. The offer to hand over the mortgaged property less the *sir* lands was not in compliance with the contract in this respect in the mortgage deed and was declined. On the 23rd August 1902 it was officially notified that the superintendence of the estate of the family had, with the sanction of the Chief Commissioner, been relinquished by the Court of Wards with effect from the 12th June 1902. The mortgaged property was not sold by the Court of Wards, the mortgage debt, with the exception of Rs. 16,000 which were paid in 1892 and 1893, has not been paid, and the Court of Wards did not transfer the mortgaged property to the mortgagees, and the management of the estate was relinquished by the Court of Wards.

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Their Lordships are of opinion that under these circumstances the moneys remaining unpaid under the mortgage became payable and the plaintiffs were entitled to bring the suit, for sale. Their Lordships will humbly advise His Majesty that the decree of the Judicial Commissioner should be affirmed, and that this appeal should be dismissed. The appellants must pay the cost of this appeal.

Solicitors for Appellants:—*Messrs. Downer* and *Johnson.*

Solicitors for Respondent :—*Messrs. T. L. Wilson & Co.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[Appeal from thh High Court at Allahabad.]

Present :—Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Kunwar Brijraj Singh and another ... *Appellants.**

v.

Kunwar Sheodan Singh and others ... *Respondents.*

Brijraj Singh v. Sheodan Singh

Hindu Law—Joint family—Will by father—Power to partition by—Construction—Family arrangement—Consent of sons—Each son representing his branch—Division in status effected by—Clause, giving father power to cancel—Effect of—Contractual condition or mere threat.

There were three brothers, Rao Karan Singh, Kunwar Sheodan Singh (plaintiffs) and Rao Sultan Singh (whose widow and sons were defendants in the case.)

The father of the brothers was Rao Balwant Singh. In 1895, he was in advanced years and indifferent health and determined to free himself from the labours of business and devote the remainder of his life to pilgrimages. Accordingly, he drew up and executed a document (which he called a will) setting out a division of the family property among the members of the family reserving nothing for himself. Though styled a will, the document was intended really as a record of family arrangement then and there made and carried into effect partitioning the family estate among those interested.

In pursuance of the arrangement, the parties severally applied for mutation of names in respect of the villages and mutation was effected.

On the death of Rao Sultan Singh, there was a similar mutation of names in favour of his son.

There was also evidence of separate enjoyment.

The division was unequal in that the eldest son (Rao Sultan Singh) was given a larger share than the others.

Held, that although the father had no right to make a partition by will among the members of the family except with their consent, the evidence established consent of the sons to the arrangement and their acceptance was binding not only on themselves but also on their sons, as each of them was representing his branch in the transaction.

*5th May 1913.

Held accordingly that the parties were divided in status from the date of the will and the suit for partition brought as if they were not divided was unsustainable.

Reliance was placed on a clause in the will to show that the partition was not intended to take effect *in presenti*. It was " if I at any time come back from pilgrimages and find mismanagement or character of anyone bad then I shall have power to cancel this will which shall be enforced from the date of its execution."

Held, that the highest effect that could be given to the clause was that it evidenced a contractual condition which the sons accepted in order to obtain partition but that it did not prevent the partition operating *in presenti*; that it was merely put in as a threat to keep the sons in good behaviour and could not have been enforced specifically or even at all.

L. DeGruyther K. C., and *Bhugwandin Dube* for Appellants.

A. Grey and *Lowndes* for Respondents.

Their Lordships' judgment was delivered by

Lord Moulton.—This is a suit brought by two brothers, Rao Karan Singh and Kunwar Sheodan Singh (with whom are joined as Plaintiffs their respective sons Kunwar Shibraj Singh and Kunwar Rauber Singh), against the widow and son of their eldest brother Rao Sultan Singh claiming a partition of certain properties which they allege to be the joint and undivided property of the family to which they belong, in which they are entitled to a two-thirds share. The defence is that the properties originally belonging to the family, were the subject of a division by a family arrangement made and acted upon in 1895 during the lifetime of the father of the Plaintiffs, and that thenceforward the properties ceased to be held jointly, and that those properties of which the Defendants are in possession came to them under that family arrangement and became and still remain their separate property.

The principal subject of dispute is village property. But the suit relates also to certain other property, as to which different considerations arise. It will be convenient in the first instance to determine the questions in issue so far as they relate to the village property only and to consider subsequently the effect of the facts thus found on the rights of the parties in respect to the other property.

It will be seen from the foregoing that the real issue in the case is whether or not the alleged family arrangement was in fact made and assented to by the parties interested. The Defendants' contention in this respect is exceptionally clear and precise. It leaves no doubt as to the terms of the arrangement even in their minutest details, and is equally definite as to the date when and the circumstances under which it was made.

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The father of the three brothers was Rao Bulwant Singh. In 1895 he was the head of the family, which was then joint and undivided. The village property under his management, and to which this case relates, has been found by the Court of first instance to have been ancestral property, and that finding is acquiesced in by the parties. He was at that date in advanced years and indifferent health, and determined to free himself from the labours of business and devote the remainder of his life to pilgrimages and travel in other countries. Accordingly, on the 26th November, 1895, he drew up and executed a document (which he calls a Will) setting out a division of the family property among the members of the family, reserving nothing for himself. This is the family arrangement set up by the Defendants.

Their Lordships incline to the view that the term "Will," as applied to this document, was a complete misnomer. It is manifest that it differed from a Will in the crucial characteristic that it was intended to speak from the date at which it was written, and not from a future date, viz., the death of the writer. It was, in fact, and was intended to be viewed as, a record of a family arrangement then and there made and carried into effect partitioning the family estate among those interested. Indeed, in anticipation of this formal partitioning the sons had been put into possession of their shares some two months previously. All this appears from the concluding passage of the document, which reads as follows:—"All the three sons were put in separate possession of the estate in the beginning of the year 1303 Fasli" (September 1895). "I have no other heir having a right besides those mentioned in this Will. I have therefore executed this Will in order that it may serve as evidence."

There is no doubt whatever as to the authenticity or date of this document. But the property was ancestral and therefore Rao Balwant Singh, although head of the family, had no right to make a partition by Will of that property among the various members of the family except with their consent. They had independent rights in it with which he could not interfere. The main question therefore is whether there is evidence sufficient to establish the consent of the Plaintiffs Rao Karan Singh and Kunwar Sheodan Singh to this family arrangement. If they accepted it their acceptance would bind not only them but also their sons, who are the remaining Plaintiffs as they would be representing in the transaction their respective branches of the family.

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Their Lordships are of opinion that the evidence of their acceptance of the partition is overwhelming. To appreciate it fully it will be necessary to examine in some detail the contents of the document itself and the acts of the parties consequent thereon.

That the document testifies to a partition of the estate taking place then and there cannot be doubted. The sons were all adults at the time, and before setting out the specific shares which each was to receive, the document reads thus:—

"My three sons are at present fully qualified to conduct the business. Therefore in order to avoid a dispute after my death I have at present while in a sound state of body and mind and of my own free will and accord divided the property among my sons, and heirs as follows."

There follows a specific division of the villages by name among the three sons. It then gives certain *Sir* lands and other property to his wife for life, and proceeds to provide that at her death the *Sir* lands (with the exception of that in the village of Badri) shall go to the wife of the eldest son according to the custom of the family. The *Sir* land in the village of Bodri is to go to the wife of the plaintiff Kunwar Sheodan Singh, "because the share of Kunwar Sheodan Singh is less than that of Kunwar Karan Singh," the other plaintiff. The remainder of the property held by the wife for life is at her death to be divided among her three grandsons. There are other minor details set out, but the above are the important provisions of the document and will suffice for the decision of the case.

This document was executed on 26th November 1895. Early in 1896 the plaintiffs and their brother Rao Sultan Singh severally apply for mutation of names in respect of the villages allotted to them by their father in the document. It will suffice to refer to one of these applications all of which mutatis mutandis are substantially identical. For this purpose the application of Kunwar Karan Singh in respect of the village Nagla Tula Ram may be taken. It is dated 25th February 1896 and reads as follows:—

"Application for mutation of names in respect of 20 biswas of the Zamindari property of the village of Nagla Tula Ram."

"The applicant begs to state as follows:—The applicant's father Rao Balwant Singh partitioned his property among his heirs under his registered will dated 26th November 1895 and in accordance with the partition the 20 biswas of the villages of Bajripur and Nagla Tula Ram and 20 biswas of Khamanpur a hamlet of

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Jirauli Mahal Rao Balwant Singh fell to the applicant's share. Therefore this application is filed and it is prayed that according to it the name of Rao Balwant Singh may be expunged in respect of the village of Nagla Tula Ram and the applicant's name entered in the khewat. Separate applications have been filed in respect of the remaining Villages. The applicant's elder brother Rao Sultan Singh has filed the original will in a case relating to the village of Sahaoli. It is also a proof in this case.

It will be well to follow up the proceeding thus initiated. On March 19th 1896, we have the Tahsildar's record of the hearing of the application and the order made thereon. It reads as follows:—

"Application for mutation of names in respect of 20 biswas of the village of Nagla Tula Ram, pargana Akrabad, according to the partition of the property."

"Kunwar Karan Singh, applicant, v. Rao Balwant Singh.

Under a will, filed with the record of the mutation case relating to the village of Sahaoli, Rao Balwant Singh, a rais of Sahaoli, divided his Zamindari property among his sons. The 20 biswas of property of the Village of Nagla Tula Ram, in respect of which the name of Rao Balwant Singh stands recorded without the participation of any one else, has fallen to the share of Kunwar Karan Singh. Kunwar Karan Singh prays that his name may be entered in respect of the village aforesaid. Rao Balwant Singh verifies the application and prays for expungement of his name. In spite of the expiry of the time given in the notice, no objection has been taken. From the office report the property is found to be correct. The Patwari of the village says that Kunwar Karan Singh made collections and assessments for *kharif* of 1303 Fasli. As a transfer in possession has taken place, and no objection has been raised, the name of Rao Balwant Singh be expunged in respect of the village and the name of Kunwar Karan Singh entered in place of it. The record be submitted to the pargana officer for approval. A fee of Rs. 7 is deposited and the Treasury tender is filed with the record. No penalty is payable."

No more complete evidence that the family arrangement recorded in the so-called will was understood by all parties to be operative from the first and was acted on by them as such can be imagined than these two records, which are merely specimens of similar records relating to the other villages apportioned to the sons. It will be seen that the Patwari of the village testifies to the appli-

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cant having made collections in 1303 Fasli (September 1895), thus confirming the truth of the statement in the so-called Will that it was at that date that the sons entered into possession of the villages allotted to them. It should be added that direct evidence was given on behalf of the Defendants that it was on that occasion that Rao Balwant Singh publicly announced his intention of making a partition of the property among the members of the family and gave the possession of the villages to the respective sons.

There is another set of transactions of a different date, which add strong confirmation to the Defendant's Case. Rao Sultan Singh died on 30th March 1901, and his father Rao Bulwant Singh, died a few days later on 7th April 1901. Therefore there ensued a situation such that the conduct of the parties must evidence almost conclusively whether the property was regarded as belonging to an undivided family, or whether each son of Rao Bulwant Singh held his portion separately. The importance of the situation is emphasised by the fact that the main grievance of the Plaintiffs is that the share of the eldest brother is much larger than that of either of his brothers.

The conduct of the parties on this occasion was, in their Lordships' opinion, unambiguous and such as to show conclusively the truth of the Defendants' contention. We find that application was made in July 1901 by the widow of Rao Sultan Singh on behalf of her son Rao Briraj Singh for mutation of names with regard to the property held by her late husband. The following is the record:—

" Amendment of khewat,

" Rao Briraj Singh, minor, under the guardianship of Mussamat Rani Piari Kunwar.

" In the matter of the death of Rao Sultan Singh.

" Village of Sumera alias Bijaigarh, pargana Akrabad. 17th July 1901.

" To-day this case is put up in the presence of Kunwar Karan Singh and Kunwar Sheodan Singh and their statements have been taken down. They admit that the property aforesaid entered as Holding No. 2 measuring 280 bighas stands recorded in papers in the name of Rao Balwant Singh and that the same was declared to be in the share of Rao Sultan Singh under a will. Rao Sultan Singh is dead and his heir is Rao Briraj Singh, whose name be entered. The patwari bears testimony to possession and other sharers have taken no objection. It is

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ORDERED.

That the name of Rao Balwant Singh be expunged in respect of holding No. 2 and the name of Rao Briraj Singh, be entered in papers and that the Sadar Musarim do comply with the orders."

There then follows the record of the statement made by Kunwar Karan Singh on that application. It reads as follows:—

"Present Haji Mohammad Makdum Hussain, Settlement Deputy Collector at Aligarh.

"17th July 1901.

"Rao Briraj Singh, Minor, under the guardianship of Musammat Rani Piari Kunwar in the matter of the death of Rao Sultan Singh.

"Village of Kumera alias Sijaigarh.

"Statement of Kunwar Karan Singh.

"My father's name is Rao Balwant Singh: age thirty-three years: occupation, *Zamindari*; residence Sahoali, pargana Akrabad."

"Statement.

Two hundred and eighty bighas entered as holding No. 2 stands recorded in the name of my ancestor, Rao Balwant Singh, and the same has, under a will, fallen to the share of my brother Rao Sultan Singh. Rao Sultan Singh is dead, and now his son Briraj Singh is the owner. His name should be recorded and I have nothing to do with it.

"Signature of Kunwar Karan Singh."

And on the same day the statement of the other Plaintiff, Kunwar Sheodan Singh:—

Rao Briraj Singh, Minor, under the guardianship of Mussammat Rani Piari Kunwar.

"In the matter of the death of Rao Sultan Singh, Village of Sumera alias Bijaigarh, pargana Akrabad.

Statement of Kunwar Sheodan Singh, a rais of Sahaoli.

"Statement.

"My statement is the same as has been made by my brother Kunwar Karan Singh.

"(Sd.) Kunwar Sheodan Singh."

It is not necessary to go into the details of the mutation of names with respect to the *Sir* lands. They support the contention of the Defendants in substantially the same way as that which has been already given with respect to the village property.

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It is now necessary to examine the evidence put forward by the Plaintiffs in answer to the case of the Defendants, based as it is on the unbroken evidence of ten years' conduct of all parties. In the first place, the Plaintiff Kunwar Karan Singh does not give evidence at all, so that his acts as shewn by the records remain undenied and unexplained. The Plaintiff Kunwar Sheodon Singh, however, gave evidence. He makes no attempt to deny any of the matters above referred to, nor does he give any explanation why he took no action until the year 1905, i. e., four years after the death of his father and brother and ten years after he had taken possession of his apportioned shares. It is not too much to say that he did not attempt to shew that there was a single fact known to him in 1905 when he instituted the suit which had not been known to him throughout. He makes it clear, however, that the family had lived in harmony till shortly before the suit was instituted, and let it be seen that it was the pleaders whom he consulted that suggested that the claim made in this action should be set up. Taken as a whole his evidence leaves the defendants' case entirely unshaken.

The testimony mainly relied upon for the Plaintiff's is that of Chirauji Lal. He had been the general agent or factor of Rao Balwant Singh, and continued to transact the business in respect of the village properties for the sons after 1303 Fasli (September 1895). He was in a position to give most important evidence, for he must have known all the facts of the case, and if his evidence could be relied on, the fact that he gave evidence, for the Plaintiffs would have great weight. Unfortunately the very fact that he was in a position to know everything makes it impossible to accept his evidence as reliable. He was no more able to explain away the public acts of the Plaintiffs to which reference has been made than could they themselves, and the contrast between his evidence and their conduct is enough of itself to throw the gravest doubt on the reliability of that evidence.

But an examination of his evidence shows in other ways that it is unreliable. Separate account books of the villages allotted to Sultan Singh were put to him by the Defendants, and he admitted that they were in his own hand-writing, and kept by him. One of these books contains the receipts of those villages, in the case of the year 1897. He admits that it contains a statement in his own handwriting that Sultan Singh is the proprietor of the property. He also admits that, so far as entries of expenditure are concerned, they relate only to the expenditure of Sultan Singh. Another relates to the year 1902. It contains the accounts of the same villages with a

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statement in his own hand-writing that Briraj Singh is the proprietor and similarly the items of expenditure relate to him alone. These books demonstrate the falsity of the rest of his evidence. It is true that he produced collective account books for all the villages purporting to show that the property was enjoyed in common in spite of the partition. There are numerous discrepancies between these and the separate account books which he alleges were compiled from them, and he is wholly unable to account for these discrepancies or indeed for the existence of the separate account books to all. The learned Judge of First Instance, who saw the witness and examined the books, came to the conclusion that these collective account books were not genuine, and their Lordships have no doubt that this conclusion was correct.

The claim of the Plaintiffs in this action evidently arose from the suggestion of the pleaders whom they consulted after quarrels arose in the family, and was based on the fact that the document which evidences the partition is termed a will. It is obvious that such a partition could not have been made by Balwant Sing by Will strictly so-called. But as has been already pointed out, the document is much more than a will (if indeed it is in any sense a will at all), for it describes and witnesses to a family arrangement centemporaneously made and acted on by all parties. Every one treated it as such at the time. The mutations of names show this beyond controversy. There is nothing, therefore, in the fact that the document is called a Will which invalidates the partition, which was undoubtedly made in fact, and which was acted on by all parties for ten years without any dispute or misunderstanding as to their respective rights under it.

Counsel for the Plaintiffs have endeavoured to support the contention that the partition was not intended to take effect *in presenti* by reference to a provision to be found in this document. It reads as follows :—

"If I at any time come back from pilgrimages and find mismanagement or character of any one bad, then I shall have power to cancel this Will, which shall be enforced from the date of its execution."

Their Lordships are of opinion that the highest effect that can be given to such words is that this evidences a contractual condition which the sons accepted in order to obtain the partition which gave them immediate possession of the property, and viewed thus, the contractual acceptance of a power of forfeiture in case of bad

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behaviour would not, in their Lordships' opinion be sufficient to prevent the partition operating *in presenti.* But the true interpretation of the provision is probably that it was merely put in as a threat in order to keep the sons in good behaviour, and that it could not have been enforced specifically, or even at all. It is certainly quite insufficient to outweigh the overwhelming evidence that this was a family arrangement accepted by all parties.

The above considerations relate only to the village property. In addition to this there were two buildings, one in Aligarh and the other at Sahaoli. The disposition in the document relating to these buildings is peculiar and did not in the opinion of the learned Judge of First instance amount to an absolute disposition of them, and their Lordships are not prepared to differ from his views on this point.

There remains the movable property. As to this the family arrangement is absolutely silent. The Plaintiffs are therefore entitled to their share of these movables as inherited property.

It will be seen therefore that their Lordships are of opinion that the judgment of the learned Judge of First Instance was right on all points. Both Plaintiffs and Defendants appealed from his decision to the High Court. That Court allowed the Plaintiffs appeal and dismissed that of the Defendants. The Defendants appealed from both of these decisions. In their Lordships' opinion the High Court ought to have dismissed both appeals. They will accordingly humbly advise His Majesty that the order of the High Court allowing the plaintiffs' appeal should be discharged with costs, and the Decree of the Subordinate Judge restored and that the Order of the High Court dismissing the defendants' appeal should be affirmed. The plaintiffs must pay the costs of the Defendants' appeal to His Majesty in Council, and the defendants must pay costs of their unsuccessful Appeal.

Solicitors :—*Messrs. Ranken, Ford,* and *Chester* for Appellants.

Solicitors :—*Barrow, Rogers* and *Nevill* for Respondents.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Umadai Raja Rajai Damara Kumara Thimma Nayanim Bahadur Varu Raja of Kalahasti. } *Appellant.**

v.

Sri Raja Velugoti Sri Rajagopala Krishna Yachendra Bahadur Varu, K. C. I. E., Maharajah of Venkatagiri and another. } *Respondents.*

Raja of Kalahasti *v.* Maharajah of Venkatagiri

C. P. C. Order 21 r. 90—Material misstatement in the sale proclamation—Mistake of both the decree holder and the Judgment debtor as to property sold—Ignorance of statements to which Judgment debtor was bound to object—Ignorance due to conduct of decree holder—Estoppel—Difference between auction purchaser's right before and after confirmation.

Where both the decree holder and the judgment-debtor proceeded on the footing that what was going to be sold was the rent charge on a certain village and not the village itself, the value of the property and the peishcush due thereon having been fixed on that basis but the other description of the property given in the sale proclamation was such as to take in the entire village.

Held: that if what was sold was the village and not merely the rent-charge, there was a misstatement as to material particulars in the sale proclamation and the price fetched at the sale being grossly inadequate, the court could set aside the sale under order 21 r. 90 C. P. C.

Held: further that as the judgment-debtor was unaware of the statements in the sale proclamation to which he was bound to object, and the ignorance was one for which he was not in the circumstances to blame having been in part induced by the conduct of the decree-holder, he was not estopped from objecting to the sale though he had been served with a copy of the sale proclamation.

Where an act of court is induced by the mistake of parties, it may be set aside.

Huddersfield Banking Company Limited v. Henry Lister & Son, Limited[1] *Moore v. Peach, the Charging Cross Bank, Garnishee*[2] referred to.

A purchaser at a court-auction has no absolute right to have the sale confirmed where there is an irregularity in the publication or the conduct of the sale, although he is in no manner, responsible for the irregularity. There is considerable difference between his rights before and after the confirmation of sale.

Appeal from the order of the District Court of North Arcot, in C. M. P. No. 810 of 1910 in E. P. No. 120 of 1907 in O. S. No. 2 of 1907.

L. A. Govindaraghava Aiyar for Appellant.

V. Ramesam and *S. Srinivasa Iyengar* for Respondents.

The Court delivered the following

*A. A. O. No. 113 of 1912. 29th April 1913.

1. (1895) 2 Ch. 273. 2. (1897) 66 L. J. 198.

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Judgment:—This appeal is against an order of the District Court of North Arcot refusing to set aside the sale of a village Chintapalli held in the execution of a mortgage decree. The mortgagor Judgment-debtor is the Rajah of Kalhasti, and the mortgagee is the Maharajah of Venkatagiri. The purchaser at the Court sale is the Rajah of Tuni. Subsequent to the mortgage which was the subject of the decree, the mortgagor entered into a transaction of exchange with one Narasimha Rayanimgar by which Chintapalli was given to Narasimha in exchange for some other property. Under the terms of the instrument of exchange the mortgagor was entitled in addition to the village received by him in exchange to an annual sum of Rs. 507–2–9 from the income of the Chintapalli village. This arrangement was apparently made in order to compensate the mortgagor for the difference in value between Chintapally and the village given by him in exchange for it. The suit and the decree on the mortgage were subsequent to the exchange, but the mortgagee was of course not bound by the exchange. Narasimha Raynimgar, to whom the equity of redemption had passed under the exchange transaction, was not a party to the suit on the mortgage. It may be mentioned in passing that there were several other items of property comprised in the mortgage and the decree passed thereon. In execution of the decree, the mortgagee realised the greater part of the money due to him by the sale of other properties; he then brought to sale Chintapally village for the recovery of the balance. In the application for sale proclamation to be settled by the Court under Order 21, Rule 66, the decree-holder stated the revenue payable on the village to be Rs. 188–11–10, and estimated its market value at Rs. 2,800. There seems to have been some objection raised to the draft of the sale proclamation, and the Judgment-debtor was called upon to give his own estimate of the value of the village. He stated that the value was Rs. 9285 calculated at 15 times the average annual gross income of Rs. 619. It is not disputed that both the decree-holder and the Judgment debtor were quite mistaken with respect to the value that each gave of the village. The cause of the mistake was clearly this: the decree-holder acted on the footing that what was to be sold in execution of the decree was the mortgagor's right, title and interest as it existed at the time of the sale. This right, it would be observed, was only a rent charge of Rs. 507–2–9 a year in consequence of the transaction of exchange which took place subsequent to the mortgage. As a matter of fact the mortgagee was entitled to bring to sale the mortgagor's right in the village as it stood at the time of the mortgage. Whether the mortgagee was under the mistaken im-

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pression that he was entitled to sell only the mortgagor's equity of redemption as it then stood or whether an account of his having omitted to make Narasimha Rayanimgaru a party to the suit as he was bound to do under S. 85 of the Transfer of Property Act, he contented himself with bringing the equity of redemption to sale, is not quite clear. It is, however, certain that the Judgment debtor in giving his own valuation and in stating the annual income and revenue of the village also proceeded on the footing that the mortgagee intended to bring to sale only his rent charge over the village. He calculated the value at 15 times the gross annual income, he took the rent charge and the land cess which was also payable by Narasimha Rayanimgar to the mortgagor to be the annual income and the peishcush which appears to have been calculated at one-third of the rent charge, in accordance with the usual estimate made of the proportion borne by the peishcush to the actual income, was stated to be Rs. 188–11–10 the same figure as had been adopted by the decree-holder. The right of the defendent in the village to be brought to sale was described as "defendant's ayan interest." The expression "ayan interest," would apparently be consistent with the interest of the defendant as it stood at the time of the mortgage or at the time of the sale. What the words 'other interest' mean is not quite clear. Possibly they were put in to denote that all the right title and interest of the debtor was to be brought to sale; but this again is consistent with the intention that what was to be sold should be the right mortgaged by the Judgment-debtor to the plaintiff in the suit or the interest of the mortgagor as it stood at the time of the sale. The price fetched at the auction sale was Rs. 7950. The Judgment-debtor applied under Order 21, Rule 90, to set aside the sale.

The application proceeded on the basis that the sale proclamation would have the effect of passing to the purchaser the entire right of the mortgagor as it stood at the time of the mortgage to the plaintiff. The application was not opposed by the decree holder, but it was resisted by the purchaser, who maintained that what was sold to him was what was mortgaged to the plaintiff and not merely the rent charge which the Judgment-debtor had at the time of the sale. The District Judge has also proceeded on the view that the entire right in the village was sold by it and passed to the purchaser. The arguments in appeal have also proceeded on the same footing. It will be observed that in this view the auction-purchaser would not have a safe title, as Narasimha Rpyanimgaru, who had a substantial interest in the village at the time of the suit, was not made a party to it, but the purchaser is apparently prepared to take the title

to the village with this defect. It is not disputed that the price fetched at the auction sale must be regarded as very much less than the real value of the village. In his petition, the Judgment-debtor stated that the annual gross income of the village was about Rs. 4,000 and that the value will be about Rs. 60,008. His clerk, the first witness at the enquiry held by the Judge, said that the annual beriz of the village was Rs. 2,000. The 2nd witness another clerk, stated that Narasimha Rayanimgaru had after the exchange spent about Rs. 4,000 in improving the village. The karnam of the village the third witness gives Rs. 3,400 as the average annual income. The figures given by these witnesses are disputed by the auction-purchaser, and he relies upon a statement made by the Judgment-debtor at an earlier stage of the proceedings that the annual income was not less than Rs. 1,200. The value of the village would then be about Rs. 18,000 taking the gross income for 15 years to represent the market value. It is at any rate clear that the price fetched at the sale was much less than the market value of the village. The petitioner requested the lower court for an adjournment to examine two witnesses who did not attend at the hearing; but the District Judge refused the adjournment; as in the view he took of the case there was no defect or irregularity in the publication and conduct of the sale, and it would be useless for the petitioner to prove that sale was made for a grossly insufficient price.

The learned vakil for the purchaser does not seriously contend before us that Rs. 7,950 would be an adequate price for the village, his argument being that the sale cannot be set aside as there was no irregularity in publishing and conducting it. The District Judge's order refusing to set aside the sale is based on the ground that the Judgment-debtor is estopped from objecting to the statements contained in the sale proclamation regarding the peishcush and the value of the village and from seeking to set aside the sale on the ground of the incorrectness of these statements. Mr. Ramesam on behalf of the purchaser maintains that this view is correct. Order 21, Rule 66 lays down that " the proclamation of sale should specify as fairly and accurately as possible.

(*b*) the revenue assessed upon the estate.

(*c*) every other thing which " the courts consider material for a purchaser to know in order to judge the nature and value of the property." It is not incumbent upon the court to state the value of the property in the sale proclamation. It is not denied that a materially incorrect statement of the revenue or of the value of the property where the value is stated would constitute an irregularity

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which if it caused substantial injury to the debtor, would entitle him to have the sale set aside.

Now, in India an execution sale is an act of the court. The title of the purchaser is derived from the court's act. The court has according to Rule 66, to give notice to the decree-holder and the judgment debtor before a proclamation to sell is drawn up. The decree-holder is bound to put in a verified statement of the matters required to be stated in the sale proclamation. The Court is entitled to summon any person whom it thinks necessary and to examine him in respect to any of those matters in order to ascertain correctly the particulars stated in the proclamation. Although the settlement and publication of the proclamation are acts done by the Court, it is of course largely dependent upon information given by the parties with respect to the particulars to be given in the proclamation. It has, therefore, been held by the Privy Council and by the courts in India that a party who does not raise an objection to the proclamation which he ought to have raised and thereby fails in the duty which he owes to the court should he held to be estopped from complaining of an irregularity resulting from an erroneous statement which he should have corrected. Mr. Ramesam contends that this rule of estoppel must be applied to this case and relies on *Girdhari Singh* v. *Hurdeo Narain Singh* [1], *Olpherts* v. *Mahabir Pershad Singh* [2] and *Arunachallam* v. *Arunachellam* [3] and *Behari Singh* v. *MukatSingh*[4]. The question for decision is whether the rule is applicable against a Judgment-debtor in the circumstances of the case. It has to be remembered that the mistake in the proclamation was in the first instance due to the action of the decree-holder, who calculated the peishcush on the value of the rent charge possessed by the Judgment debtor at the time of the sale. Now, there was nothing to prevent the decree-holder from bringing to sale only the Judgment-debtor's equity of redemption as it stood at the time of the sale. Whether he voluntarily intended to get only the Judgment debtor's rent-charge sold, or whether he was under the impression that was what he was entitled to bring to sale, it cannot be said that the Judgment-debtor was bound to assume that his right in the village at the time of the mortgage was to be brought to sale in the face of what was indicated by the decree-holder's statement of the peishcush. If the description of the Judgment-debtor's interest had been more definite and showed more clearly that the rent-charge alone was intended to be sold, no possible trouble could have arisen. The amount realised by

1. (1876) L. R. 3 I. A. 230.
2. (1882) L. R. 10 I. A. 25.
3. (1888) I. L. R. 12 M. 19.
4. (1905) I. L. R. 28 M. 273.

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the sale was sufficient to discharge the balance due to the decree-holder on his mortgage. The sale would not then be impeachable on the ground that Narasimha Rayanimgaru was not made a party to the suit. It is the inconsistency between the description of the property to be sold (as it is assumed to be by all the parties concerned in these proceedings) and the statement of the peishcush and the value of what was to be sold that has caused detriment to the judgment-debtor. The description of the judgment-debtor's right was certainly not such as to show clearly that what was to be brought to sale was not the rent charge only. In the circumstances, it is hardly reasonable to charge the judgment-debtor with any neglect or failure of duty in proceeding on the footing that what was to be sold was only his rent charge. It is by no means clear that he could not successfully insist that the purchaser has acquired only the rent-charge by the sale. But both he and other parties concerned as well as the lower court have proceeded on the footing that the description would embrace all that was mortgaged to the decree-holder; and it is in this view that we have to decide whether there was not a material irregularity which the judgment-debtor is entitled to complain of. We are not prepared to hold that the judgment-debtor's act in not objecting to the statement of the peishcush and in stating the value on the footing of the peishcush being correctly stated should be held to estop him from complaining that the statement as applied to his entire right in the village at the time of the mortgage is incorrect and constitutes a substantial irregularity which would vitiate the sale. In the view that this entire right has been sold by the court, the judgment-debtor's acquiescence in the statement of the peishcush must be clearly held to be due to a mistake of fact regarding what the Court intended to sell. He was certainly not aware that anything more than the rent charge was to be sold. It cannot be held that he was bound to be aware that the court was going to sell anything more than the rent charge. The decisions relied on by Mr. Ramesam do not apply to a case where the judgment-debtor's failure to object to the proclamation was due to a mistake for which he could not be held to blame. If the decree-holder voluntarily chose to sell only the rent charge, though aware that he could sell more then the Judgment-debtor was not bound to object to his doing so. If on the other hand, the decree-holder was under the impression that he could not sell more than the rent charge even then the judgment-debtor was probably under the same mistake; at any rate, he was not bound to object to the decree-holder's selling less than what he might be entitled to bring to sale. The Court will not apply the rule of estoppel to cases where the

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Judgment-debtor was not aware of the facts to which he was bound to object. See *Dhanukdhari Singh* v. *Nathuni Sahu* [1], *Basanta Kumari Guha* v. *Ramkanai Sen Poddar* [2] *and Kabidanund Thakur* v. *Pirthi Chand Lal* [3]. In this case the judgment-debtor was not aware that all his right in the Chintapally village as it stood at the time it was mortgaged was intended to be sold; and we are not in a position to say that he ought to have been aware that such was the case. To such a case the doctrine of estoppel will not apply. Where an act of a court is induced by the mistake of parties, it may be set aside. *Huddersfield Banking Company, Limited* v. *Henry Lister and Son Limited*[4], *Moore* v. *Peachy the Charging Cross Bank, Garnishee*[5] and Freeman on Execution; Vol. II, 1802. The irregularity is the mistake in the proclamation made by the court. That mistake was no doubt induced in part by the judgment debtors omission to object to the statement of the peishcush and to his proceeding to state the value in accordance with that statement; but his omission was due to a mistake for which he cannot be held responsible, as already pointed out. Mr. Ramesam contends that, as against his client who is the auction-purchaser, the judgment-debtor cannot rely on his failure to object to the proclamation being due to the act of the decree holder; but a purchaser at a court auction has no absolute right to have the sale confirmed where there is an irregularity in the publication or the conduct of the sale, although he could in no manner be responsible for the irregularity. The sale being the act of the court, the auction-purchaser has no absolute right to its being confirmed where there are irregularities in the court's auction. There is a considerable difference between an auction-purchaser's rights before and after the confirmation of the sale. Where there has been substantial irregularity in publishing or conducting a sale and material injury has been suffered by the judgment-debtor in consequence, the auction-purchaser has no right to the confirmation. We must, therefore, reverse the order of the Lower Court and set aside the sale. The case is not one in which we would make any order as to costs either in this or in the lower court. The purchase-money should be refunded to the auction-purchaser.

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1. (1907) 6 C. L. J. 62 at p. 67.
2. (1910) 13. C. L. J. 192.
3. (1911) 14 C. L. J. 346.
4. (1895) 2 Ch. 273.
5. (1897) 66 L. J. 198.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar. Mr. Justice Sadasiva Aiyar.

R. M. P. V. Muthia Chettiar ... *Appellant* (*Defendent*).

v.

S. R. M. A. R. Ramasami Chettiar...*Respondents.* (*Plaintiff*).

Statutes—Retrospective operation of—Estates Land Act S.17—Rent Recovery Act S, 7—Rule enacted a rule of procedure—Suit for rent for faslis prior to Estates Land Act—Maintainability of without tender of patta after passing of the Act.

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The rule enacted in S. 7 of the Rent Recovery Act (Act VIII of 1865) is merely a rule of procedure and does not affect the right of the land-holder to levy rent.

Held, therefore, that suits for rent instituted after the passing of the Estates Land Act are not liable to be dismissed on the ground of non-tender of patta though in respect of faslis prior to the passing of the said Act.

There is no distinction between cases where the change in the processual law imposes a new and further restriction on the prosecution of a substantial claim in the court and where it takes away a restriction on such prosecution imposed by the older processual law.

G. Lee Morris v. *Sambamurthi Aiyar*[1] dissented from.

Retrospective operation of statutes explained and discussed.

Second appeal against the decrees of the District Court of Ramnad at Madura in Appeal Suits Nos. 160 and 170 of 1910 presented against the decree of the court of the Head Assistant Collector, Ramnad, in Summary Suit No. 421 of 1908.

L. A. Govindaraghava Aiyar for Appellant.

T. Rangachariar for Respondant.

The Court delivered the following.

Judgment :—*Sundara Aiyar*, J.—This is a suit by a land-holder in the Zemindary of Sivaganga against a ryot for rent for fasli years 1315,1316 and 1317. The principal contention raised by the defendant so far as they relate to this second appeal are :—

(1) that the suit is not maintainable as pattas had not been tendered by the land-holder prior to the institution of the suit ;

(2) that rent for *Angami* cowle land was payable only at Rs. 6 a Kurukkam and not at Rs. 16 a Kurukkam the rate claimed by the plaintiff ;

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* S. A. No. 117 of 1911. 4th April 1913.

1. (1871) 6 M. H. C. R. 122.

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(3) that the defendant was not bound to pay more than Rs. 1-14-0 for all the trees in his holding and ;

(4) that plaintiff was not entitled to recover the cess known as *Chittu Nottam.*

Both the Lower Courts held that, according to the Estates Land Act I of 1908, which was in force at the time of the institution of the suit, tender of patta was not essential to entitle the land-lord to maintain a suit for rent. This question has been already decided by this Court in several cases. See *Sri Raja Satrucherla Veerabadra Raju Garu* alias *Sivaskandu Raju Bahadur Garu v. Ganta Kurmi Naidu*[1], *Kanthimathinatha Pillai v. Muthuswami Pillai,*[2] where it was held that S. 8 of Act VIII of 1865 which required the exchange of pattas and muchilikas between the land-holder and the ryot or the tender of a patta by the land holder to the ryot as a condition precedent to the maintenance of a suit for rent did not apply to suits instituted after Act I of 1908 came into operation. But as Mr. Govindaraghava Aiyar earnestly desired to reargue the question, we allowed him to do so. His contentions may be briefly stated as follows :—that S. 7 of Act VIII of 1865, which laid down that "no suit brought and no legal proceedings taken to enforce the terms of a tenancy shall be sustainable unless pattas and muchilikas have been exchanged as aforesaid, or unless it be proved that the party attempting to enforce the contract had tendered such patta and muchilika as the other party was bound to accept, or unless both parties shall have agreed to dispense with pattas and muchilkas", was not merely a rule of procedure but affected the right of the land-holder to levy rent from his ryot ; that section 77 of the Estates Land Act, which enacts that " at any time after an arrear of rent has become due, the landlord may institute a suit before the Collector for the recovery of the arrear " should not be given retrospective effect so as to affect claims for rent which accrued due while Act VIII of 1865 was in force ; and that non-tender of patta before the expiration of the fasli year for which it was due put an end to the landlord's right of action while Act VIII of 1865 was in force ; and that a right so extinguished could not be revived by the repeal of that Act and by the enactment of Act I of 1908. There can be no doubt that, if the non-tender of patta affected the land-holder's right to his rent under Act VIII of 1865, the appellant's contention must succeed. The substantive rights of parties must be decided according to the law in force at the time of the accrual of such rights.

1. (1912) 22 M. L. J. 451. 2. (1912) M. W. N. 960.

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Mr. Govindaraghava Aiyar, on the other hand, concedes that the processual law as to the enforcement of a right must be that in operation at the time when the right is sought to be enforced. Did section 7 of Act VIII of 1865 affect the landlord's right to the rents? In my opinion it did not. It merely imposed a condition which the landlord was bound to fulfil if he wished to institute a suit for its recovery or to take legal proceedings to compel its payment. As pointed out in *Sri Raja Satrucherla Veerabadra Raju Garu* alias *Sivaskandu Raju Bahadur Garu* v. *Ganta Kurmi Naidu* [1] the rent accrued due when it was payable irrespective of the tender of patta or the time when it was tendered. The law of limitation would commence to operate, not from the date of the tender of patta but from the time that the rent was payable. The tender of patta was, therefore not necessary to complete the land-holder's right to rent against his ryot. Now what is the scope of the rule, that vested rights cannot be taken away by a subsequent statute? It means that a statute will not be construed, unless the language clearly requires it, so as to impair rights acquired under existing laws or to create an obligation or duty which did not exist before or a disability in respect of transactions or considerations already passed. A common-law or statutory substantive right would not be affected by a statute passed subsequent to its accrual nor would the statute affect transactions which had become complete before its enactment. The validity of a contract must be judged by the law as it stood when it was entered into. So also whether an act done by a person was lawful or tortuous or amounted to an offence or not, also the validity or invalidity of any act done by a person. Illustrations of these different classes of cases are given in Maxwell on the 'Interpretation of Statutes' at pages 324 to 333. On the other hand the mode in which a right is to be enforced is determined by the law as it stands at the time. The mode of enforcement will include all questions relating to the tribunal which is to compel the rendering of the right by the party under obligation, the time within which the right may be enforced (subject to an exception to be presently noticed), the rules of evidence, regulating its enforcement including the admissibility of documentary evidence, the pleas which it is open to the parties to an action, both plaintiff and defendant, to set up, and the reliefs the court will or will not grant to enforce the right. All these matters are treated as relating to processual law. But in administering processaual law understood in this broad sense, a further distinction has to be noticed, the failure

1. (1912) M. W. N. 441.

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to grasp which distinction sometimes leads to confusion. Some matters coming within the law of procedure must be decided by the law as it stands at the time when the suit is instituted, while with regard to other matters a change in the law subsequent to the institution of the suit will modify the procedure which the Court should adopt. Thus the defences which a litigant is entitled to raise in answer to a claim made in a suit cannot be modified by a subsequent statute. The same observation holds good with regard to anything which a party who seeks the assistance of a court should comply with as a condition precedent to obtaining it. A plaintiff cannot be prejudiced by the defendant being allowed to set up pleas which were not open to him when the suit was instituted. In this sense it is often said that a change in the processual law subsequent to the commencement of an action cannot change the rights either of the plaintiff or of the defendant. The right spoken of here is not a substantive right of either party but a right relating to the enforcement of a substantive right which would be included in the wide sense of processual law, that is, law relating to remedies for the enforcement of substantive rights. But these remedial rights relating to the enforcement of substantive rights are affected by any change in the law subsequent to the accrual of the right but before steps are taken to enforce it in a court. Sometimes a party has rights of a remedial character to enforce a substantive right without resorting to the tribunals and authorities constituted by Government for the purpose. Thus he is entitled to abate a nuisance. If he has a right of easement he is sometimes entitled to remove an obstruction to the enjoyment of it. Both Act VIII of 1865 and Act I of 1908 confer a remedial right on a landlord who is not paid his rent, namely the rights to distrain the ryot's property. If a distraint is made by a land-holder, its validity must be determined according to the law as it stands at the time of the distraint; for any act of an individual must be judged according to the law which governs him when he does it. But if, before he exercises his remedial right, the law regulating the validity of the act is changed he must exercise his right in such a manner as to be in accordance with the manner in which the law directs him to exercise it when he does so.

Applying these principles to the present case, there can be no doubt that a land-holder may institute a suit in a Revenue Court, after the coming into force of Act I of 1908, for recovery of rent which accrued due while Act VIII of 1865 was in force and that he could not institute it in the ordinary civil courts. See *Weldon* v.

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Winslow[1]. The Estates Land Act does not contain a provision similar to that embodied in S. 7 of Act VIII of 1865, that a suit for rent cannot be sustained unless patta was tendered to the tenant prior to its institution. That provision was one which related only to the enforcement of the right, as the tender of patta was not necessary to compel the land-holder's right to rent but only to the enforcement of it in Court or to the landlord exercising a remedial right himself. In so far as it related to the recovery of it through Court, it undoubtedly belonged to the region of processual law. The non-performance of the condition merely furnished a defence to the action by a plea which did not deny the landlord's right to the rent. The object of tendering patta was merely to give notice to the tenant of what the land-holder claimed to be the terms of the ryot's holding the land which he was entitled to enforce. Such notice was not necessary if the tenant had executed a muchilika or other instrument acknowledging the terms of the tenancy for the year. It was considered by the Legislature in the interests of the ryot that such notice should be given before the landlord could be allowed to enforce his rights, through Court. In *Coburn* v. *Colledge*[2] a solicitor instituted an action for the recovery of the amount of a bill of costs. The suit was brought within the period of limitation if computed from the time that the attorney delivered his bill of costs to the defendant. S. 37 of the Solicitor's Act of 1843, provided that " no solicitor could commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by him until the expiration of one month after the delivery to the party to be charged therewith of a bill of such fees, charges and disbursements. " The Court of appeal held that the delivery of the bill was not necessary to complete the solicitor's right to the payment of what was due to him, but was only a rule of procedure, and that limitation should therefore be computed from the time that he was entitled to payment, apart from the delivery of the bill. Referring to the section of the Solicitor's Act, *Lord Esher,* M. R. observed. " It takes away no doubt the right of the Solicitor to bring an action directly the work is done, but it does not take away his right to payment for it which is the cause of action. The statute of limitation itself does not affect the right to payment but only affects the procedure for enforcing it in the event of a dispute or refusal to pay. Similarly, I think, S. 37 of the Solicitor's Act, 1843, deals, not with the right of the Solicitor but with the procedure to enforce that right. It does not provide that no

1. (1884) 13 Q. B. 784.
2. (1897) 1 Q. B. 702.

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solicitor shall have any cause of action in respect of his costs or any right to be paid till the expiration of a month from his delivering a signed bill of costs, but merely that he shall not commence or maintain any action for the recovery of fees, charges or disbursements until then. It assumes that he has a right to be paid the fees, charges, and disbursements, but provides that he shall not bring an action to enforce that right until certain preliminary requirements have been satisfied. If the Solicitor has any other mode of enforcing his right than by an action, the section does not seem to interfere with it. For instance, if he has money of the client in his hands not entrusted to him for any specific purpose, there is nothing in the section to prevent his retaining the amount due to him out of the money. If that be the true construction of the section, it does not touch the cause of action but only the remedy for enforcing it.

The plaintiff, in order to make out a cause of action must assert certain facts which, if traversed, he would be put to prove. It is, well known, of course, that any of those facts which is not traversed, is taken to be admitted ; * * * * In former times, if he failed to assert any of those facts, his declaration was demurrable as showing no cause of action. If he asserted those facts and they were traversed, it lay upon him to prove them. If any of them were not traversed he need not, of course, prove them * * * * If the plaintiff alleges the facts which if not traversed, would *prima facie* entitle him to recover, then I think he makes out a cause of action. Applying that to a case like the present when the plaintiff had completed the work, under the old course of pleading alluded to by my brother Lopes, he could have brought his action, declaring for money payable for work and labour done at the request of the defendant ; and if the defendant made no answer to that claim, he would have been entitled to recover. The defendant could not have demurred to the plaintiff's declaration which would have shown a perfectly good cause of action and unless the defendant set up something to defeat the claim, the action would have been maintainable. Therefore, as soon as the Solicitor had done the work, he could have maintained his cause of action for work and labour. The defendant might plead that no bill of costs had been delivered, but that would only be by way of answer to a case which constituted a good cause of action. " In *Rangayya Appa Row* v. *Bobba Sriramulu*[1] the Judicial Committeee of the Privy Council observed, with reference to S. 7 of Act VIII of 1865, that it " was not an enabling section but a restraining section." The

1. I. L. R. 27 M. 143.

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restraint placed upon the procedure in enforcing the right to rent was removed by the Legislature and the removal deprived the defendant of a plea which he could set up in answer to the right to enforce, but one which would not amount to a denial of the right itself. But, as observed in Maxwell on the 'Interpretation of Statutes', "no person has a vested right in any course of procedure, he has only the right of prosecution or defence in the manner prescribed for the time being for the Court in which he sues, and if an Act of Parliament alters that mode of procedure he has no other right than to proceed according to the altered mode. The remedy does not alter the contract or the tort. It takes away no vested right, for the defaulter can have no vested right in a state of the law which left the injured party without or with only a defective remedy." It is a mistake to suppose that in allowing suits to be instituted under Section 77 of Act I of 1908 for rent which accrued due before the Act, without previous tender of patta, retrospective operation is given to the section. It is merely enforced as it stands in suits instituted after it came into force. The defendant has no vested right in a defence which was available before, but abolished by the Act. It is rather the defendant who seeks to enforce a provision which was no longer in force. The provision must be regarded, after the repeal of Act VIII of 1865, just as if it had never existed at all, in suits instituted after the repeal. *Sureties & another Assignees of the Estate and Effects of a Bankrupt* v. *Ellison*, [1] *Attorney General* v. *Lamplough*[2]. In re *the Mexican and South American Company, Grise wood and Smith's case, Depass's*[3]. *In the Queen* v. *the Inhabitants of Denton*[4] a man was convicted on an indictment not provided for by the common law. The indictment was good under a statute which was in force at the time that it was laid but was repealed before judgment was asked for. It was held that the judgment must be arrested. Lord Campbell observed "By arresting the judgment we are not giving the statute any retrospective operation. We allow it force only from the time when it passes and we say that if the count was bad then it cannot be acted upon now." It is unnecessary to consider whether this decision is in accordance with the principle that some rules relating to processual law cannot be altered so as to affect pending cases. But the principle enunciated is certainly applicable to all laws relating to the enforcement of substantive rights which are repealed before the institution of an action.

1. (1829) 9 Bar. and Cress 750.
2. (1878) 3 Ex. D. 214.
3. (1859) 4 D. and J. 544.
4. (1852) 118 Eng. Reports 287.

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Reference was made by Mr. Govindaraghava Aiyar to, *In re- Joseph Suche and Company Limited* [1], but in that case the question related to the substantive rights of creditors in bankruptcy proceedings and is not analogous to the present case. The *Colonial Sugar Refining Company Limited* v. *Irving* [2], *Nanabin Abu* v. *Shekubin Andu* [3], and *Salimamma* v. *Valli Husanabba Beari* [4], were cases where the law was altered after the commencement of the proceedings. It was held that the right of appeal must be regulated by the law in force at the time when the proceedings commenced, an appeal being only a continuation of the proceedings in the Court of First Instance. As already observed there are some rights in processual law which cannot be altered except by clear words by legistation subsequent to the institution of the proceedings. These cases are no authority for the position, that an alteration made before the commencement of an action will not affect anything coming within the province of processual law and not relating to the substantive right sought to be enforced.

Mr. Govindaraghava Aiyar contends that the failure to tender patta within the end of each of the fasli years in question destroyed the land-holder's right of action for rent. This contention cannot be accepted. No doubt the court could not enforce the right to rent in an action under Act VIII of 1865 if the defendant raised the plea of non-tender of patta. But the defendant might or might not raise it. The failure to tender patta did not of itself destroy the right to institute a suit. The failure *plus* the defendant's insistence in the suit on a plea of its non-maintainability would together prevent the court from giving the plaintiff a decree. If the non-tender of patta itself destroyed the right of action the court would be bound to dismiss the suit even if the defendant did not plead it. The cases cited by the appellant's pleader which laid down that a right of action barred under an existing statute of limitation would not be revived by a subsequent statute are not analogous. The lapse of time by itself destroys the plaintiff's right to his remedy by suit, and the court is bound to dismiss the suit though the defendant may not plead limitation. Much reliance was placed for the appellant on *G. Lee. Morris Receiver of the Estate of the late Rajah of Tanjore* v. *Sambamurthi Rayar* [5]. The question there was whether a suit was maintainable after Act VIII of 1865 came into force for rent which accrued due before, the law as it stood at the time of the accrual not requiring the tender of patta before a

1. (1875) 1 Ch. D. 48.
2. (1905) A. C. 300.
3. (1908) I. L. R. 32 B. 337.
4. (1911) 21 M. L. J. 764.
5. (1871) 6 M. H. C. R. 122.

suit could be maintained. The Court (*Holloway* and *Kindersley*, JJ.) held that the suit was sustainable. *Holloway*, J. with whom the other learned judge concurred evidently treated the tender of patta as necessary to complete the acquisition of right to complete the landholder's right to rent under Act XIII of 1865, for he observed, "the law as to the acquisition of rights is that prevailing at the period of the arising of the matters of fact which generate them. Their enforcement must be according to the rules of process at the period of the suit. Care must however, be taken .to distinguish between laws which are merely processual and such as under that fictitious appearance are really material. To declare a certain right which would be validly created by certain matters of fact not creatable without the addition of some other, is material and not formal law, the non-distinguishing of which has led to very great injustice." (To call substantive law material and processual law formal does not seem to lead to any elucidation of the nature of primary and remedial rights, but rather calculated to create confusion). The view adopted by the learned Judge is entirely inconsistent with the later decisions of this Court, where it was clearly laid down that the right to rent is complete without the tender of a patta. It is also inconsistent with *Coburn* v. *Colledge*[1]. The learned Judge disagreed with the decision in *Le Roux* v. *Brown*[2]. But that case has never been dissented from in the English Courts. On the other hand, the view laid down there was accepted in *Maddison* v. *Alderson*, [3], and *Rochefocould* v. *Boustead* [4]. The learned Judge further observes, " Now to say that the right of the landlord shall not exist upon its actionable side unless something is done which was not necessary before is to affect an acquired right by matters subsequent; and this is not processual but material law, and no restrospective effect should be given to it." What the learned Judge meant by the 'actionable side' of a right is not clear. Possibly he was referring to the possibility of a right continuing to subsist though the remedial right is destroyed or affected by some circumstance. This is no doubt the case where a right of action is destroyed by the lapse of time itself provided in the statute of limitations. But as already pointed out the lapse of time destroys the right when the period prescribed for instituting an action expires. The learned Judge was evidently of opinion that the condition laid down by a statute which restricts the circumstances under which a complete right may be enforced makes the right itself incomplete. This is in accordance neither with principle nor with the decisions either of the

1. (1897) 1 Q. B 762.
2. (1852) 12 Common Bench 801.
3. (1883) 8 A. C. 488.
4. (1897) 1 Ch. 126.

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English or the Indian Courts. The learned Judge evidently perceived the difficulty in sustaining the position adopted by him, because he speaks of the incompleteness of the right as attaching only to a certain side of it which he calls the 'actionable side.' The actual decision in the case is also inconsistent with several cases in the English Courts cited in Maxwell on the 'Interpretation of Statutes' which laid down that a statute laying down conditions restricting the enforcement of a previously accrued right is applicable if the action is instituted after the modification in the law. Where the law, as modified, could not reasonably be complied with after the change, it has been held that the new law would not be taken as applicable to such cases.

It may also be observed that under Act VIII of 1865 suits for rent lay in the ordinary civil courts, while such suits are made cognizable, in certain cases, exclusively by a Revenue Court under Act I of 1908. The strict application of S. 7 of Act VIII of 1865 would not require the condition of tender of patta to be enforced when the suit is in a Revenue Court.

For all these reasons, the contention that the suit is not maintainable on account of the non-tender of proper pattas for the faslies in question cannot be supported.

The next point relates to the rate of rent for Angami cowle land. The findings of both courts on the question are concurrent. Rs. 16 per Kurukkam was found to have been paid for a long time by the ryot. The lower courts were entitled to find that there was a contract that such rent should be always payable. We are bound to accept the finding in second appeal.

With regard to the rent payable for trees, the District Judge has apparently misconstrued Exhibit II. That document provided a consolidated rent of Rs. 1-14-0 for certain kinds of trees on the *Shunmuga Oorani* bund on *Kottaikkaraipuli Mettangadu* next to it, on *Achukattu Varappu* and in the backyard of the ryot's house. The Judge is no doubt right in holding that what is collectable according to the terms of Exhibit II must be regarded as rent; but he did not advert to the effect of the document in fixing the amount payable. The plaintiff claimed Rs. 34-10-9 per year, while the defendant contends that no more than Rs. 7-10-0 per year would be payable in any event. We must ask the District Court to submit a revised finding on the question, what rent is payable for the trees in the defendant's holding?

The last question for decision, is, whether the plaintiff is entitled to recover the cess called *Chittu Nottam*. The evidence in

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the case does not show clearly what the nature of this cess is. The District Judge holds that the Head Assistant Collector should not have disallowed it. The word '*Nottam*' seems to show that the cess was levied as a consideration for testing coins. Plaintiff's 2nd witness states that the man who collects rent is called the '*Nottamgar*' and that there are emoluments due to him. But he adds that the *Chittu Nottam* is not paid to the *Nottamgar*. The ryot is not bound to pay any consideration to the land-holder for testing coins; nor would he be bound to make payment to enable the landlord to collect the rents due to him from his ryots. The cess has never been incorporated with the rent so as to become part of it. A decree was first passed against the defendant *ex parte* for the rent due by him by the Head Assistant Collector, but the claim for *Chittu Nottam* was disallowed. This decree was set aside by the Appellate Court at the defendant's instance, but the plaintiff preferred no appeal against the disallowance of *Chittu Nottam*. We do not think that, in these circumstances, the defendant should be held to be bound to pay the amount claimed as *Chittu Nottam*.

The finding on the question of the rent for the trees will be submitted within one month from the date of receipt of this order in the lower court. Seven days will be allowed for filing objections.

Sadasiva Aiyar, J:—I need not repeat the facts of the case as they have been fully set out by my learned brother in his judgment. The only question I intend to deal with is whether the tender of a patta was necessary before the land-lord could recover his rent in a suit brought after the passing of the Estates Land Act for rent accrued due before the Act. In *Sri Raja Satracherla Veerabhadra Raju Garu* alias *Sivaskandu Raju Bahadur Garu* v. *Ganta Kurmi Naidu*[1], *Sundara Aiyar* and *Spencer*, J.J. held that that preliminary condition had been taken away by the Estates Land Act even with respect to suits brought for previous rents. This decision has been followed in several other cases. If it were not for the long and strennous argument advanced before us by Mr. Govindaraghava Aiyar who appeared for the appellant in this case, I would have disposed of this question very shortly by stating that the question cannot be reopened on the principle of *Stare decisis* especially as suits for arrears of rent for faslis 1315, 1316 and 1317 must hereafter be very rare, more than three years having elapsed now from the close of Fasli 1317. However, out of deference to the arguments of the learned vakil, I shall notice them very shortly. His contention was that the decisions in *Sri Raja Satrucherla*

1. (1912) 22 M. L. J. 451.

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Veerabadra Raju Garu alias *Sivaskandu Raju Bahadur Garu* v. *Gantakurmi Naidu*[1], and other cases are wrong because they are opposed to the principle of the decision of *Holloway* and *Kindersley*, J J. in *G. Lee Morris E. Receiver of the Estate of the late Raja of Tanjore* v. *Sambamurthi Rayar*[2]. In that case, *Holloway*, J., held that the provision in 7 of Act VIII of 1865 requiring a tender of patta in order to enforce the landlord's right to rent by an action in a court of law was a provision which related to 'material' law and not to 'formal' law. The learned judge seems to admit that a condition merely requiring tender of a putta as a condition precedent to enforce by action the right to rent which always existed in the landlord is *prima facie* a provision relating to 'processual' law and not to 'material' law. But he considered that this *prima facie* view was wrong because the law imposing the condition had only " the fictitious appearance" of processual law and that it was really material law. I am, with the greatest respect, unable to follow the reasoning of the learned judge. I think that that condition related to formal law not merely in appearance but also in substance and that it had not merely a fictitious appearance of formal law. The learned Judge says that because this condition altered " the right itself upon its actionable side", it related to material law. I think the fallacy lies in hiding the fact that the condition related to processual law by using the paraphrase that it related to the actionable side of a substantial right. Supposing a person was entitled to bring a suit on a plaint stamped with Rs. 200 when the cause of action arose, but before he brought the suit on the cause of action, the Legislature had increased the stamp to Rs. 400; can he say that he was entitled to stamp his plaint with only Rs. 200 because his 'right on its actionable side' had entitled him to bring a suit on a Rs. 200 stamp paper before the law was changed and that the new law should not affect his said right 'on its actionable side'? Every formal or processual law which imposes new conditions on litigants or removes old conditions from their backs does affect a right on its "actionable side" or a liability on its defensible side but that is no reason for not applying the processual or formal law to actions brought after that law came into force. I am therefore unable to follow the case in *G. Lee Morris Receiver of the Estate of the late Raja of Tanjore* v. *Sambamurthi Rayar*[2], with the greatest deference to the eminent Judges who decided it. I am fortified in this view of the law by the decision of that eminent Judge Sir *T. Muthuswami Aiyar* in the case in *Secretary of State* v. *Vira*

1. (1912) 22 M. L. J. 451. 2. (1871) 6 M. H. C. R. 122.

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Rayan[1]. There the question arose in this way. It was assumed for the sake of argument that Regulation 2 of 1802 section 18 prevented the Courts from enforcing a claim brought by the Government for possession of Government land after 12 years from the date of the cause of action; the Regulation did not however enact that the right became legally extinct after the expiry of the 12 years. The Limitation Act of 1871 extended the period of limitation for suits by Government to 60 years from the date of the cause of action. There was no provision in that Act (of 1871) similar to the provision in the later Acts 15 of 1877 etc., declaring that nothing therein contained should be deemed to revive any right to sue-barred under an earlier Limitation law. It was held that the Government which was merely restricted by Regulation 2 of 1802 from enforcing by suit its claim after 12 years could sue after the Limitation Act of 1871 came into force within 60 years of the cause of action to enforce that claim to land, though more than 12 years had elapsed since the date of the alleged trespass. The dictum in the above decision in *Secretary of State* v. *Vira Rayan*[1] was criticised by Mr. Govindaraghava Aiyar for the appellant as it was opposed to some of the observation in the decision in *Abdul Karim* v. *Manji Hansraj*[2]. (See also the case in *Venkatachala Mudali* v. *Seshagiri Rao*[3] and *Molakatalla Naganna* v. *Pedda Narappa*[4] and to the opinion of the majority of the Judges in the Full Bench case in, *In the matter* of the petition of *Ratansi Kaliyanji*[5]). But I prefer to follow the decision in *Secretary of State* v. *Vira Rayan*[1] which is binding on this Bench. The case in, *In the matter of the* petition of *Ratansi Kalianji and six others*[5] might also be distinguished on the ground that the direct question there in dispute was whether the right of the decree-holder to detain a judgment-debtor in prison for a certain period related to processual law or material law, two of the learned Judges holding that it related to processual law and was affected by a later statute (which was passed during the judgment-debtor's detention in jail) deducting the maximum term of imprisonment while the three other learned Judges held *contra*. Similarly there were doubts as to whether rights of appeal and revision in pending suits related to "material" rights or related to "processual" law but that matter (whatever might be the correct logical view has been set at rest by the decision of the Privy Council in the *Colonial Sugar Refining Company* v. *Irving*[6] followed in *Nanabin Abu* v. *Sheku bin Andu*[7] dissenting from *Vajechand Ramji* v. *Nandram*

1. (1885) I. L. R. 9 M. 175.
2. (1876) I. L. R. 1 B. 295.
3. (1874) 7 M. H. C. R. 283.
4. (1873) 7 M. H. C. R. 288.
5. (1877) I. L. R. 2 B. 118.
6. (1905) A. C. 369.
7. (1908) I. L. R. 32 B. 337.

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Daluram.[1] I do not think that it is convenient or permissible to make a distinction between cases where the change in the processual law imposes a new or further restriction on the prosecution of a substantial claim in the Court or merely takes away a restriction on such prosecution imposed by an older processual law. Whether the change in the processual law favours the prosecution or the defence, it must be held to affect all actions *commenced* after the statute making the change comes into force unless of course the statute itself contains saving clauses which prevent the change affecting particular actions or classes of actions. I do not think it necessary to notice in detail the numerous cases quoted on both sides in which the provisions of various original amending and repealing statutes like the Statute of Frauds, the statute allowing a married woman to sue in her own name without joining her husband as plaintiff, the statute requiring solicitors to serve bills before presenting claims for costs and so on were considered. I do not say that isolated passages could not be quoted from some of these numerons cases which passages might be held to favour the defendant's contention in this case but the general effect of the cases seems to me to establish the principle which I have tried to formulate. A very recent case decided by the Privy Council in *Vasudeva Mudaliar* v. *Sadagopan Mudaliar*[2] shows that the provision in the Limitation Act made by the new Section 31 affected even a pending suit which had been remanded by the Privy Council with a direction that the lower Court might apply to that suit the law as to limitation laid down by the Privy Council before Section 31 was enacted but which law so laid down by the Privy Council was materially and expressly affected by that S. 31. I am clear that the right of a defendant to raise technical pleas as to court fees or the absence of notice of suit required by a law or the omission to fulfil a condition imposed on plaintiff before bringing his suit to enforce a right vested in the plaintiff (vested according to ordinary principles of jurisprudence and not a right newly created in plaintiff's favour by the statute itself imposing the condition) the right of a defendant to raise such technical pleas is not a material right which could not be affected by a new statute making changes in the processual law.

As regards the question of rates of rent, the question of *Chittu Nottam* and tree tax, I do not think I could usefully add anything to what my learned brother has said.

In the result I concur in the order proposed by him.

1. (1907) I. L. R. 31 B. 545. 2. (1912) 23 M. L. J. 16.

In compliance with the above order in the judgment, the District Judge of Ramnad submitted.

Findings to the following effect.

I find Rs. 7-10-0 to be the correct annual rent.

This second appeal coming on for final hearing after the return of the finding of the lower appellate court upon the issue referred by this Court for trial, the Court delivered the following

Judgment:—We accept the finding that the rent payable for trees is only Rs. 7-10-0 per year and not Rs. 34-10-9 a year. We have already disallowed the claim for *Chittu Nottam*. The decree of the lower appellate court will be modified accordingly. The parties will pay and receive proportionate costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Sadasiva Aiyar.

Narayana Aiyar and others ... *Appellants. (Defendants Nos. 3 to 6).*

v

Rama Aiyar and others ... *Respondents (Plaintiff and defendants Nos. 1 and 2.)*

Limitation Act, art. 120, 125—Hindu Law—Alienation by widow—Suit by reversioner who became so by subsequent adoption—Cause of action accrues from adoption—Presumptive reversioner—Attestation—Presumption of consent—Consent and ratification, effect same.

Suit for a declaration that two alienations dated 1881 and 1889 respectively made by a Hindu widow were invalid against the minor plaintiff. The widow died in 1899 and the next reversioners were her daughters defendants 1 and 2. Plaintiff was the adopted son of the 1st defendant, having been adopted in 1903. The suit was brought in 1907.

Held, that as the suit was after the death of the widow and as the plaintiff was not "a person entitled to possession if the female died on the date of the institution of the suit," art. 125 did not apply.

That art. 120 applied.

That the cause of action accrued to the plaintiff from the date of his adoption and not from the date of the alienation when he was not in existence and could not sue.

Per *Sadasiva Aiyar* J.:—When an adult male of full mental capacity, admittedly having a tangible interest in the property affected by a deed, attests the deed, the presumption is that his attestation is taken as a proof of his consent to and knowledge of the correctness of the recitals in the deed and it lies upon the person who asserts the contrary to prove it.

Per *Sankaran Nair* J.:—The effect to be given to attestation by a witness will depend upon the facts of each case.

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* S. A. No. 62 of 1912. 30th April 1913.

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Consent to an alienation by the next reversioner and ratification of past alienations stand on the same footing.

Held, accordingly, that as the sale deed of 1881 and a sale deed in 1894 of a portion of the property comprised in the sale deed of 1889 (which had been resold to the widow in 1893), had been attested by the nearest male reversioner and the female reversioners had acquiesced in the transactions, the alienation of 1881 and the alienation of 1889 (to the extent of the property comprised in the deed of 1894) were binding against the plaintiff.

Second Appeal against the decree of the District Court of Tinnevelly in A. S. No. 654 of 1910 preferred against the decree of the Court of the Additional District Munsif of Tinnevelly in O. S. No. 19 of 1909.

T. R. Ramachandra Aiyar for Appellant.

C. V. Anantakrishna Aiyar for Respondent.

The Court delivered the following

Judgments:—*Sadasiva Aiyar*, J.—The defendants Nos. 3 to 6 are the appellants before us. The suit was by a reversioner for a declaration that the two alienations of 1881 and 1889 made by a widow, Aramvalarthammal, under Exhibits I and II (b) respectively are invalid against the minor plaintiff. Aramvalarthammal died in 1899, and the next reversioners are her daughters, defendants Nos. 1 and 2. The plaintiff is the adopted son of the 1st defendant, having been adopted in May 1903. The suit was brought in 1907 within five years of the plaintiff's adoption but more than 12 years from the dates of the alienations by the plaintiff's maternal grand-mother, Aramvalarthammal. The lower appellate court decreed the plaintiff's suit on the following findings and reasonings :—

(*a*) The alienations under Exhibits I and II(*b*) were not made for purposes binding on the reversioner.

(*b*) Though the sale under Exhibit I was attested by the next presumptive male reversioner (Aramvalarthammal's brother) and though the next presumptive female reversioners, the daughters, assented to the alienation, and though the male reversioner, Chinna Aiyavu Aiyar, who attested Exhibit I, owned the land next to the alienated land and was using the well on the land sold, it cannot be held that there is anything to show affirmatively that Chinna Aiyavu Aiyar understood or considered the merits of the sale-deed, Exhibit I, and hence his mere attestation is useless to show that he consented to the alienation.

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(c) Exhibit II(b), the alienation of the plaint properties in 1889 by Aramvalarthammal, is not attested by the next male reversioner though acquiesced in by the female reversioners, the daughters. But the alienee under Exhibit II(b) resold the land and a house-site to Aramvalarthammal and her daughter, the 2nd defendant, in 1893 under Exhibits B and II (a), and the site alone was sold under Exhibit II in 1894 by the 2nd defendant to the 3rd defendant. The plaintiff's 1st witness who was the male presumptive reversioner on the date of Exhibit II has attested it. He has been examined as a witness and the learned District Judge remarks that the inference from his attestation is stronger than the inference from the attestation of Chinna Aiyavu Aiyar to Exhibit I and that nothing directly impairing the effect of this attestation was suggested to him by the plaintiff or elicited from him. The attestation of Exhibit II, which alienates only the site, by the plaintiff's 1st witness does not however involve an inference that the plaintiff's 1st witness ratified the previous alienation under Exhibit II(b) of both the land and the site mentioned in the 2nd schedule to the plaint. Even as regards the site it is not established that his consent was with full notice and appreciation of the facts. Hence even as regards the site in the 2nd schedule, the alienation is invalid.

The lower appellate court did not deal with the question of limitation, but the District Munsif held:—

(a) that article 125 of the Limitation Act does not apply because it relates to a suit filed during the life of a female alienor by the nearest reversioner and, in this case, Aramvalarthammal had died before this suit was brought;

(b) that the Article applicable is Article 120, which prescribes a period of 6 years from the date on which the right to sue accrues;

(c) that though the alienations took place in 1881 and 1889, the right to sue accrued to the plaintiff only when his adoption took place and he became the daughter's son and next male reversioner in 1903, and that the suit brought in 1907, within 6 years, is therefore not barred.

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The District Munsif further remarked that the plaintiff derived his title as reversioner directly from the last male owner (his maternal grand-father) and not through his adoptive mother, the 1st defendant.

The defendants Nos. 3 to 6 who are the appellants before us contend,

(1) that the suit is barred by limitation as the cause of action for all reversioners, even though they may not have been in existence, arose on the date of alienation and all had only either 12 years or 6 years from the date of alienation to bring their suit,

(2) that the attestation of the next presumptive reversioner in Exhibit I in 1881 should, in the circumstances, be treated as his having consented to the alienation and hence the alienation is valid against the reversioner,

(3) that the attestation of Exhibit II by the plaintiff's 1st witness validates the alienation under Exhibit II (*b*) of both the site and the land mentioned in the 2nd schedule,

and (4) that such attestation of Exhibit II in any event validated the alienation of the site sold under Exhibit II (and alienated under Exhibit II (*b*) along with another land) as against the plaintiff.

First on the question of limitation; this divides itself into three sub-heads.

(*a*) whether Article 125 is applicable,

(*b*) whether Article 120 is applicable, and

(*c*) when did the cause of action arise to the plaintiff, whether under Article 125 or under Article 120.

As regards the 1st sub-head, it is clear that the plaintiff does not come under the designation of a person who sues to have an alienation of a land made by a Hindu female declared to be void, *while being himself the person who, if the female died on the date of instituting the suit, would be entitled to the possession of the land.* Article 125 therefore does not apply to the present case on two grounds *viz.*, that the suit is not brought during the life of the alienating female and again that the plaintiff was not entitled to the possession of the land at the date of instituting the suit, as his mother and his aunt were alive. The next question is what

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other article applies to the plaintiff's suit. As no other specific article applies, article 120 must apply. The last question under this heading of limitation is, when does the right to sue accrue under the third column of article 120? Now it has been finally decided that (unless, as in the exceptional case of *Muthusami Mudaliar* v. *Masilamoni*[1], the presumptive reversioner brings the suit *expressly on behalf of all the reversioners*), no succeeding presumptive reversioner claims under a deceased earlier presumptive reversioner and that each reversioner has got his own separate cause of action to set aside the widow's alienation. The latest case in which many of the authorities have been considered and the above proposition has been re-affirmed is *Gajjala Veerayya* v. *Gajjala Gangamma*[2]. But it is argued that there is a dictum in the Full Bench case of *Chiruvolu Punnamma* v. *Chiruvolu Perrazu*[3], that "an unauthorised alienation by a qualified owner gives rise to a cause of action for a declaratory suit from the date of the alienation to *all the reversioners*." In the first place, the dictum is clearly *obiter* because the question referred to the Full Bench in that case was only whether the decree in a suit by the presumptive reversioner *to set aside an adoption is res judicata* against succeeding presumptive reversioners In the second place, the dictum that an unauthorised alienation by a qualified owner gives rise to a single cause of action to all the reversioners cannot be considered to mean that it gives a cause of action to the remote or presumptive reversioners *who were not in existence on the date of the alienation*, though, as regards remoter reversioners who *were* alive on the date of alienation, their causes of action also might have arisen on such date. In the case of *Gajjala Veerayya* v. *Gajjala Gangamma*[2], *Sundara Aiyar* J. and myself held that, as the remoter reversioner was a minor on the date of the alienation, though he was in existence, he had three years from his attaining majority (reading article 125 and section 7 of the Limitation Act together) to bring his own suit to set aside the alienation by the widow, though his father, who was the next presumptive reversioner on the date of the alienation, might have been barred from bringing such a suit. As said by *Mukherjee*, J. in the case of *Abinash Chandra Mazumdar* v. *Harinath Shah*[4]. "It is only reasonable to hold that the right of any reversioner to sue for a declaration cannot accrue before he is born. This view is in accord with that taken in the case of *Govinda Pillai* v. *Thayammal*[5]. Thus even holding that the

1. (1909) I. L. R. 33 M. 342.
2. (1912) M. W. N. 912.
3. (1905) I. L. R. 29 M. 390 at p. 411.
4. (1904) I.L.R. 32 C. 62 at p. 71.
5. (1904) 14 M. L. J. 209.

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obiter dictum of the Full Beuch in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu*[1], should be followed, it might properly be restricted to cases where the reversioner who brings a suit to set aside the alienation *was in existence on the date of the alienation.* See also *Govinda Pillay* v. *Thayammal*[2], which followed *Bhagavanta* v. *Sukhi*[3]. It might be argued that, if each presumptive reversioner who was *not* in existence on the date of the alienation had 6 years from the date when his right to sue accrued (*i. e.*, when he came into existence) to set aside the alienation, numerous suits might be brought as each such presumptive reversioner came into existence. Practically, however, it is very unlikely that, during the remainder of a widow's life-time after the date of her alienation, more than a very few distinct sets of presumptive reversioners who were not in existence on the date of her alienation would come into existence. As I have said in *Garikapati Paparayudu* v. *Rattamma*[4] "The very object of allowing a suit by a contingent reversioner has been unfortunately (if I may be permitted to say so) defeated to a very large extent by the decisions which are binding on us to the effect that a decree passed in favour of or against such a reversioner is not binding on a remoter reversioner. I might be permitted to hope that the legislature might see fit to enact that the decree in a suit *bona fide* brought and litigated by the then nearest reversioner is binding on the remoter reversioners." But so long as the law treats each presumptive reversioner as having a separate right to sue in respect of setting aside alienations by the widow, the inconvenience of allowing different suits by separate sets of reversioners cannot be avoided. We must therefore hold that the plaintiff's suit is not barred by limitation.

The next question which I shall take up is whether the attestation of Exhibit II by the plaintiff's 1st witness validated the alienation of only the site to which it relates or whether it also validated the alienation of the land which along with the house site had been alienated under Exhibit II (*b*). This, of course, assumes that the attestation by the plaintiff's 1st witness is proof of the ratification by him of the alienation under Exhibit II (*b*) of the site alone or of the site and the land. The question of the effect of an attestation will be reserved for consideration later on. In *Kattamoodi Raghupathi* v. *Kattamoodi Kamamma and others*[5] decided in August 1912, I considered the Full Bench case of *Rangappa Naik* v. *Kamti Naik*[6], and the case of *Kuppier* alias *Venkata-*

1. (1906) I.L.R 29 M. 390 at p. 411.
2. (1904) I. L. R. 28 M. 57.
3. (1899) I. L. R. 22 A. 33.
4. (1912) M.W.N. 1176 at p. 1179.
5. (1912) 23 M. L. J. 363.
6. (1907) I. L. R. 31 M. 366.

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subbier v. *Kotta Chinnaramier*[1], and came to the conclusion that consent to an alienation by the next reversioner and a ratification of past alienations stand on the same footing. In this case, the plaintiff's 1st witness by attesting Exhibit II could be held to have ratified the alienation of only the house site affected by Exhibit II and cannot be held to have ratified the alienation of the land not affected by Exhibit II, though the alienations of both the site and the land were made by a single document, Exhibit II (*b*), in 1889 to Meenakshisundaram Aiyar who afterwards sold the site alone under Exhibit II in 1894. The only remaining questions left for consideration are whether the attestations of the next presumptive reversioners in Exhibits I and II are sufficient proof under the circumstances of their consent to and ratification of the alienations of the respective properties dealt with in those two documents. In *Kandasami Pillai* v. *Rangasumi Nainar*[2], it is said "that, having regard to the ordinary course of conduct of Indians in this Presidency, attestation by a person who has or claims any interest in the property covered by the document must be treated *prima facie* as a representation by him that the title and other facts relating to title, recited in the document, are true and will not be disputed by him as against the obligee under the document." I do not think that the above observation is against the dictum laid down by the Privy Council in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*[3]. In that case, their Lordships clearly found that it was *not* proved that, at the date of the execution of the deed in question the attestor Juggut Ram was the next heir and reversioner, and they further state that the defendant who relied upon the alleged concurrence of Juggut Ram "did not by any suggestion in his written statement or otherwise put forward the concurrence of Juggut Ram" in the alienation sought to be supported. They treated Juggut Ram as merely a remote relation not proved to have any interest in the property alienated and their Lordships said that "the mere attestation of such an instrument by a relative does not necessarily import that he attested in order to give consent or concurrence to the alienation." On the contrary, in the later case of *Vadrevu Ranganayakamma* v. *Vadrevu Bulliramayya*[4], the Privy Council approvingly say "But it frequently occurs in Indian documents that a man signs as a witness to show that he is acknowledging the instrument to be correct." I may respectfully add that, in my pretty long experience as a Judicial Officer, if the attestor of a document has an existing interest in the property dealt with in the

1. (1912) M. W. N. 758.
2. (1912) 23 M. L. J. 301 at p. 306.
3. (1869) 13 M. I. A. 209 at p. 229.
4. (1879) 5 C. L. R. 439 at p. 447.

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document, it has been always the case that his attestation has been taken in order to bind him as to the correctness of the recitals therein. In *Gopaul Chunder Manna* v. *Gour Monee Dossee*[1], the learned Judges clearly decided that a reversioner attesting a conveyance by a Hindu widow cannot impeach the sale afterwards, thus treating the attestation as tantamount to assent. In short, they say that the effect of his being an attesting witness to the conveyance shows the acquiescence on his part in the act of the widow. This case is a direct authority upon the point now being considered. In *Matadeen Roy* v. *Mussodun Singh*[2], the judgment of two very learned Judges (*Sir Barnes Peacock*, C. J. and *Dwarakanath Mitter*, J.) contains the following observations: "When the plaintiff put his name as a witness to his brother's signature to a deed conveying the whole of the property, the court might reasonably infer that he knew that his brother was selling the whole of the property. If he knew that his brother was selling the whole of the property and his own, and allowed him to do so without objection, it would be evidence against him either that the whole property did belong to his brother or that he was acquiescing in his brother's act of selling the whole." This again is a clear authority for the proposition that attestation *by a person*, who has an interest, raises the *prima facie* presumption that he knows the contents and acquiesces in the disposition of the property by the deed he attests. In *Abpoy Churn Ghose* v. *Attarmoni Dassee*[3], *Stephen* J. refused to treat the attestation of the presumptive reversioner as acquiescence on the ground that the attestor "was a mere boy studying at college and had no idea of the effect of the deed in question" and that the boy's evidence, that, till he saw the deed in court, he did not know that he had attested the document, should be believed in the circumstances. In *Ahmedabad United Printing and General Agency Company Limited* v. *Ardesir Kavasji*[4], the learned judges say "We have, however, the fact that he (Eruchsha) was an attesting witness. He was a Government servant who must have understood the effect of the deed which he was attesting and which was executed by his brother who was in *vahivat* of all the family properties." And then the learned judges held that, considering the surrounding circumstances, he was bound by the mortgage deed which he had attested. The effect of the attestation was also considered in *Chunder Dutt Misser*. v. *Bhagwat Narain Thakur*[5], and the learned judges held that, under the circumstances of that case, the party's attestation

1. (1866) 6 W. R. (C. R.) 52.
2. (1868) 10 W. R. (C. R.) 293.
3. (1908) 13 C. W. N. 931.
4. (1912) I. L. R. 36 B. 515.
5. (1898) 3 C. W. N. 207.

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may support the inference that he was a consenting party, the attestor in that case not being a mere remote relative as in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*[1], but the next presumptive reversioner.

On the whole, I see no sufficient reason to recede from the opinion I expressed in *Kandasami Pillai* v. *Rungasami Nainar*[2], that a presumption is raised, when an adult man of full mental capacity attests a deed *and when such a man has admittedly a tangible interest in the property affected by the deed,* that his attestation has been taken as a proof of his consent to and knowledge of the correctness of the recitals in the deed and it lies upon the person, who contends that such an attestor did not know all the recitals in the deed and did not consent to the alienation made by the deed, to prove the contrary. I do not intend to lay down that the attestation of a *casual* witness *who had then no interest in the property affected by the deed* must estop him for all time and when he afterwards acquires an interest in the property affected by the deed. In the present case, the circumstances clearly raise the presumption that the next reversioners did consent to the respective alienations under Exhibits I and II. As regards Exhibit II, the reversioner who attested it has been examined in the case and the District Judge says "the inference from the attestation is so far stronger as regards Exhibits II and II (*b*) that the attestor has been examined and that nothing directly impairing the effect of his attestation was suggested to him or elicited." Instead of, however, giving the natural effect to the attestation, the learned District Judge says that it was for the 4th defendant to have elicited that the attestation also involved the conscious assent on the part of the attestor. I think the burden of proof lay on the other side. Not only this, the learned District Judge overlooked the fact that the attesting witness, the plaintiff's 1st witness, says "The 3rd defendant asked me to attest Exhibit II and I attested it *as he said that he would build a house thereon next to mine which would be a security to my house.*" This conclusively shows his knowledge of the contents of the deed and that he gave even his consent to a substantial house being built upon the site alienated by Exhibit II. I therefore hold, differing from the District Judge, that the alienation of the property in the 1st Schedule and of the site in the 2nd schedule to the plaint cannot be questioned by the plaintiff as those alienations were consented to and ratified by the then presumptive male reversioners and by the female reversioners. The District

1. (1869) 13 M. I. A. 209. 2. (1912) 23 M. L. J. 301.

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Judge's decree should be modified by allowing the plaintiff's claim only as regards such of the plaint properties as are not covered by Exhibits I and II. As it appears that there are no properties in the plaint schedules not covered by Exhibits I and II, the suit will stand dismissed. The parties will bear their respective costs in all the courts.

Sankaran Nair, J.:—I agree. The reversioner who is really prejudiced by the widow's alienations will be ascertained only after the death of the widow and on the death of the last surviving daughter. Nevertheless it has now been settled that all persons who may possibly live to succeed her have a right of suit, under certain circumstances, to declare the alienation invalid and that one possible reversioner does not represent another in such suits. The plaintiff is admittedly such a reversioner and his right to sue as such is not denied, though he became a member of this family by adoption only after the alienations. If he has the right of suit, it is obvious that limitation can run against him only when he could sue.

As to the effect to be given to attestation by a witness, it will depend upon the facts of each case. In this case I agree with my learned colleague as to the inference to be drawn from it.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Logadapathi Chinnayya ... *Petitioner (Defendant in O. S. No. 10 of 1907 on the file of the Court of the Assistant Agent Bhadrachellam Division.)*

v.

Kotla Ramanna ... ... *Respondent—(Plaintiff in do.)*

Fraud—Judgment—Essentials of, for setting aside—Res judicata, not an exception to—Collateral or extraneous fraud—Deliberate perjury, if ground—Truth or falsity of evidence, not collateral—Unfair conduct of suit—Limit for questioning—Discretionary Remedy—Negligence—Ground for not exercising discretion.

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The rule allowing a judgment to be vacated on the ground of fraud is not an exception to the rule of res judicata but is independent and outside the scope of the principle.

The effect of *Duchess of Kingston's case*[1] is that the correctness of a judgment of a Court of competent jurisdiction cannot be impeached but it may be shown that the value of the judgment assuming it to be correct is destroyed by collateral or extrinsic fraud in the obtaining of it.

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*C. M. P. No. 2455 of 1910. 10th March 1913.

1. (1776) 20 Howell St. Tr. 537.

The test to be applied is—is the fraud complained of not something that was included in what has been already adjudged by the Court but extraneous to it?

Questions e. g. whether the testimony of a witness is true or false and whether a document produced in evidence is genuine or not are not extraneous or collateral to the judgment.

A party cannot show that the evidence which was insisted upon by his opponent as true was in reality false and characterise such insistence as fraud in the obtaining of the Judgment. Nor could he be permitted to adduce fresh evidence for the purpose for it was his duty to place all his evidence before the Court at the former trial.

The fraud must be something which would destroy or seriously impair the value of the judgment by showing that by means of an independent collateral wrong, one of the parties was prevented from conducting the litigation fairly or was deprived of the materials which he was entitled to place before the Court.

That one of the parties acted improperly in the conduct of the suit is not a ground for setting aside the Judgment when such conduct falls within the province of adjudication by the court which passed the judgment.

The right of a party to insist on his opponent acting with truth and honesty in the conduct of a suit must in the interests of finality be taken to be exhausted with the adjudication in the case.

Quaere: whether a judgment could be set aside on the ground that the successful party was guilty of deliberate perjury or suborning perjury.

Conflict on the point indicated and the correctness of the decisions that lay down that it could be done, doubted.

Held: however, that it was clear law that in the absence of a finding that the successful party has been guilty of deliberate perjury a judgment could not be set aside.

Held: also that the power of the court to set aside a judgment for fraud is a discretionary one and the court will not exercise it in favour of a person who has himself been guilty of negligence or fraud.

In a suit upon accounts, the defendant having failed to appear, the court examined the plaintiff and a decree was passed in his favour. Then the defendant instituted a suit to vacate the judgment on the ground of fraud. The allegation of fraud consisted in the defendant not giving credit, contrary to agreement for the full amount due to him on a sale of timber. Defendant said that the arrangement was that the plaintiff should be credited only with what was actually realised by his selling it. The court found that the defendant failed to prove the arrangement set up and as he had sworn in the previous suit to the accuracy of his accounts held that the judgment was vitiated by fraud to the extent of the amount not given credit for.

Held: that the finding did not amount to one of deliberate perjury on the part of the defendant and the judgment could not be set aside.

Held: further, the defendant having failed to appear at the hearing of the former suit, was guilty of negligence and the court ought not to exercise its discretion in his favour.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to direct the Government agent at Godaveri to review his judgment in A. S. No. 3 of 1910 on the file of his Court.

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P. Narayanamurti for Petitioner.

T. Prakasam for Respondent.

The Court made the following.

ORDER:—This is an application made under Rule 8 of the rules applicable to the Godaveri Agency asking us to direct the agent to review his judgment in an appeal by which he confirmed the decree of the Assistant Agent of Bhadrachalam. The facts which led up to the case may be very briefly stated. The appellant who was the defendant in the first Court, instituted O. S. No. 16 of 1906 in that Court for the recovery of a sum of Rs. 643-9-0 from the present plaintiff alleged to be due on dealings between the parties. The present plaintiff filed a written statement alleging that some items in the account sued on had been wrongly debited against him and denying the accuracy and reliability of the accounts put in by the present defendant. The Commissioner was appointed to scrutinise the accounts and to report on the result. The present plaintiff did not put in an appearance on the day fixed for the hearing of the suit. The present defendant was examined as a witness and a decree was passed in his favor for the amount sued for. An appeal was preferred by the present plaintiff to the Agent, but the decree was confirmed by him and this Court also refused to interfere with the appellate decree of the Agent. The present suit has been instituted to set aside the former decree on the ground that it was obtained by fraud and for an injunction to restrain the defendant from executing it. The only allegation of fraud that was insisted on at the hearing was that the defendant, having bought from the plaintiff timber worth Rs. 1026-14-0 did not give him credit for the whole amount but only for Rs. 610-2-0. It will be observed that this allegation is at variance with the defence made by the present plaintiff in O. S. No. 16 in which his allegation was that certain items were wrongly debited against him in the defendant's account. In answer to the present suit, the defendant alleged that the contract for the sale of timber referred to by the plaintiff was made on his behalf by his son in his absence, that it was a part of the agreement that the timber should be of a certain quality, that what was supplied by the plaintiff was not of the quality agreed to, that he, in consequence refused to ratify the sale, and that the plaintiff agreed to an arrangement whereby the defendant sold the timber at Rajahmundry and credited the actual sale proceeds (610-2-0) after deducting the expenses, to the plaintiff's account. The Assistant Agent at first dismissed the suit on the ground that it was barred by the rule of *res judicata* in consequence of the previous judgment and that

the ground alleged by the plaintiff for setting aside the decree did not amount to such fraud as would entitle him to get the previous judgment vacated. On appeal the Agent set aside that judgment on the ground that the plaintiff's allegation in the plaint that the defendant fraudulently kept back certain accounts from examination by the Commissioner was an averment of fraud which would entitle him to have the previous judgment vacated, if he could prove the allegation. After remand, witnesses were examined on both sides. The defendant also put in two documents in support of his case. The Assistant Agent, however, came to the conclusion that the defendant did not succeed in proving the arrangement set up by him. He did not find that any accounts were withheld by the defendant from the Commissioner at the trial of O. S. No. 16 as alleged in the plaint. Having thus found that the defendant ought to have given credit for Rs. 1026-14-0 and not for Rs. 610-2-0 to the plaintiff, he observed "To this extent, therefore, the entry in defendant's accounts was fraudulent and defendant was not entitled to the decree he obtained in O. S. No. 16 of 1906 against plaintiff on the strength of these accounts." He, therefore, set aside the decree and granted an iujunction restraining the defendant from executing it. He concluded with a somewhat unintelligible observation. "As there is good reason to conclude that the litigation in this suit is merely fictitious, each party will bear his own costs throughout." On appeal, the Agent modified the Assistant Agent's judgment by restraining the appellant from executing the decree in O. S. No. 16 only to the extent of Rs. 416-12-0, the amount of the loss which the plaintiff suffered by the incorrect entry in the defendant's accounts. His finding of fraud was expressed in these terms. "As appellants swore to the accuracy of the accounts and they have been proved inaccurate to the extent of Rs. 416-12-0 he must be said to have obtained his original decree fraudulently and respondent was entitled to have it set aside to that extent." The learned Vakil for the petitioner in this Court contends that no fraud such as would entitle the plaintiff to get the decree in O. S. No. 16 set aside has been proved, that all that has been found by the Lower Court is that the decree in O. S. No. 16 was incorrect and that this finding is based on evidence let in by the plaintiff which he might and ought to have let in O. S. No. 16 and which he, by his own carelessness, failed to adduce then. The respondent contends that on the finding of the Lower Courts, the evidence given on oath by the defendant at the trial of O. S. No. 16 was perjured testimony and a decree obtained by perjured evidence may be set aside on the ground of fraud. It is indisputable that a decree may be vacated on

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the ground that it was obtained by the successful party by fraud. The question is what would amount to fraud which would entitle an unsuccessful litigant to get the decree vacated. He cannot, it is clear, be allowed to get round the rule of *res judicata* and to prove that the judgment given by the Court was wrong, because it came to a wrong conclusion on the evidence before it. It follows from this that the Court's conclusion both on the construction to be put on the evidence placed before it and on the inference to be drawn from such evidence as well as on the trustworthiness of the evidence should be regarded as final. If the Court acts erroneously in forming its judgment on any of these matters, the proper remedy is to invoke the help of the appellate tribunal where an appeal is allowed by law. Another mode of rectifying an erroneous judgment is to apply for review of judgment. The unsuccessful party has, in such an application, an opportunity to adduce any evidence which he failed to adduce at the hearing and which he could not with all proper diligence, have then adduced. It cannot be doubted that, in such cases, he cannot institute a fresh suit to get the judgment vacated. The allegation of fraud for vacating a judgment, therefore, must be extraneous to everything which has been adjudicated on by the Court and not any fraud which has already been dealt with by the Court. The rule allowing the acavting of a judgment for fraud is not an exception to the rule of *res judicata* but is independent and outside the scope of that principle. In the *Duchess of Kingston's case*[1] Sir William DeGrey, Lord Chief Justice, observed with regard to the judgment of a competent Court " But if it was a direct and decisive sentence upon the point, and, as it stands to be admitted as conclusive evidence upon the Court, and not to be impeachable from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of courts of justice. Lord Coke says, " it avoids all judicial acts, ecclesiastical or temporal. (See the *Duchess of Kingston's case*[1]). The effect of this pronouncement is that the correctness of the judgment of a court of competent jurisdiction cannot be impeached but it may be shewn that the value of the judgment assuming it to be correct, is destroyed by the collateral or extrinsic fraud in the obtaining of it. Now the judgment of a Court includes the decision of the questions whether the testimony of any witness

1. (1776) 2 Smith-Leading Cases,11th Edn. 731 at 738, s. c.

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is true or false, and whether a document produced in evidence is genuine or not. These questions are not extraneous or collateral to the judgment, but are steps which lead to the final adjudication of the Court, quite as much as its opinion as to the effect of the evidence adduced and the inference to be drawn from it. The parties in a suit are entitled to convince the Court that the evidence given by their respective witnesses is true and prove the contentions they urge. It stands to reason, therefore, that the unsuccessful party cannot be allowed to resort to a fresh suit in order to make a fresh attempt to show that the evidence which was insisted on by his opponent as true was in reality false and to characterise such insistence as fraud in obtaining the judgment. Nor can he be permitted to do so by adducing fresh evidence for the purpose, for it was his duty to place all his evidence before the Court at the former trial. In *Patch* v. *Ward*[1] Lord *Cairns L. C.* observed. "Now it is necessary to hear in mind what is meant and what must be meant by fraud when it is said that you may impeach a decree signed and enrolled on the ground of fraud. The principle on which a decree may be thus impeached is expressed in the case which is generally referred to on the subject, the *Duchess of Kingston's case*[2]. Then his Lordship cites the passage already quoted above and proceeds to explain it. "The fraud there spoken of must clearly, as it seems to me, be actual fraud such that there is on the part of the persons chargeable with it the *Malus Animus* the *Mala Mens* putting itself in motion and acting in order to take the undue advantages of some other person for the purpose of actually and knowingly defrauding him." There can be no undue advantage taken of another by a party in putting any matter before the court to be adjudged by it to be true or false. Both parties are entitled to invoke the judgment of the court and to convince it of the truth of the evidence adduced by them respectively. It is true that parties ought not to let in false evidence and that it is highly improper and immoral to do so. But it is the function of the court to decide whether the evidence is true or false. If the adducing of false evidence can be spoken as a fraud, then the court in deciding the case, must be taken to have adjudged whether such fraud has been committed or not and what it has once adjudged it cannot be called upon to decide again. The test to be applied is "Is the fraud complained of not something that was included in what has been, already adjudged by the Court but extraneous to it? If, for instance, a party be prevented by his opponent from conducting his case properly by tricks or mis-repre-

1. (1867) 3 Ch. A. 203.
2. (1776) 2 Smith Leading Cases 11th Edn. 731 at 738.

sentation that would amount to fraud. There may also be fraud upon the Court if, in a proceeding in which party is entitled to get an order without notice to the other side, he procures it by suppressing facts which the law makes it his duty to disclose to the court. But where two parties fight at arms' length, it is the duty of each to question the allegations made by the other, and to adduce all available evidence regarding the truth or falsehood of it. Neither of them can neglect this duty and afterwards claim to show that the allegation of his opponent was false. Assuming that he could prove the charges, that would not amount to proving fraud on the part of his opponent because the Court has already decided that his opponent's allegation was true and not false. If he could show that his opponent prevented him by an independent collateral wrongful act, such as by keeping his witnesses in confinement, or by stealing his document from adducing his evidence that would be an act of fraud which would entitle him to get the court's decree set aside. Fraud must be something which would destroy or seriously impair the value of the judgment by showing that one of the parties was prevented by the other from conducting his litigation fairly or by being deprived of the materials which he was entitled to place before the Court. Black in his article on Judgments in 23 Cyclopdiæ of American Law and Procedure includes the following acts in fraud which would vacate a judgment; misrepresentation or tricks practised upon defendant, keeping him away from the trial, preventing him from claiming his rights in the premises or setting up an available defence; acting contrary to an agreement between the parties that the case should not be continued or that defendant's time to answer should be extended or that the action should be dismissed as the result of compromise or settlement or that the case would not be pressed to a judgment. The same learned author says in his treatise on 'Judgments Vol. I. S. 321. "There may well be cases of fraud in the cause of action, or in the manner of procuring the instrument in suit, where the courts would not withhold relief on motion: as where the complainant was kept in ignorance of the fraud until it was too late for him to plead it in defence, and could not have discovered it by due diligence, or where he was fraudulently prevented from setting it up at the proper time." But a judgment cannot be set aside for fraud on the ground that one of the parties to the suit acted improperly in the conduct of it when such conduct falls within the province of adjudication by the court. The right of a party to insist on his opponent acting with truth and honesty in the conduct of the suit must, in the interests of finality of litigation be taken to be exhausted with the adjudication

by the Court. He may for instance compel his opponent to produce all documents relevant to the suit, but it would be dangerous to hold that he may set aside the Court's judgment on the ground of fraud because his opponent did not produce them. He may compel him to give evidence on his behalf, but he must be satisfied with what he can do for this purpose in the course of the suit itself. The law has prescribed means for the punishment of a person who perjures himself or fails to produce documents which he is legally bound to produce, but there would be no end to the litigation, if his improper conduct in these matters can be made the means of setting aside the judgment of the court by a fresh suit. He might go on re-agitating the same matter by successive suits to the end of his life and his heirs might then take it up as an inheritance. Moreover he might, after a superior appellate court has adjudicated against him institute a suit in an inferior Court to set aside the superior Court's judgment, as he would be entitled to institute his suit in the lowest Court competent to try it. See *Nistarini Dassi* v. *Nundo Lal Bose*[1], and *Sarthakram Maiti* v. *Nundoram Maiti*[2]. It must be admitted that there is a conflict in the opinions of eminent judges as to what exactly would constitute fraud in any particular case for the purpose of the vacating of a judgment. But the principle appears to be laid down with clearness in the *Duchess of Kingston's case*[3] as something which is collateral to the matters adjudged by the Court. In *The Bank of Australia* v. *Nias*[4], a decree was obtained in Australia on a contract. The decree holder then brought a suit in England on the judgment of Colonial Court. The defendant pleaded that the alleged contract on which the decree was passed was not true, and that, if true it was obtained and procured by fraud and by the plaintiffs and others in collusion with them. *Lord Campbell* delivering the judgment of the Court of Queen's Bench disallowed those pleas, holding that they do not amount to an averment of fraud. He observed " The pleas demurred to might have been pleaded, and, if there be any foundation for them, they ought to have been pleaded in the original action. They must now be taken to have been in due manner decided against the defendant. We are bound to take judicial notice that by the law and constitution of this Empire there is an appeal from it (that is the decision of the Australian Court) to Her Majesty who would refer the appeal to the Judicial Committee of Her Privy Council. I will not take notice of the fact of there having been an

1. (1902) I. L. R. 30 C. 69.
2. (1906) 11 C. W. N. 579.
3. (1776) 2 Smith Leading Cases 11th Edn. 731 at 738.
4. (1851) 16. Q. B. 717.

appeal; but I may say that either there has or there has not been an appeal; and in either case it seems contrary to principles and expediency for the same questions to be again submitted to a Jury in this country. A regular mode having been provided by which an erroneous judgment of a Colonial Court may be examined and reversed, that mode ought to be pursued. Before the Judicial Committee, the Judges there presiding would fairly examine the judgment; and only set it aside if it was unjust. But, although perfectly regular and just, it may be set aside if the same questions are again to be submitted to a jury. Although the *onus probandi* is now to be shifted to the defendant; he is to be at liberty to adduce new witnesses whom he may suborn to prove that the Company never made the promises which were the foundation of the judgment or that these promises were obtained by the fraud and covin of the plaintiffs" *Flower* v. *Llyod* [1], is an important case on the question. There the plaintiffs brought an action against the defendants to restrain alleged infringements of a patent process. It was ultimately dismissed by the Court of Appeal. They then instituted another action to have it declared that the judgment on appeal had been obtained by fraud and for consequential relief. The alleged fraud consisted in the defendants' keeping back from an expert, who had been appointed to inspect the defendant's process, certain materials relating to the process in his procession and in making a false statement relevant to the matter of the inquiry. The Court of Appeal held that the plaintiff had failed to prove his allegation, but *James L. J.* with the concurrence of *Thesieger L. J.* proceeded to make certain important observations as to the nature of fraud to be proved in such a case. He observed "Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require my grave consideration indeed, before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arms' length could be set aside by a fresh action on the ground that perjury had been committed in the first fixed action, or that false answers had been given to interrogatories or a misleading production of documents, or of a machine or of a process had been given? 'There are hundreds of action tried every year in which the evidence is irreconcilably conflicting and must be on one side or other wilfully and corrupty perjured.' In this case if the plaintiffs had sustained on this appeal the judgment in their favour

1. (1879) 10 Ch. D. 327.

the present defendants in their turn, might bring a fresh action to set that judgment aside, on the ground of perjury of the principal witness and subornation of perjury, and so the parties might go on alternatively *ad infinitum.* There is no distinction in principle between the old common law action and the old Chancery suit and the court ought to pause long before it establishes a precedent which would or might make in numberless cases, judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely: but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the court must not forget the evils which may arise from opening new such sources of litigation, amongst such evils not the least being that it would be certainly to multiply indefinitely the mass of those very perjuries, falsehoods and frauds." *Bagallay L. J.* did not agree in those observations but reserved for himself an opportunity of fully considering the question of law. In *Exparte Alice Cockerell* [1], an application to set aside on the ground of fraud an order obtained by a married woman for permission to convey her interest in the property bequeathed to her was dismissed. *Lord Coleridge C. J.* observed. "If it can be shown that the order was obtained by fraud or by the suppression of information which it was essential that the Court should have, the Court will undoubtedly set aside the order." The decision cannot be taken to lay down that every party is bound to bring voluntarily before the court all matters that have a material bearing on the questions at issue and that every suppression of information by a litigant would make a decree in his favour liable to be set aside. It does not appear whether any notice was given to the husband before the order was passed. If the wife was entitled to an exparte order, it was her duty to place certain facts before the court, her suppressing them would be a ground for setting the order aside. Generally an *exparte* order could be recalled on sufficient grounds being shown by the opponent, apart from any question of fraud. *Aboulloff* v. *Oppenheimer and Company*[2] perhaps marks a departure from the view taken in *Flower* v. *Lloyd*[3]. A suit was filed in England on a judgment obtained in a Russian Court. The judgment was one directing the defendant to return to the plaintiff certain goods belonging to him or in default, that the plaintiff should recover their value. The defendants did not admit that judgment was obtained in Russia by the plaintiff, but alleged that, if it was, it was obtained by the gross fraud of the

1. (1878) 4 C. P. D. 9. 2. (1882) 10 Q. B. D. 295.
3. (1878) L. R. 10 Ch. D. 327.

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plaintiff and of her husband because the goods in question were at the time of the suit and of the judgment, in the possession of the plaintiff and of her husband and that fact was concealed from the court. The court held that the plaintiff was entitled to have this plea tried. It is not quite clear how far the judgment of *Coleridge* C. J. was due to the fact that the suit was on a foreign judgment. *Brett* L. J. and *Baggally* L. J. were, apparently, of opinion that the same rule would be applicable whether the action was on the judgment of a court in England or upon a foreign judgment. It will be observed that the question raised in the action in the English Court was whether goods belonging to the plaintiff were really detained by the defendant at the time of the action in the Russian Court, that is whether the claim adjudged by the Russian Court to be a good one was in reality a fraudulent claim, and that no collateral fraud was alleged. *Brett L. J.* observed: "It has been contended that the same issue ought not to be tried in an English court which was tried in the Russian Courts, but I agree that the question "whether the Russian courts were deceived, never could be an issue in the action tried by them. The question may be raised in the Russian court in order to determine the matters which were in issue. But I think it true to say that the judgment of *Knight Bruce* V. *C.* in *Barr* v. *Jackson*[1] does show that the mere fact of evidence having been brought forward to substantiate or defeat one issue, does not prevent a party from bringing forward the same evidence in a subsequent action between the same parties either to maintain or to defend other issues therein raised. In the present instance, the issue in the Russian courts would be whether the defendants were wrongfully detaining the goods of the plaintiff. The question of fact whether the plaintiff had the goods in her possession at the moment when the action was commenced would be a circumstance very material to be considered in order to determine that issue but in the present action upon this paragraph of the defence the only issue is whether the judgment of the Russian courts was obtained by the fraud of the plaintiff successfully perpetrated on those courts. The issues in the two actions are not the same; and therefore the defendants are not estopped from setting up in this action the same evidence that was adduced at the trial of the action in the Russian courts. I wish to say, however "that I am strongly of opinion that in the present action no question can be raised whether the judgment of the Russian courts was erroneous; ...... the only manner in which that foreign judgment can be rendered ineffective

1. (1842) 62 E. R. 1028, s. c. 1 Y. & C. Ch. 585.

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upon the ground of fraud is, by proving that it was obtained by the fraud of the plaintiff who now relies upon it." There can be no doubt that, if the issue in the two actions was different there would be no question of *res judicata,* although the same evidence might bear upon both the issues. But were the issues different? The question in the Russian action was whether the plaintiff's goods were wrongfully detained by the defendant. If they were not the plaintiff's claim was fraudulent. The only fraud complained of in the English action was that the claim was fraudulent in that it sought to recover goods which were really in the plaintiff's own possession. That was the identical issue tried by the Russian court. That court decided that the claim was not fraudulent. There was no fraud on the court unless the making of a fraudulent claim is a fraud on the court. *Brett L. J.* distinguishes *Flower* v. *Lloyd*[1] on the facts of the case. One distinction drawn is that, in *Flower* v. *Lloyd*[1], fraud was committed not before the court itself at the trial of the action, but previously to the case being brought to a hearing before the court. But is this the right test to be applied? Is not the proper test whether the fraud complained of was or was not adjudged by the court in the previous suit itself not made out? *Coleridge C. J.* appears to have based his judgment, in part at least on the ground that a judgment when impeached was foreign judgment with respect to which it has often been held that it is only *prima facie* evidence of the fact established by it. (See *Ochsenbein* v. *Papelier*[2]. This is the view taken of *Abouloff* v. *Oppenheimer*[3] by the Supreme court of the United States in *Vadala* v. *Lawes*[4]. *Abouloff* v. *Oppenheimer and Co., Ltd.*[3] was accepted as correct but apparently only on the ground that it was binding on the court. *Lindley L. J.* observed that there was no distinction between a foreign judgment and a domestic judgment when it was impeached on the ground of fraud. The facts relied on in the case as constituting fraud were not quite similar to those in *Abouloff* v. *Oppenheimer*[5]. *Lindley L. J.* observed that there were two rules which ought to be borne in mind; first, that a party to an action can impeach a judgment in it for fraud, and secondly, the merits of an action which have been tried cannot be re-opened. The question was which rule was to prevail. He went on and observed "until *Abouloff's case*[5] the difficulty of continuing the two rules and saying what ought to be done where you could not enter into the question of fraud to prove it without re-opening the merits had never come

1. (1878) L. R. 10 Ch. D. 327.
2. (1873) L. R. 8 Ch. A. 694.
3. 98 U. S. Rep. 93
4. (1890) L. R. 25 Q. B. D. 310
5. (1882) 10 Q. B. D. 295.

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forward for explict decision. That point was raised directly in the case of *Abouloff* v. *Oppenheimer*[1] and it was decided. I cannot fritter away that judgment, and I cannot read the judgments without seeing that they amount to this, that if the fraud upon the foreign court consists in the fact that the plaintiff has induced that court by fraud to come to a wrong conclusion, you can re-open the whole case, " even although you will have in this court to go into the very facts which were investigated and which were in issue in the foreign court. The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this court you have to consider whether the foreign court has been imposed upon....The counsel for the plaintiff have pointed out and I think unanswerably, that that is really frittering away, if you look at it from one point of view, the general rule on which they are relying that you cannot retry the merits." Referring to the judgment of *Brett L. J.* he said that the proposition laid down by his Lordship can only be applicable to cases where there is what is called extraneous fraud, such as imposition on the court itself, but he held that the effect of the judgment in that case was to enable defendant to re-open the judgment by shewing that it was based on false evidence. He observed, referring to the judgment of *Baggally L.* J. " That is to say, not only where there has been a fraud on the court by what is called extrinsic circumstances, such as the alleged shuffling of the bills of exchange, but where the plaintiff has obtained judgment by the use of perjured evidence, " that is such a fraud as would enable the defendant to impeach the foreign judgment." His Lordship concluded as follows :—" It appears to me, therefore, impossible in the face of that case to differ from the view taken by the Divisional Court. In *Baker* v. *Wordsworth*[2] on the other land, the Court refused to set aside the decree on the ground that it was obtained by perjured evidence. *Wright* J. observed," there is no authority that the mere proof that a verdict and judgment have been obtained by perjury is sufficient to induce the court to set the judgment aside and the expression of the Lords Justices in *Flower* v. *Lloyd*[3] are strongly against such a proposition. In *Cole* v. *Langford*[4] when judgment has been given in default of pleading by the defendant the plaintiff made a motion to set aside the judgment on the ground of fraud. The allegation of fraud was that the judgment was obtained by exhibiting to the court and the jury certain false and counterfeit documents and certain memorandum books containing false and fraudulent entries touching the

1. 98 U. S. Rep. 93.
2. (1890) 67 L. J. Q. B. 301.
3. (1878) L. R. 10 Ch. D. 327.
4. (1898) 2 Q. B. 396.

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matters in issue in the action. The judgment was set aside. *Ridley* J. gave no reasons for doing so. *Phillimore* J. relied on the case of *Priestman* v. *Thomas*[1]. But that case merely decided that the question whether a will was a forgery or not was *res judicata* by a judgment passed in prior proceedings between the parties setting aside on the ground of fraud. The result of the English cases is that until *Abouloff* v. *Oppenheir and Co.*[2] it was held that the fraud complained of should not be a matter already adjudged by the court, but should be collateral to it. But in that case, it was held, that notwithstanding a prior adjudication that the fraud complained of was not true or not proved a subsequent complaint of the same fraud without any further allegation raised a new issue whether the previous judgment was obtained by fraud. This rule was not acted upon in *Baker* v. *Wordsworth*[3] at any rate, so far as fraud consisting in perjured testimony being put before the court was concerned. In the American Courts although there appears to be some conflict of judicial opinion on the question whether perjured testimony of the party to the litigation or subornation of perjury by him could be regarded as fraud for the purpose of vacating a judgment the Supreme Court held in the case of *United States* v. *Throckmorton*[4] that it could not be so regarded. (See 23 Cyclopaedia of American Law and Procedure.) Mr. *Justice Miller* delivering the opinion of the court, expounded the scope of the rule that a judgment may be set aside for fraud, thus: "In cases where, by reason of something done by the successful party to the suit, there was in fact no adversary trial or decision of the issue in the case, where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent as by keeping him away from court, a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side, these and similar cases which show that there has never been a real contest in the trial or hearing of the case are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and fair hearing." The learned judge has reviewed both the English and the American authorities on the question. *Greene* v. *Greene*[5] explained the

1. (1889) 9 P. D. 210.
2. (1882) 10 Q. B. D. 295.
3. (1890) 67 L. J. Q. B. 301.
4. 98 United States 93 at 96.
5. 2 Gray 361.

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position thus. The maxim that fraud vitiates every proceeding must be taken like other general maxims to apply to case where proof of fraud is admissible. But when the same matter has been actually tried or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud because the judgment is the highest evidence and cannot be contradicted." In America it has also been held that a decree cannot be set aside for fraud on the ground that the successful party bribed his witness to swear falsely (See Black "Judgments" Vol I S. 323 Note 204 with regard to the bribing of witnesses to swear falsely).

In *Mahommad Golab* v. *Mahomed Sulliman*[1] *Sir Comer Petheram* C. J. and *Ghose* J. were of opinion that a decree could not be set aside for fraud on the ground that it was obtained by perjury committed by, or at the instance of the other party. The learned judge followed *Flower* v. *Lloyd*[2]. *Petheram* C. J. observed "where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage the decree is not binding upon and the decree may be set aside by a court of justice in a separate suit and not only by an application made in the suit in which the decree was passed, but I am not aware that it has ever been suggested in any decided case, and in my opinion it is not the law, that, because a person against whom a decree has been passed alleged that it is wrong and that it was obtained by perjury committed by or at the instance of the other party, which is of course fraud of the worst kind that he can obtain a re-hearing of the questions in dispute in a fresh action by merely "changing the form in which he places it before the court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. To so hold would be to allow defeated litigants to avoid the operation, not only of the law which regulates appeals, but that of that which regulates *res judicata* as well. The reasons why this cannot be the case are very clearly stated by *James L. J.* in the passages I have quoted." *Abouloff* v. *Oppenheimer and Co.*[3] and *Vadala* v. *Lawes*[4] do not seem to have been brought to the notice of the learned judges. But the case is valuable as indicating the correct principle of law to be applied in their opinion. The decision has been followed in *Abdul Aug Chowdhry,* v. *Abdul Hafly*[5], and *Mosuful Huq* v. *Surendra Nath Roy*[6], though a

1. (1894) I. L. R. 21 C. 612.
2. (1878) 10 Ch. D. 327.
3. (1872) 10 Q. B. D. 295.
4. (1890) 25 Q. B. D. 310.
5. (1910) 14 C. W. N. 695.
6. (1912) 16. C. W. N. 1002.

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different view was taken in *Lakshmichandran Saha* v. *Nurali*[1]. In *Venkatappa Naik* v. *Subba Naick*[2], deliberate perjury committed by the successful party was regarded by *Boddam*, and *Moore* JJ. as a ground on which a judgment might be set aside on the authority of *Abouloff* v. *Oppenheimer*[3], and *Vadala* v. *Lawes*[4], was not brought to the notice of the court. The correctness of the decision was questioned in *Kumarasami Chetti* v. *Ramakrishna Ammal*[5], but the point did not arise for decision. There appears to be no decision of the Privy council bearing on this question. In *Khayenbrimatha Mahata* v. *Primonath Roy*[6], the Judicial Commitee held that, when an *exparte* decree is attacked, not merely on the ground of irregularity or insufficiency of the service of summons, but also on the ground that the plaintiff prevented the defendant from defending the suit by getting him declared a lunatic and forcing him by his threats to leave his home and stay elsewhere in secrecy, it could be set aside on the ground of fraud, but there no attempt was made to impeach the Judgment on the ground of any fraud which formed the subject of adjudication by the court. In *Tika Ram* v. *Daulat Ram*[7], *Mahomed Golab* v. *Mahomed Sulliam*[8], was approved though the case itself was one in which the only substantial complaint was taken to be that summons had not been properly served on him.

In this state of the authorities, if it were necessary to decide whether a judgment could be set aside for fraud on the ground that the successful party was guilty of deliberate perjury or suborning perjury, we might have to consider whether it is desirable to refer the question to a Full Bench of the Court for an authoritative pronouncement. But, we do not think, that it is necessary in the circumstances of this case to decide that broad question. In the first place the fraud alleged in the plaint was that some items were wrongly debited in the defendant's account against the plaintiff. The judgment of the Lower Courts on the other hand is based on the fact that the defendant failed to prove that there was an agreement between him and the plaintiff that the timber alleged by the defendant to have been sold to the Plaintiff for Rs. 1026-14-0 should be taken as the price for which they were sold by the defendant. Secondly it can hardly be held that the Lower Courts

1. (1911) I. L. R. 38 C. 936.
2. (1905) I. L. R. 29 M. 179.
3. (1872) 10 Q. B. D. 295.
4. (1890) 25 Q.B. D. 310 ; 67 L. J. Q. B. 301.
5. (1912) 23 M. L. J. 187.
6. (1902) I. L. R. 29 C. 395.
7. (1909) I. L. R. 32 A. 145.
8. (1894) I. L. R. 21 C. 612.

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have found that the defendant was guilty of deliberate perjury in obtaining the judgment in O. S. No. 16. They have no doubt, held that the defendant failed to prove the agreement set up by him, considering the evidence adduced for the purpose to be insufficient. But this is considerably short of finding deliberate perjury on his part. As laid down in *Patch* v. *Ward*[1], what the court is to find is " malicious and fraudulent design to mislead the Court." See also *Jagun Proshad* v. *Posum Sahoo*[2]. *Abouloff* v. *Oppenhemier*[3] does not lay down that the mere fact that the evidence formerly believed is found on the strength of the evidence of other witnesses to be unacceptable is sufficient to set aside the judgment on the ground of fraud. Thirdly, the power of the court to set aside a judgment on the ground of fraud is a discretionary one. (See . . . .) Black observes that, to entitle a party to have a judgment vacated, he must show a sufficient reason why he did not assert and enforce his rights at the proper time and in the regular manner and that his whole conduct throughout has been free from fraud or any turpitude, and he must free himself from all imputation of laches, for the judgment will not be disturbed if it appears to have been entertained as a result of his own heedlessness, sloth, lack of diligence in protecting his own interests. Here the Assistant Agent found that the Plaintiff was absent at the hearing of O. S. No. 16 without due cause. It would be extremely undesirable to allow such a person to prove under the guise of an allegation of fraud, that the claim of the defendant was unsupportable and the finding of the court wrong. We allow the petition and direct the agent to review his decree in the light of this judgment. The Respondent will pay the petitioner's costs in this court.

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1. (1867) 3. Ch, A. 203.
2. (1903) 8 C. W. N. 172.
3. (1872) 10 Q. B. D. 295.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Abdur Rahim.

K. Lakshmana Iyer and another ... *Appellants.**

v.

Sankaramurthi Pillay and others ... *Respondents.*

Transfer of Property Act S. 55—Vendor's lien—Contract to the contrary—Agreement to execute mortgage for purchase money—Effect of—Hindu law—Co-parcener's interest—Transfer of, to other co-parceners—Sale.

Lakshmana Iyer *v.* Sankaramurthi Pillai

Where a transaction between members of a Hindu joint family by which one co-parcener transfers his interest to the other or others, takes the form of a sale and is accepted as such by the other co-parcener, or co-parceners there is no reason why effect should not be given to it as a sale with all the incidents attaching thereto.

Under the Hindu law as it obtains in the Presidency of Madras, the interest of an individual co-parcener is property and can properly form the subject of a sale.

2nd defendant sold his 1/6 th share in the family property to the other co-parceners for Rs. 70000 out of which Rs. 7000 was left with the vendees on an agreement that the latter should execute a mortgage of some of the family lands in his favour for that amount. Before a mortgage was actually executed in pursuance of the said agreement, a mortgage was given to the plaintiff of the same properties. Plaintiff was aware of the fact that a portion of the purchase money had not been paid but was unaware of the agreement.

Held (i) that the transaction was a sale and the 2nd defendant had a lien under the law in respect of the unpaid portion of the purchase money.

(ii) That the agreement to execute a mortgage did not involve a contract to the contrary within the meaning S. 55 of the Transfer of Property Act excluding the lien.

(iii) That having regard to S. 101 T. P. Act the lien was not merged in the mortgage subsequently executed and the 2nd defendant was entitled to priority to that extent.

Appeal from the decree of the Court of the Subordinate Judge of Tinnevelly in O. S. No. 24 of 1906.

K. Srinivasa Iyengar and *S. Srinivasa Iyengar* for Appellants.

M. D. Devadoss, T.R. Ramachandra Aiyar, T.R. Venkatarama Sastri and *V. N. Kuppu Rao* for Respondents.

The Court delivered the following

Judgment:—*Miller J.*—The question in this appeal is a question of priorities. The second defendant sold to his other co-parceners his one-sixth share of the family property for Rs. 70,000 and obtained a mortgage bond in 1894. The sale-deed

*A. S. No. 36 of 1909. 27th November 1912.

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Miller J.

is Exhibit H. We are concerned with that portion of the price, Rs. 70,000 which was not paid to the seller at the time. The deed contained a statement that that Rs. 7000 had been reserved on account of a hypothecation bond "that has to be executed by you to me." That was in August 1894. Then, in November 1894, the plaintiff obtained a mortgage (Exhibit A) of some of these properties; and on the 12th December 1894, the 1st defendant gave to the 2nd defendant a mortgage (Exhibit II) of some of the properties in Kamsapuram, which were some of the properties of which the one-sixth share was sold in August. Now, the question is, whether by reason of the prior agreement before this mortgage (Exhibit II, I ought to have said, was executed in pursuance of the agreement in Exhibit H), whether by reason of the existence of this agreement before the mortgage to the plaintiff, the mortgage Exhibit II should not be held to have priority over that of the plaintiff. The Subordinate Judge has found and, I think he is right, that, at the time of the plaintiff's mortgage, the plaintiff must be taken to have had notice that Rs. 7,000 of the sale amount remained unpaid, and to have known that the vendor, the 2nd defendant, had a charge upon the property sold to the extent of the portion of the price which remained unpaid. The Subordinate Judge holds that the mortgage to the plaintiff must be postponed to the extent of the prior charge known to him and the effect of that is that the mortgage Exhibit II will take priority over the plaintiff's mortgage on one-sixth of the Kamsapuram properties encumbered by it. The appeal is by the plaintiff. The first argument I shall deal with is the contention that one co-parcener cannot sell his share to another, and consequently that there could be no charge upon the property under S. 55 of the Transfer of Property Act. Now, it is clear, I think, and it was not denied, that a co-parcener can alienate or get rid of his share to other co-parceners, not necessarily to them all jointly but to one whom he chooses or to some out of the whole body. But it was urged that he cannot do this by way of sale but by way of surrender. But it seems to me that, if the transaction takes the form of a sale and is for valuable consideration and if the other co-parcener accepts the transfer as a sale, there is no reason why we should not attach to the transaction, whether it is called a surrender or whether it is called a sale, the effect which the Transfer of Property Act gives to a sale. The 2nd defendant by Exhibit H certainly purported to sell for a price of Rs. 70,000 his share of the joint property and the fact of the transaction was that of his share of the joint property was transferred to

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his co-parcener. I think it is clear at the present day that it cannot be said in this presidencythat a co-parcener has no share which he could sell. There is no doubt that he can alienate to an outsider that which he can claim at partition and is properly called a share and a recent case shows that the extent that is alienated, when it comes to be divided for the outsider's benefit, will be that which would have been divided if partition had occurred at the time of the alienation. That seems to me the decision of the Full Bench in *Chinna Pillay v. Kalimuthu Chetty*[1]. It is impossible, I think to say that there is nothing which he could alienate to his co-parceners, nothing which they could obtain in exchange for their money. I fail to see why the transaction does not come within the Transfer of Property Act's definition of sale as the transfer of ownership in exchange for a price paid or provided or part paid and part promised. Now, if it is a sale, then a charge attached to the whole of the property sold to the extent of Rs. 7,000 and, on that, the finding of the Subordinate Judge, which I have accepted, is that it was known to the plaintiff. Then it is said that there was a "contract to the contrary" *i. e.*, the statement in Exhibit H that "this money is reserved with you in order that you may execute to me a hypothecation bond for that amount," a contract which negatived the charge created by S. 55 of the Transfer of Property Act. I have had some doubt whether I should not hold that the statement in Exhibit H had the effect, but, on the whole, I think it does not. It certainly does not necessarily have that effect, it is not necessarily a substitution of this agreement for the charge and it was nowhere before alleged that there was a contract in lieu of the charge. I think, therefore that we cannot say properly that there was any such contract in the case. Then the next argument was that, even if that be so, at any rate when once the mortgage, Exhibit II was taken in substitution of the lien, the lien was gone. But I think the effect of S. 101 of the Transfer of Property Act is that we must hold for the benefit of the vendor who has a charge upon the property, that charge was not merged in the mortgage, Exhibit II, if it appears to be for the charge holder's benefit to keep it alive. Now, it is not suggested that it was not for the second defendant's benefit to keep the charge alive and, therefore, unless it is clear that he intended to give it up (and that, I think, is not clear from Exhibit II), I think we are bound to hold, according to S. 101 of the Transfer of Property Act, that he did keep it alive. That being my opinion, it seems to follow that the

1. (1912) I. L. R. 35 M. 47.

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Miller J.

Subordinate Judge's decree is right. It was suggested that if that is so, then S. 81 of the Transfer of Property Act should be applied. But that applies only in cases where the plaintiff has no notice of the previous mortgage. It is also suggested that we should apply the provisions of S. 82 of the Transfer of Property Act as to contribution, but it appears to me that it is unnecessary to do that in this suit. There is a memorandum of objections and that attacks the finding of the Subordinate Judge that the plaintiff had notice that only some part of the price was unpaid. It is based on evidence which is intended to show that there was before the plaintiff's mortgage a definite agreement known to him that the particular lands of the Kamsapuram village were to be mortgaged to secure the unpaid price under Exhibit H. The Subordinate Judge thinks that this is not proved and I certainly agree with him in that. The only witness who speaks definitely to the agreement alleged, is the 2nd defendant himself and the question was only asked of him in cross-examination. His evidence, I think, can hardly be relied upon and there is really no other evidence in the case that there was any agreement other than the simple agreement to execute a hypothecation bond. In the result, I think, the appeal fails and the Memorandum of objections also fails and both must be dismissed with one set of costs in each.

Abdur Rahim J.—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Justice Tyabji.

Artharama Rabu and others ... *Plaintiffs—(Appellants.)**

v

Arthapadhi and others ... *Defendants—(Respondents).*

Vendor and purchaser—Consideration—Strangers cannot question—Estates Land Act—Zamindar—Home farm Lands—Burden of proof on—Estates Land Act (Madras Act I of 1908) S. 185—C. P. C. Order 41 r. 4—One of the appellants dying—Abatement—Power to act under, notwithstanding.

Artharama Rabu v Arthapadhi

The question whether a sale is supported by consideration is purely a matter between the vendor and the vendee and when the vendor does not dispute the validity of the sale, it is not open to third parties to question the title of the vendee.

The burden of proving that particular lands in a zamindari are homefarm lands lies on the party asserting it (here a purchaser of the kudivaram right from the Zamindar) and in that connection, the question of possession, that is, whether the zamindar has been in direct possession through his private servant is the most important fact to be considered.

* S. A. No. 979 of 1911. 30th July 1912.

Artharama Rabu v. Arthapadhi

Where one of the appellants (defendants) dies and the appeal abates so far as he is concerned, the Court has nevertheless power under Order 41 r. 4 to reverse the judgment in favour of all the defendants (including the deceased defendant) if the appeal was on a ground common to all the defendants.

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Ganjam at Berhampore in A. S. No. 85 of 09 preferred against the decree of the Court of the District Munsif of Aska in O. S. No. 1061 of 08.

T. V. Seshagiri Aiyar for Appellants.

T. Prakasam for Respondents.

The Court delivered the following

Judgment :—The plaintiffs are the appellants before us. They purchased the kudivaram right in 21 acres of lands from the Zamindar of Pratapagiri. Their case is that the plaint lands were the Hetta home farm lands of the Zamindar, that, therefore, he owned both the Kudivaram and Melvaram rights in the lands and that the plaintiffs' purchase in 1906 gave the plaintiffs, the Kudivaram occupancy rights in the lands, the Zamindar having been in direct possession till 1906. The defendants contended that the plaintiffs' sale deed in 1906 is unsupported by consideration and therefore invalid, that the Zamindar never owned the kudivaram in the plaint lands, as these lands were jeroity and not private home-farm lands, that the defenddants have been all along in actual possession and that the Zamindar or the plaintiffs were never in possession. The District Munsif decreed the suit brought by the five plaintiffs, who were undivided Hindu brothers. The Subordinate Judge on the defendants' appeal held (*a*) that the plaintiffs' sale deed is unsupported by consideration and hence the plaintiff could not claim title to the plaint lands under such a deed, (*b*) that the defendants have been in possession from 1906, and the Zamindar was not in possession of the kudivaram (*c*) that the plaint lands are not proved to be home-farm lands, especially having regard to the question of possession. On these findings he reversed the District Munsif's decree and dismissed the suit of the five plaintiffs with costs. As regards the question of consideration for plaintiffs' sale deed, the Subordinate Judge was clearly in error in going into that question which is purely a matter between the Zamindar and the plaintiffs. The Subordinate Judge admits (para 7 of his judgment) that the Roza (zamindar) and his men are supporting the plaintiffs, and if the zamindar does not dispute the validity of the sale to the plaintiffs, the defendants have no business to do so.

As regards the question of possession the finding of fact by the Subordinate Judge cannot be questioned in second appeal.

Artharama Rabu v. Arthapadhi

Coming to the question whether the plaint lands were home-farm lands or jeroity lands the Madras Estates Land Act S. 185 clearly puts the burden of proving that particular lands are home-farm lands on the Zamindar and his representatives. The question of possession that is, whether the Zamindarhad been in direct possession through his private servants is the most important fact to be considered in such cases.

The Subordinate Judge's finding that the Zamindar was never in possession and that the defendants had been in possession was entitled on that fact to come to the conclusion that the plaint lands had not been proved to be the Zamindar's private lands. The Subordinate judge has, no doubt misquoted the evidence of the plaintiff's 5th witness and has perhaps not given such weight to the documents L, S, T, N, and O, as the Munsif thinks they are entitled to but we cannot say there has been any misconstruction of documents or that the mistakes made in the reading of the evidence are of such serious character that we ought not to accept the Subordinate Judge's finding of fact and should remand the case for a fresh finding.

There is another question of law raised by the Appellant's Vakil. The District Munsif's decree was passed in favour of five plaintiffs.

These five plaintiffs were made respondents in the appeal to the Subordinate Judge's Court and the 15 defendants were appellants. The 2nd defendant died after the appeal and his legal representative was not brought on the record. The learned vakil for the plaintiffs (Appellants in the second appeal) contends that as regards the 2nd defendant who was the 2nd appellant in the Subordinate Judge's Court his appeal abated and the Subordinate Judge should not have allowed the appeal before him as a whole and dismissed the plaintiffs' suit as a whole, but ought to have dismissed the plaintiff's suit only so far as it related to the lands in the possession of the surviving appellants Nos. 1 and 3 to 15 before him. It is no doubt true that the appeal to the Subordinate Judge's Court abated so far as the 2nd defendant(2nd appellant) was concerned. But the appeal remained undisposed of as regards the other defendants and as the other defendants appealed on a ground common to them and the deceased defendants (namely the ground that the plaintiff had no title), Order XLI Rule 4 (O. C. P. 544) applied and the Court had the power to reverse the judgment of the District Munsif in favour of all the defendants including the deceased defendant. It was however, contended in reply to this argument that Order XLI Rule 4

(O. C S. 544) when it gave power to reverse the decree in favour of all the defendants, (including defendants who did not appeal) could not have intended to enure to the benefit of a defendant who was dead or for the benefit of his legal representative.

Artharama Rabu v. Arthapadhi.

There is no doubt much force in this argument but we think that the policy of the Legislature in enacting Rule 4 of Order XLI is that the appellate Court should have full powers to do justice to all parties, whether before it or not, provided it has gone into the whole case at the instance of parties who represent all the contentions necessary to be considered for the disposal of the case. Our view is supported by the decision in *Chintaman* v. *Gunga Bai*[1] which in our opinion directly decides the question in dispute. We therefore reject this contention also of the appellant's Vakil, and dismiss the appeal and confirm the lower Court's decree but with the modification that costs should be awarded against the plaintiffs only in favor of defendants Nos. 1 and 3 to 15 in the lower Courts. The parties will bear their respective costs in this second appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Iyer.

Kayarohana Pathan ... *Plaintiff—Appellant.**

v.

Subbaraya Thevan and another *2nd and 10th Defendants—Respondents.*

Hindu Law—Inheritance—Leprosy—Sanious or ulcerous and agonising type alone a ground of exclusion—Incurable nature of leprosy—Insufficiency of, as a test—Unfitness for social intercourse, test.

Kayarohana Pathan v. Subbaraya Thevan

Both the texts and the decided cases fully establish that it is only the agonising sanious or ulcerous type of leprosy that forms a ground of exclusion from inheritance under the Hindu Law.

It is not safe to make incurableness the test as that is a matter of opinion and too indefinite to be used for legal purposes.

Unfitness arising from the virulent and disgusting nature of the disease is the only satisfactory test.

Quaere, whether leprosy as a ground of exclusion is not obsolete.

Where a person was suffering from the anæsthetic form of leprosy which was in a medium stage when succession opened

Held, that he was not disqualified from inheriting.

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* S. A. No. 695 of 1912. 28th March 1913.

1. (1903) I. L. R. 27 B. 284.

Kayarohana Pathan v. Subbaraya Thevan

Second appeal from the decree of the Court of the Subordinate Judge of Tanjore in A. S. No. 708 of 1910 preferred against the decree of the Court of the District Munsif of Tiruturapundi in O. S. No. 113 of 1909.

C. S. Venkatachari for Appellant.

C. V. Ananthakrishna Iyer for Respondents.

C. S. Venkatachari for appellant argued that leprosy in this case is pronounced by doctors to be incurable. According to Yajnavalkya's text incurable disease is a disqualification. Ghose p. 360. None of the cases relied upon by the lower court *Janardhan* v. *Gopal*[1], *Rangayya* v. *Thanikachella*[2], *Bhagwan Ramaniya Das* v. *Ram Prapasam Ramaniya Das*[3], *Helen Dasi* v. *Durga Das Mundal*[4], *Ranchod* v. *Ajoobhai*[5] consider the question from this point of view. Cases have wrongly thrown emphasis on the virulence of the disease while the texts throw emphasis on its incurable nature. Ratnakara cites leprosy as one of the diseases disqualifying. See Colebrooke's Digest.

Anantakrishna Aiyar for respondent cited *Ananta* v. *Ramabai*[6]. Manu's "Nirindriya" is understood by Yajnavalkya as incurable disease *i.e.*, the disease must be of such a nature that the man should have entirely lost feeling or become owing to disease ostracised from society. Hence the qualification as to virulence &c. in the cases. There is no case directly holding that leprosy is a disqualification. These texts are considered largely obsolete *Vedanayaga* v. *Vedammal*[7], *Venkatasubba Row* v. *Purushotam*[8].

The Court delivered the following

Judgment:—The question for decision in this Second Appeal is whether the defendant is disentitled to inherit his paternal uncle's son's estate by reason of his suffering from leprosy. The plaintiff is the sister's son of the deceased owner. The medical evidence is that the defendant is suffering from the anæsthetic form of leprosy and that it is in the medium stage. The District Munsif decided against the defendant on the ground that according to the opinion of the medical witness the disease was incurable. The Subordinate Judge held that the defendant was not excluded because the disease was not the sanious or ulcerous type and was not virulent and he was not regarded as unfit for association by his castemen. The

1. (1868) 5 Bom H. C. A. C. J. 145.
2. (1895) I. L. R. 19 M. 74.
3. (1895) I. L. R. 22 C. 843.
4. (1906) 4 C. L. J. 323.
5. (1907) 9 Bom. L. R. 1149.
6. (1879) I. L. R. 1 B. 584.
7. (1904) I. L. R. 27 M. 591 at 598.
8. (1902) I L. R. 26 M. 133.

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Mitakshara, which is the predominent authority applicable in this presidency, does not expressly mention leprosy as a ground of exclusion from inheritance. It states "an impotent person, an outcaste, and his sons, one lame, a mad man, an idiot, a blind man, and persons afflicted with an incurable disease and others (similarly disqualified) must be maintained excluding them, however, from participation. Mitakshara, Ch. II, S. 10. Pl, 1—Pl. 6 states with regard to the persons enumerated in Pl. 1 that they are debarred of their shares, if their disqualification arose before the division of the property. But one, already separated from his co-heirs, is not deprived of his allotment." Placitum provides "if the defect be removed by medicaments or other means at a period subsequent to partition, the right of participation takes effect on the same principle on which 'when the sons have been separated, one, who is afterwards born of a woman equal in class' shares the distribution is based." Of the Smrithi writers the only one who expressly excludes a leper is Devala; Manu excludes one who is a Nirindriya that is devoid of an organ, after expressly mentioning eunuchs and outcastes, one born blind or deaf, an insane, an idiot and a dumb man, but a leper is not referred to by him. See Buhler, Ch. IX, Sloka 201. Apastamba and Vasishta do not exclude him. Narada excludes persons afflicted with a chronic or acute disease (See Sacred Books of the East, Vol 33, page 194), or, as otherwise translated an acute or agonizing distemper. Atrophy or pulmonary consumption is instanced as a chronic and leprosy as an acute disease in the Ratnakara. Yagnavalkya and Vishnu exclude persons suffering from an incurable disease. So far as leprosy is concerned, the later Hindu law books generally lay down that to be a ground of exclusion it must be of the sanious or ulcerous and not of the anæsthetic type. See *Janardhan Pandurang* v. *Gopal Pandurang*[1], *Ananta* v. *Ramabai*[2] and *Rungiah Chetty* v. *Thanikachela Mudaliar*[3]. The ancient texts apparently base the exclusion on the ground of the incapacity of the sufferer to perform the funeral and other obsequial rights of the deceased. The texts relate in terms to the right to partition on the distribution of an estate amongst several sons of a deceased owner; and the Mitakshara expressly provides that the share of the excluded sufferer should be restored to him if he is subsequently cured. It may be doubted whether the rule of exclusion would apply to a case of strict inheritance, as a person who is once excluded from inheritance which consequently vests in another, is not entitled to claim it again subsequently. All the reported cases

1. 5 B. H. C. R. 145 (A. C. J.) 2. (1877) I. L. R. 1 B. 554.
3. (1895) I. L. R. 19 M. 74.

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on the subject, *Muthuvelayudu Pillai* v. *Parasakthi*[1], *Ananta* v. *Ramabai*[2], *Rungiah Chetty* v. *Thanikachela Mudaliar*[2] and *Helan Dasi* v. *Durgadas Mundel*[3] relate to the right to partition. In *Ranchod* v. *Agoolai*[4] the question was one of inheritance proper. The leprosy in that case was held to be of the anæsthetic type, and it was held that the sufferer was not excluded. The question whether the texts were applicable to a case of real inheritance was not raised at the arguments in the case. The precedents cited in West and Buhler's Digest of Hindu Law also refer to cases of partition. In one case the pandit was asked whether the nephew of a deceased person was entitled to the certificate of heirship in preference to his son who was insane. In his answer he expressly referred to the fact of the son and nephew being united in interest as the ground for the holding that the nephew was entitled to preference. It cannot, however, be denied that the texts have been applied to the right of inheritance in the case of blindness and dumbness although not in the case of leprosy. It must be noted that ancient writers excluded various other persons from inheritance to the paternal estate along with those specifically enumerated in the Mitakshara. The author refers to them by the expression " others similarly disqualified." How wide the reasons for exclusion were, will appear from Colebrooke's Digest Vol. II, pages 424 to 435. Many of the grounds of exclusion would not now be enforced by the Courts and are practically obsolete. See Mayne's Hindu Law, paragraph 592 and *Vedanayaka Mudaliar* v. *Vedammal*[5]. In *Venkatasubba Row* v. *Purushotam*[6], *Bashyam Iyengar* and *Moore* JJ. abstained from expressing an opinion on the question whether lameness was a ground of exclusion, although a " pangu" is expressly named by Yagnavalkya amongst excluded persons. Sir Thomas Strange refers to the opinion of Colebrooke that all the texts of exclusion cannot be said to have been abrogated or to be obsolete although the Courts would not go into proof of several of them, such as the claimant being addicted to vice or profusion or being guilty of neglect of obsequies and duties towards ancestors. " But" Colebrooke observed " expulsion from caste, leprosy and similar diseases, natural deformity from birth resulting from an uncanonial marriage would doubtlessly now exclude, and I apprehend it would have to be so adjudged in our Adawlets." See Strange's Hindu Law, Vol. I, page 159. It is doubtful how far the injunctions contained in the books are now actually enforced in different

1. Mad. Sud. Dec. for 1860 page 239.
2. (1895) I.L.R. 19 M. 74.
3. (1906) 4 C. L. J. 323.
4. (1907) 9 B. L. R. 1149.
5. (1904) I.L.R. 27 M. 591 at 598.
6. (1902) I.L.R. 26 M. 133.

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parts of the country. In Steele's Law of Castes it is observed that the rules of exclusion are largely qualified by custom and that in seventy-two cases at Poona it was found that insanity excluded only unmarried persons and that in eighty-three castes blind persons married and having families might inherit. In *Bai Amrit* v. *Mai Manik* [1] a boy bordering on idiocy was allowed to transmit a heritable right to his widow. See West and Buhler's Digest, Introduction, page 155.

Again there is a difference of opinion amongst Hindu writers whether the disability to inherit could not be removed by the performance of expiatory ceremonies. According to some authors, expiation, though productive of spiritual benefit would not in cases of major sins, and serious diseases indicative of such sins render the sufferer fit for social intercourse or to inherit. This was the view taken in Bengal Sudder Adawlet Decisions, Vol. 2, page 108 referred to in the Vyvasthachandrika, Vol. 2, precedents page 492. But others are of a different opinion. These considerations would have to be borne in mind if we had to pronounce a definite decision on the question whether in a case of inheritance proper leprosy of the sanious or ulcerous type would be a ground of disqualification in this presidency at the present day; but it is not necessary to do so, as the finding is that the defendant in this case is not suffering from leprosy of that type. It is contended for the appellant that as according to the medical opinion the disease is incurable, the case is one which falls within the text of the Mitakshara; but the question is not whether according to modern medical opinion the disease is curable though of anæsthetic type. Both the texts of the Hindu Law and the decided cases fully establish that it is only the agonizing sanious or ulcerous type of leprosy that can be regarded as a ground of exclusion. It may be that it is only that type that was regarded as incurable by the Hindu writers. It is not safe to adopt the test whether the disease is curable or not. That is very much a matter of opinion on which the medical profession itself might be divided. The test would moreover be an indefinite one for legal purposes, as what is at one time regarded as curable may at other times be regarded as incurable. Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what was to be accepted in both the texts and the decisions as the most satisfactory test. The result is that we must dismiss the second appeal.

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1. (1872) 12 B. H. C. R. 79.

Vairavan Chettiar v. Avicha Chettiar

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Vairavan Chettiar and another. *Appellants.* (Plaintiffs 2 and 4.)*

v.

Avicha Chettiar and others ... *Respondents (Defendants 1 to 3 and Plaintiffs 3.)*

Limitation Act, (Act. XV of 1877), Art. 115, 36, 120—Implied contract, meaning of—Principal and Agent—I. C. A. S. 235—Suit under,—"Breach of implied warranty of authority."

The article of Limitation Act applicable to a suit for damages against a person under S. 235 I. C. A. (i. e., for untruly representing himself to be the authorised agent of another and thereby inducing a third person to deal with him as agent) is Art. 115 and not Art. 36 or Art. 120.

The expression "implied contract" in art. 115 is used in the sense in which that expression is used in English law and not in the sense in which it is used in the Contract act.

In Dukar Pershaud Bustooree v. Mussamat Tookumaree Dabee[1], followed.

Nature of such actions discussed.

Appeal from the decree of the Subordinate Judge of Negapatam in O. S. No. 28 of 1907.

S. Varadachariar for *K. Srinivasa Iyengar* for Appellant.

S. Srinivasa Iyengar and *K. V. Krishnaswami Iyer* for Respondents.

The Court delivered the following

Judgment:—So far as the 1st and 2nd Respondents are concerned this appeal must fail on the finding of the Subordinate Judge, with which we agree. There is no evidence that the 3rd defendant (3rd respondent) executed Exhibit C with the authority of his father, Chockalinga, or that Exhibit C was subsequently ratified either by Chockalinga or by Srirangam Achi and Sivagami who succeeded Chockalinga in the guardianship of the 1st and 2nd defendants. The 3rd defendant's testimony is completely against the plaintiffs. It may be that he is not speaking the truth but in the absence of any evidence to prove plaintiffs' case their claim against the 1st and 2nd respondents must fail. Exhibit A does not shew that Srirangam Achi and Sivagami intended to ratify Exhibit C. The appeal must therefore be dismissed with costs as against the 1st and 2nd Respondents.

*A. No. 139 of 1908. 29th April 1913.

1. (1871) 16 W. R. (P. C.) p. 35.

The next question is whether the 3rd defendant is liable to compensate the plaintiffs for the damage caused to them by his executing Exhibit C. without the authority of Chockalinga. Several questions of fact and law, the solution of some of which is not free from difficulty, have been argued in connection with this point, but we abstain from discussing them as we are of opinion that the claim of the 3rd defendant must fail on the ground of limitation.

The covenant in Exhibit C. is that the barque Vettival should be sold and the pass for it standing in the name of Chockalinga should be transferred to the plaintiffs within one month after the barque returned to Negapatam or Thondi. This took place according to the plaintiff's on the 10th of January 1904. The suit was instituted on the 31st July 1907 that is more than 3½ years after the boat returned to Thondi. What is the article of the Limitation Act applicable to the case? The third respondent contends that it is article 36 or article 115, while the appellant urges that it is article 120, no other article being applicable. We do not think that article 36 can be held to be applicable. It relates to a suit for compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not specially provided for in the schedule. Assuming that the action may be held to be one in tort, it is certainly not for a wrong independent of contract but one connected with a contract and arising from one of the incidents of a contract. A person entering into a contract on behalf of a principal ought not to do so without authority from the principal. His acting on behalf of the alleged principal amounts to a representation that he has authority from the latter to do so. His acting without such authority is a wrong connected with the contract. The case cannot therefore fall within the purview of article 36.

Article 115 provides "for compensation for the breach of any contract express or implied, not in writing registered and not herein specifically provided for." Is the cause of action in this case the breach of an implied contract?

The Indian Contract Act, S. 235 enacts as follows: "a person untruly representing himself to be the authorised agent of another and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing." In treating of the measure of damages awardable against an agent acting without the authority of the principal, Messrs. Pollock and Mulla observe that in English law "the duty is grounded on an implied warranty by the agent that he

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has the authority, and the action being in contract lies even if the agent honestly believed he had authority, and against executors; while in England an action in tort for deceit does not." It is open to question whether in India the compensation recoverable under the Section will be assessed on the same principle. The language used seems more appropriate to an action in the nature of deceit than to one founded on warranty. The language of the section no doubt supports the statement of the learned commentators, that the suit appears to be treated as one for damages for misrepresentation and not one on a contract. Section 9 of the Act defines an implied contract as one in which there are an actual proposal and acceptance, though made otherwise than in words. Obligations imposed by law similar to contractual obligations are not included in the definition and are placed in the Act in a separate category in Chapter V; but there can be no doubt that according to English law a contract that the agent has authority to act on behalf of the principal would be implied by law whenever he contracts on behalf of a principal. In construing article 115 of the Schedule to the Limitation Act it must be remembered that Act IX of 1871 which enacted article 115 was passed before the Indian Contract Act which was enacted in 1872. We think that the expression 'implied contract' was used in the article in the sense in which it is understood in English law. The Contract Act and the Limitation Act are not statutes *in pari materia* and it should not be assumed that article 115 is confined to cases of what would be implied contracts according to the definition in the Contract Act. The result of confining it to such cases would be that where a suit is instituted against the principal and an agent together and relief is claimed against them in the alternative according as the act was authorised or not by the principal a different period of limitation would be applicable against each of them, though the obligation arises out of the same transaction. We do not think that this could have been intended. We are of opinion on the whole that article 115 must be applied to the case. In *Dukar Pershaud Bustooree* v. *Mussammat Tookumaree Dabee*[1], the Privy Council held that the obligation of a *del credere* agent to pay the vendor of goods their price when it is not paid by the purchaser to be one on an implied contract. Paragraph 14 of the plaint states, that the cause of action arose on the 13th February 1904, that is one month after the arrival of the boat at Thondi. On this allegation the suit must be held to be barred. It is urged that, as the 1st and the 2nd defendants' guardians

1. (1871) 16 W. R. (P. C.) p. 35.

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executed the power of attorney, Exhibit A, with a view to transfer the pass of the barque on the 28th November 1906 to the plaintiffs' names, the contract was not really broken on the 13th February 1904. But the execution of Exhibit A was not in performance of the agreement, Exhibit C, but in consequence of a request by Erambrumoorthi Pillai to whom Chockalinga had sold the barque to the guardians asking them to transfer it to the plaintiffs on the ground that he had sold the barque to them. There is nothing in the facts of the case to postpone the commencement of limitation beyond one month after the arrival of the barque at Thondi. We must therefore hold that the suit as against the 3rd defendant is barred by limitation. In the result the appeal is dismissed with costs against him also.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arnold White Chief Justice and Mr Justice Oldfield.

K. Sheik Meera Sahib and Co. ... ... *Appellants.* * *(Plaintiffs.)*

v.

Sheik Naina Lubbay Marcayar and others ... *Respondents.* *(Defendants.)*

Practice—Leave to amend on terms—Liberty to raise defences as if plaint presented then—Plaintiff bound in the absence of slip—Limitation Act(Act IX *of 1908) S. 19—Acknowledgment—Plea of accord and satisfaction by agreement at earlier date—Effect of—Denial of liability coupled with the plea of set off and acknowledgment with plea of set off—Difference between.*

Sheik Meera Sahib & Co. v. Sheik Naina

In 1909, plaintiffs sued the defendants for a sum of money. He sued defendants 1 to 3 as the legal representatives of a deceased partner, defendants 4 to 6 as the representatives of another partner and defendant no. 7 in his own capacity as a partner. In February 1912, plaintiffs applied for leave to amend the plaint by altering the claim against defendants 1 to 3 into one against them in their personal capacity as partners, The Court gave leave on terms reserving liberty to the defendants to raise defences as if the plaint was filed in 1912,

Held that the plaintiff was bound by the order and all the defendants could plead limitation as if the suit was filed in 1912.

Held also that in the absence of anything in the nature of a slip, the order could not be varied or cancelled on appeal.

Defendants stated in 1909 in their written statement that there was an agreement in 1907 that the plaintiffs' firm should receive from the defendants 25 p. c. of their dues in full satisfaction of their claims and that they were ever ready and

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* O. S. A. No. 42 of 1913. 1st August 1913.

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willing to pay the same but that the plaintiffs made default. They also stated that the plaintiffs' firm had taken possession of certain goods belonging to them, that they were liable to give credit out of the value of those goods to the extent of 25 per cent. of the claim and that in any event the defendants' liability should be exonerated to the extent of the value of the goods.

Held that these statements were neither of them acknowledgments of liability in 1909 within the meaning of S. 19 of the Limitation Act so as to save limitation whether as regards the whole or as regards the 25 per cent.

The plea ot accord and satisfaction of the debt by reason of an agreement at an earlier date could not operate as an acknowledgment of a specific liability at the date the plea was put in.

An acknowledgment of liability coupled with a claim to a set off is a good acknowledgment under S. 19, Limitation Act but a denial of liability with a claim by way of set off in the alternative is not.

Appeal from the decree of the Honourable Mr. Justice Bakewell dated the 25th day of April 1912 in the exercise of Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 151 of 1909.

M. D. Dava Doss with *M. K. Ramaswami Aiyar* for Appellants.

K. Ramachandran and *S. Doraswami Aiyar* for Respondents.

The Court delivered the following

Judgment :—*White C. J.*—In this case the plaintiff sued the defendants for a certain sum of money. He instituted his suit in 1909. He sued defendants Nos. 1 to 3 in a representative capacity as the legal representatives of a deceased person. He sued defendants Nos. 4 to 6 also in a representative capacity. He sued defendant No. 7 in his personal capacity alleging him to be a partner in the firm with which the plaintiff had had transactions. In February 1912 the plaintiff applied for leave to amend his plaint. The amendment he asked for was that the claim against defendants No. 1 to 3 should be made as against them not in their representative, but in their personal capacity as partners. The learned Judge gave leave to amend on certain terms. The exact words of his order after giving leave to amend are " written statements of all the defendants to be filed before the 20th March......... defendants to be at liberty to raise all defences available to the amended plaint as if the plaint had been filed this day ". It was argued on behalf of the plaintiffs (the appellants) that S. 22 of the Limitation Act did not apply to defendants Nos. 1 to 3 since they were not new defendants within the meaning of that section. It seems to me it is not necessary to consider that question, because assuming that they were not new defendants within the meaning of the section, under the express terms of the order under which leave to amend was given to the plaintiff,

all the defendants were to be at liberty to raise all the defences to the amended plaint as if the plaint had been filed in February 1912.

Then we have to consider whether there has been an acknowledgment of liability sufficient to prevent the operation of the law of limitation within the meaning of S. 19 of the Limitation Act. It is true, as Mr. Devadoss on behalf of the appellant has pointed out, that all that is necessary is an acknowledgment of liability and that a promise to pay is not necessary as an acknowledgment of liability and that a promise to pay is not necessary. We have to see is there any acknowledgment ? An acknowledgment in view of the order of the learned Judge, when he gave leave to amend, in order to be available to the plaintiff, must be within three years prior to 1912. Mr. Devadoss has argued that we can extract from certain paragraphs in the writen statements of these defendants an acknowledgment sufficient for the purpose of the section ; as the written statement was put in, in 1909, if an acknowledgment can be so extracted, that is sufficient to prevent the operation of the statute. Paragraphs 10 and 11 of the written statement relate to the same matter, and they run thus :

" 10. This defendant states that in consequence of the loss sustained by the defendant in his business he entered into a composition with all his creditors inclusive of the plaintiff's firm and that on or about 4th March 1907 it was agreed at Sikkal between this defendant and the plaintiff's firm that the plaintift's firm should receive from this defendant 25 per cent. of their dues in full satisfaction of all their claims against defendant, and the plaintiff's firm agreed to receive the said sum in full satisfaction of all their claims as aforesaid and exonerate this defendant from all liability in respect thereof.

11. This defendant was ever ready willing and prepared to pay to this plaintiff 25 per cent. of the amount due to the plaintiff as aforesaid, but the plaintiff has made default in receiving the said amount from this defendant and exonerating him from all liabilities as aforesaid ".

These statements in the written-statement are no good to the plaintiff as evidence of something which may have happened in 1907 because that would be more than three years before the date, which has to be taken now as the date when the suit was instituted. What we have to see is, are these statements in the pleading an acknowledgment of liability sufficient for the purpose of the section ? As I read these allegations, so far from being an admission of an existing

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liability in 1909, they are in effect a plea of accord and satisfaction a plea that whatever may have been the state of affairs in 1907, an agreement was entered into in 1907 which had the effect of putting an end to any liability in respect of the original transactions which the defendants may have been under in 1907. They amount to a plea of accord and satisfaction in answer to the plaintiff's claim. Whether the plea is good in law or bad in law seems to me to be a matter which we need not consider. All that we have to consider is, is it an acknowledgment, and how a plea of accord and satisfaction of a debt by reason of an agreement said to have been entered into between the parties at an earlier date can be said to operate as an acknowledgment of a specific liability at the time the plea is put in, speaking for myself, I entirely fail to understand so far from being an acknowledgment it seems to be a denial of any subsisting liability in 1909.

Then it has been contended that, whatever may be the true view with regard to the original liability, paragraph 11 of the written statement operated as an acknowledgment as regards defendants Nos. 1 to 3 and 7 of the liability to pay the 25 per cent. the composition which it is said was accepted in 1907 by the creditor in discharge of his whole claim. It does not follow that the plea involves an admission that 25 per cent. was payable in 1909. The defendant said that he had been since 1907 willing to pay 25 per cent. in discharge of the original liability but the plaintiff had made a default in accepting it. I do not think we can treat that as an admission in 1909 that 25 per cent. still remained due by the defendants to the plaintiff in respect of the original liability, if it was due and owing by reason of the agreement by way of composition which was entered into in 1907.

Then we are asked to say that reading paragraphs 12 and 13 together there is a plea of set off. Explanation 1 to section 19 says that an acknowledgment would be sufficient " though it is coupled with a claim to a set off ". Is this an acknowledgment coupled with a claim to a set off ? The plea alleges that the plaint firm took possession of certain goods belonging to the defendants worth Rs. 5,000. Then it goes on : " This defendant here submits that the plaintiffs are liable to give credit to this defendant out of the value of the said goods to the extent of 25 per cent. of their claim and submits that in any event the defendants' liability to the plaintiffs' firm should be exonerated to the extent of the value of the said goods ". This seems to me to be a plea of set off in the alternative. I don't owe the money. If I do, I have a set off. It seems to me that

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is not an acknowledgment of liability coupled with a claim to a set oft. It is a denial of liability with a claim by way of set off in the alternative.

Finally we have been asked to amend the order of amendment as regards all the defendants other than defendants Nos. 1, 2 and 3 that is to say, to treat the case as if, as regards defendants Nos. 1 to 3 they are only to be entitled to raise defences available to them as if the plaint was filed in 1912, but that as regards the other defendants they are to be entitled to raise the defences which would have been available on the plaint filed in 1909. What are the words of the order ?

" All the defendants are at liberty to raise all the defences as if the plaint had been filed in 1909. It is suggested that the plaintiff is no better off by reason of this order than he would have been if he had never applied for any order at all, and that, if he had never applied for any amendment he could have gone on as against defendants other than Nos. 1 to 3, the law of limitation being no bar to his claim. That may or may not be so ; but I fail to see how we could take into consideration in determining whether we ought to vary or cancel the order. If there was anything in the nature of a slip in making the order, nothing would have been easier than to apply to the learned Judge to correct it. I do not think there was anything in the nature of a slip. I think the learned Judge after having considered the matter and after having decided in the exercise of his discretion that he would grant the amendment imposed such conditions as he thought the justice of the case demanded. At any rate there is nothing which would warrant us in saying that the Judge made a slip. I thing the plea of limitation is good and that the appeal should be dismissed with costs (two sets).

Oldfield J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arnold White Chief Justice and Mr. Justice Oldfield.

Sitharama Chetty and another. ... *Appellants** (*Defendants.*)

v.

Cotha Krishnasami Chetty ... *Respondent* (*Plaintiff.*)

Limitation Act (Act IX of 1908) S. 4—Art. 74, 75, 80—Instalment bond—Failure to accept instalments—Default—Waiver—Limitation—Estoppel from pleading—Agreement against or waiver of plea of limitation—Validity of—Estoppel against act of Legislature.

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On the 12th of December 1904, there was an agreement between the plaintiff and the defendants under which the plaintiff released his interest in a certain business for an amount which had been fixed by arbitrators. On the same day—for consideration specified in the release, defendants executed a pronote for Rs. 30,000 payable by monthly instalments of 1,000, the whole amount to be recoverable in case of three successive defaults. Defendants paid 16 instalments up to April 1906. In May and June also, defendants sent cheques to the plaintiff who declined them and finally told them in July that he was not going to accept any more instalments and was repudiating the whole transaction. In August 1906, he instituted a suit to set aside the release on the ground that it had been obtained by fraud. His suit was dismissed and the judgment was confirmed on appeal on 19-1-1910. Inthe appellate Court application was made on his behalf that a decree might be made for the amount of the pronote. The defendants in answer did not deny their liability but stated that they were always ready and willing to pay it and contended that a decree should not be passed in that suit for the amount and the appellate Court refused to pass the decree. On 25-1-1910 plaintiff made a demand for the balance of instalments on the note and immediately after instituted this suit. Defendants pleaded that the whole amount became payable in July 1906 by three successive defaults on their part and the suit was barred. The learned original side Judge held that the defendants who for the purpose of resisting the application had admitted the liability were estopped (though not under S. 115 Evidence Act) on general principles from pleading that long befofe their admission the claim had become barred.

Held on appeal,

That the defendants were not estopped and that having regard to S. 4 of the Limitation Act no estoppel could even be pleaded.

That as on the facts there was no default by the defendants, Art. 75 of the Limitation Act did not apply.

Per Chief Justice, under the circumstances, plaintiff could also properly be said to have waived the default of the defendants, if any.

Per Oldfield J. There can be no waiver of the benefit of a provision for immediate payment where there is no default in payment.

Per *curiam*: That article 74 (Per *Oldfield* J. or art. 80,) applied and the claim for instalments falling due more than 3 years from the date of suit was barredr.

In India, parties cannot waive or even contract out of the law of Limitation. *Khetrondhun* v. *Mohin Chandra Das*[1] followed.

* O. S. A. 51 of 1912. 24th April 1913.

1. (1913) 17 C. W. N. 518.

Sithramaa Chetty v. Krishnasami Chetty

· Difference between Indian and English law pointed out.

There can be no estoppel against an Act of the Legislature.

Jagadbhandu Saha v. *Radha Krishna Pal*[1] *Abdul Aziz* v. *Kauthu Mullick*[2] followed.

Where the debtors are ready and willing to pay, mere absence of completed payment does not amount to default within the meaning of Art. 75 of the 1st schedule.

On appeal from the judgment of the Hon'ble Mr. Justice Wallis in the Ordinary Original Civil Jurisdiction of the High Court in O. S. No. 53 of 1910.

K. Srinivasa Aiyangar for Appellants.

T. R. Ramachendra Aiyar for Respondent.

K. Srinivasa Aiyangar—There can be no estoppel against a statute ; he quoted S. 4. of Limitation Act ; Mitra on Limitation pp. 38-39. *Fairtitle* v. *Gilbert*[3]; *The E. I. Coy.* v. *O. Pail*[4], *Ambala* v. *Naduvakat*[5], *Mangulal* v. *Kandhailal*[6]. Inconsistent pleas in Court mean only election ; Bigelow S. 717-719 p. 673. Casperz on Estoppel p. 59. There will be no estoppel unless there was a change of position or advantage gained by the position taken ; 13 Halsbury p. 364. The whole claim on the pro-note was barred at the date of the so-called undertaking. There was no inconsistent position taken by my client.

The plaintiff could not have also asked in the previous suit for recovery of money, for that would have been inconsistent with his case. It is not by admission of my liability that I then got the Judges not to give a decree on the pro-note ; but it was by my objection that *in that suit* the amount of the pro-note could not be decreed, the appeal was dismissed. If in this suit I plead that the plaintiff should have included the subject matter of this suit in the previous suit, that would be an inconsistent position taken by me. There is no undertaking or estoppel. The so-called admission or estoppel must be express and definite and not uncertain or inconclusive ; *Vythilinga* v. *Ramachandra*.[7] The lower court has held that the first nine instalments are barred, but that even they were payable on account of estoppel.

I contend that the whole claim is barred by limitation by virtue of the clause in the pro-note which accelerates the payment of all the instalments in case of failure of three payments. Art. 75 of the Limitation Act 1908 applies. Even under the old article it was held

1. (1909) I. L. R. 36 C. 920.
3. (1787) 100 E. R. 91.
5. (1883) I. L. R. 6 M. 325, 326.
3. (1911) I. L. R. 38 C. 512.
4. (1849) 5 M. I. A. 43, 69, 70.
6. (1886) I. L. R. 8 A. 475, 483.
7. (1904) 14 M. L. J. 379, 389.

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similarly *Navalmal* v. *Dhondipa*[1], *Girindra Mohun Roy* v. *Khir Narayan Das*[2]. As to what amounts to 'Waiver' which occurs in Art. 75 ; see *Seshan* v. *Veera* [3] for the position that it is not non-suing or keeping quiet. I asked the plaintiff whether he would accept my cheques, but there was no reply [C. J. Here plaintiff repudiates the contract altogether] Yes; *Seshan* v *Veera*[3]. No waiver of a previous stipulation can be established unless there has been a receipt of money subsequently, affected by waiver. Mere statement that the plaintiff waives does not amount to waiver. Waiver is not equivalent to laches. The plaint does not say that the plaintiff has waived the benefit of non-payment of three instalments or that each instalment fell due on its respective date. Tender is tantamount to performance. Tender has been refused. So interest is not payable as if there was a default. S. 38 of the Contract Act referred to.

T. R. Ramachandra Aiyar:—The release was found to be not final and so the appellate court in the previous case gave me an additional Rs. 1100. That court not only actually held the award to be illegal and not binding but in effect held that the release was bad in that it did not include the Rs. 1100. So that court could have then given me all the amount due to me—which would include the amount of the pro-note [C. J. No; the court did not set aside the release but as by an oversight Rs. 1100 was omitted; they added that amount and allowed it.] No; If the award goes, the release goes. I offered to give up the pro-note in the plaint in the previous case. I could have sued in the alternative originally. But I prayed for inclusion of this amount at the time of the agreement, seeing that the release was not binding. But on the other side undertaking to pay it I chose to take it and consented to a decree for Rs. 1,100; otherwise I would have got a decree for a ready money of Rs. 30,000. [C. J. But the pro-note was time-barred then. How could you suppose the court would have given you the amendment when it was barred]. They could have done even if it was so. S. A. 864 of 1908 and S. A. 722 of 1910 *Kishendas Rupchand* v. *Bachappavithoba*[4] *Kutti* v. *Achutan Nair*[5] [C. J. There is nothing to show that an amendment was prayed for or that it would have been allowed]. An exactly similar case is *Baij Nath* v. *Hem Chunder* [6] where in an administration suit the court after refusing to allow a person to rank as a creditor asked him to bring a suit as the receiver admitted the creditor's claim; and

1. (1874) 11 Bom H. C. R. 155.
2. (1909) I. L. R. 36 C. 394.
3. (1909) I. L. R. 32 M. 284.
4. (1909) I. L. R. 33 B. 644.
5. (1911) 21 M. L. J. 475.
6. (1906) 10 C. W. N. 959.

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when the suit was brought it was barred: yet the suit was held to lie. As to power of Court to amend even at a late stage see *Cockrell* v. *Dickens*[1]. *M. Jahoor* v. *Rutta*[2], *Baghot* v. *Earton*[3].

The alternative claim could have been made then. S. 4 of the Limitation Act does not say that even when limitation is waived the court should dismiss the suit; *Mir Ajmuddian* v. *Mathuradas*[4]. Compare Ss. 25, 60 and 61 Contract Act. On estoppel arising from a waiver of limitation embodied in a judgment, see *Lakshman* v. *Ramachandra*[5]. If limitation is waived the court is not bound to dismiss the suit. *Fatoonissa* v. *Khonkar*,[6] *Dathu* v. *Kasi*[7], *Ahmad Ali* v. *Waras*[8], *Wright* v. *John Bagnall*[9]. Moreover there is an acknowledgment in this case in July 1907. Exhibit G. S. 19 of the Limitation Act [C. J. It is only a statement that certain amounts were paid and were agreed to be paid up to end of 1906. He does not admit an existing liability]. There is an admission. Even if not, it does not matter. There is reference to the Instalment bond *Sukhmoni* v. *Ishan*[10], *Mani* v *Seth*[11]. [C. J. When the so-called acknowledgment was made you denied all right in you on account of the pro-note].

If the old art. 75 does not apply as it speaks of 'one instalment' and here it is three instalments and art. 120 applies, then under S. 30 of the new Act, I have got two further years from the date of the new Act as Art. 75 of the new Act gives a shorter period of limitation.

As to article 75, the two cases quoted assume that 'one instalment' includes several instalments but do not decide the point. Mitra quotes to the contrary a decision of the Central Provinces. Article 74 does not apply as the third column does not contemplate a case of acceleration of the payment of the whole amount by default of some instalments. In article 75 'default' mean a refusal to pay a demand. I never made a demand and as the other side was always ready and willing to pay there was no default. 'Waiver' is the giving up of a benefit. *Badi Bibi* v *Sami*[12]. The receipt of an overdue instalment is not the only possible way of creating a waiver. Any overt act is sufficient. My statement that I did not want any instalment of the bond is a waiver. Even a repudiation of the whole contract is a waiver of the condition.

1. (1840) 2 M. I. A. 353, 389.
2. (1867) 11 M. I. A. 468, 486.
3. (1877) 7 Ch. D. 1.
4. (1874) 11 Bom. H. C. R. 206.
5. (1880) I. L. R. 5 B. 48, 60.
6. (1874) 21 W. R. 374.
7. (1884) I. L. R. 8 B. 535.
8. (1893) I. L. R. 15 A. 123.
9. (1900) 2 Q. B. 240.
10. (1898) I. L. R. 25 C. 844, 851.
11. (1906) I. L. R. 33 C. 1047 (P.C.)
12. (1892) I. L. R. 18 M. 257, 261.

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On the question of waiver cited *Badi Bibi* v. *Sami*[1]. On 'default' *In re Young and Harston*[2] *Chunilal* v. *Sukha*[3] *Namuna* v. *Roshan*[4] and Stroud p. 488. Interest is due under the circumstances *Krishna* v. *Ruma*[5] Limitation is not based on public policy; it can be waived. Mexwell p. 581, 582. *Raja of Vijianagaram* v. *D. Chelba*[6], *Asutosh* v. *Behari Lal*[7] *Wilson* v. *Mc Intosh*[8]. Acknowledgment need not be with consciousness of debt being due *Appa Row* v. *Suryaprakasa Row*[9], *Mani Ram Seth* v. *Seth Rupchand*[10], *Sukhamoni* v. *Ishan*[11], *Venkatacharlu* v. *Venkataramanjulu*[12]. If limitation is not pleaded once and a decision ensues, the decision is still a bar for another suit; *Mangul* v *Girija*[13], *Vythilinga* v. *Ramachandra*[14].

K. Srinivasa Aiyangar replied that at least art. 80 applied.

The Court delivered the following

Judgment:—*Chief Justice.*—The first question for consideration in this appeal is whether *Wallis* J.'s finding on the question of estoppel is right.

The circumstances in which the question has arisen are these:—

On the 12th December 1904 there was an agreement (Exhibit B) between the plaintiff and the defendants under which the plaintiff leased to the defendants his interest in a certain business for an amount which had been fixed by the arbitrators. On the same date, for the consideration specified in Exhibit B the defendants executed in the plaintiff's favor a promissory note for Rs. 30,000 payable by monthly instalments up to April 1906.

In August 1906 the plaintiff instituted a suit against the defendants in which he asked that the release (Exhibit B) should be set aside on the ground that it had been obtained by fraud. He declined to accept instalments under the pronote after April 1906. Fourteen instalments have not been paid. The plaintiff's suit was dismissed. On appeal the appellate Court declined to set aside the release but held the plaintiff was entitled to receive a further sum of Rs. 1,400 odd with which, he ought to have been credited on the taking of the account, as representing his share of certain debts which had been collected by the firm. In the Judgment their Lordships observe "Mr. Ramachandra Aiyar further claims payment of the amount due

1. (1892) I. L. R. 18 M. 257, 261.
2. (1885) 31 Ch. D. 174,175.
3. (1911) I. L. R. 35 B. 511, 513.
4. (1911) 13 C. L. J. 621.
5. (1910) I L. R. 35 M. 44.
6. (1904) I. L. R. 28 M. 84.
7. (1907) I. L. R. 35 C. 74.
8. (1894) A. C. 129.
9. (1899) I. L. R. 23 M. 94.
10. (1906) I. L. R. 33 C. 1047.
11. (1898) I. L. R. 25 C. 844.
12. (1895) 5 M. L. J. 241.
13. (1881) I. L. R. 8 Cal. 51.
14. (1904) 14 M. L. J. 379.

under the promissory note. The defendants do not deny their liability to pay and they submit they have been always ready and willing to pay but they contend that no decree for the same should be passed in the suit and we think they are right."

The Judgment of the Appellate Court was delivered on the 19th January 1910. On the 25th January the plaintiff demanded payment of the balance of instalments on the promissory-note Rs. 14000 and then brought the present suit. The defendants pleaded limitation. Mr. Justice Wallis gave the plaintiff a decree for the amount claimed. It was contended that a statement by one of the defendants in an affidavit (Exhibit G) amounted to an acknowledgment within S. 19 of the Limitation Act. I agree with the learned judge that this statement cannot be regarded as an acknowledgment within the meaning of the section.

The learned judge was not prepared to hold that S. 115 of the Evidence Act applied but he held on the facts that the defendants were precluded from pleading the statute. The learned judge after citing certain passages from Mr. Bigelow's treatise on the Law of Estoppel, puts it, thus—"It appears to me that it would be opposed to good conscience to allow defendants, who for the purpose of resisting an application against them, have stated that they did not deny their liability and were always ready and willing to pay to turn round immediately afterwards and allege that long before the date of their admission the suit had become barred by limitation."

The application which the defendants resisted was an application made on behalf of the plaintiff in the suit of 1906 (in which he sought to have the release set aside) that he should be given a decree for the unpaid instalments on the promissory-note. The plaintiff had refused to accept instalments after April 1906 because he had repudiated the agreement under which the instalments were payable. It was not a case, as it seems to me, in which leave to amend by adding an alternative claim for payment of the instalments could properly have been given. The learned Judges themselves say that they think the defendants were right in their contention that no decree on the note could be given in that suit. At the time when as it is suggested, leave to amend might have been given, the right to recover some, at any rate, of the instalments had become time-barred. It was not a case of leave to amend by setting up a claim to a different relief on the same cause of action but by setting up a cause of action wholly inconsistent with that set up in the plaint. As a matter of fact no application for leave to amend was ever made.

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In these circumstances since no advantage was obtained and there was no change of position I feel doubtful whether the defendants, notwithstanding their admission as to their liability, with regard to instalments which were time barred can be said to be precluded on any principle of estoppel from setting up the statute when sued on the note. I do not think it can be said that if the admission had not been made the plaintiff would have pressed for the Judgment on the note in the suit of 1906 because the parties seem to have agreed, and certainly the Court was of opinion, that judgment on the note could not be given in that suit. It seems to me, with all respect, that the learned judge in dealing with this question failed to give due weight to the express provisions of S. 4 (now S. 3 of the new Act) of the Limitation Act which enacts that every suit instituted after the prescribed period of limitation shall be dismissed although limitation has not been set up as a defence. It is well settled that there can be no estoppal against an act of the legislature. *Jagadbandher Sahe v. Radhakrishna Pal* [1] and *Abdul Aziz* v. *Kantha Mullick*[2].

In England a party relying on the statute must plead it. As regards personal actions other than actions on penal statutes the defence of the statute may be specially pleaded even if it appears on the face of the statement of claim that the cause of action accrued out of the limited time. Darby and Bosanquet on the Statute of Limitations Ex. 2 page 542. Mr. Ramachendra Aiyar on behalf of the plaintiff contended that a party could waive the statute if he liked, that the defendant's admission in the suit of 1906 amounted in effect to an anticipatory waiver of the statute as regards any claim which might subsequently be made upon the note and this being so the plea of limitation raised in this suit should on equitable grounds be disregarded. The answer to this as it seems to me, is that the parties cannot waive the statute by agreement. It would appear to be the law of this country that parties cannot waive or contract themselves out of the law of limitation. The law is thus stated by Mr. Mitra in his book in the Law of limitation "An agreement by a person against whom a cause of action has arisen that he would not take advantage of the statute cannot affect its operation on the original cause of action unless indeed such agreement amounts to an acknowledgment of liability which the statute itself recognises as an exception to the rule" Mitra, edition V volume I p. 39. Again on page 86 "Reasons of public policy having dictated the enactment of the Law of limitation the Indian legislature has since 1871 expressly

1. (1909) I. L. R. 36 C, 929. 2. (1911) I. L. R. 38 C. 572.

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declared that, whether the defence of limitation be pleaded or not, the Courts, whether of first instance or of appeal are bound to give effect to such law. See S. 4 of Act IX of 1871, and S. 4 of Act XV of 1877, and the illustrations. The bar of limitation cannot be waived, and suits and other proceedings *must be* dismissed if after the prescribed periods of limitation." And on page 248 "A law of limitation and prescription may appear to operate harshly or unjustly in particular cases but when such a law has been adopted by the state, for reasons which justify the rule in the majority of cases, it must, if unambiguous, be applied with stringency and no individual case to which those reasons are inapplicable can be excepted from its operation. The general good of the community requires that even a hard case should not be allowed to disturb the law. The rule must be enforced even at the risk of hardship to a particular party. The Judge cannot on equitable grounds enlarge the time allowed by the law, postpone its operation or introduce exceptions not recognised by it." The latest decision upon the point would seem to be *Khetri Mohin Chaterjee* v. *Mohin Chandra Das* [1] a case to which Mr. Srinivasa Aiyangar called our attention after the hearing of the appeal. Mr. Ramachendra Aiyar who appeared for the respondent relied on *Rangayya Appa Row* v. *Narasimha Appa Row*[2], *Seshachala Naicker* v. *Varadachary*[3] where it was held that when a party has abandoned the plea in the Court of first instance he cannot revive it in appeal in a case where the appellate Court cannot deal with the plea on facts found or admitted. These cases seem to me to be clearly distinguishable. In the case now before us in the first place the defendants are said to have abandoned the plea by an admission made in another suit and in the second place it cannot be said that the plea cannot be disposed of on the facts found or admitted in this suit. Another case on which Mr. Ramachendra Aiyar relied was *Baij Nath Ram Goneka* v. *Hem Chunder Bose* [4]. There, in an administration suit a receiver in the presence of the executor, admitted a creditor's debt and the court directed the creditor to bring a suit. When the suit was brought the executor pleaded limitation. It was held the executor was estopped. This case seems clearly distinguishable. When the admission was made by an officer of the Court, the Court was of opinion that, but for the admission, the creditor would have brought his suit in time and the suit which he did bring was in pursuance of the direction of the Court. It may be that an action would lie for breach of an agreement

1. (1913) 17 C. W. N. 518.
2. (1896) I. L. R. 19 M. 416.
3. (1901) I. L. R. 25 M. 55, at p. 60
4. (1906) 10 C. W. N. 959.

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not to plead the statute. (See *East India Co.* v. *Oovichurn Paul*)[1] but that, of course, is a question with which we are not now concerned.

Mr. Ramachendra Aiyar relied on the directions given by the Privy Council in the case *Muhammad Zahoor Ali Khan* v. *Mussamat Thahooranu Rutta Koer* [2]. Their Lordships in that case after considering whether they should dismiss the appellant's suit without prejudice to his right to bring a fresh suit, pointed out that such a suit would probably be met by a plea of limitation, which in the circumstances would be inequitable.

They then allowed the appellant to amend the plaint. Their Lordships took this course to avoid the raising of a plea of limitation which they considered would be inequitable. They did not say that this plea, if raised would have been ineffectual. The fact that they thought it desirable not to give the defendant an opportunity of raising the plea would rather suggest the contrary. Further the amendment allowed did not set up a new cause of action but merely changed the nature of the relief claimed.

We are only concerned with the question whether on legal or equitable grounds, the judgment of the learned judge on this part of the case can be supported. With all respect after careful consideration I have come to the conclusion that it cannot.

It was further contended on behalf of the appellant that as there had been failure to pay one or more instalments in August 1906 default was then made, and under article 75 of the 2nd Schedule to the Limitation Act the whole of the claim was time barred.

The note provided that if 3 instalments were allowed to fall into arrears the whole amount should be recoverable. The amendment of the article to which *Wallis* J. refers in his judgment was apparently intended to meet an agreement like the one in the present case.

It was contended for the appellant that default meant nothing more than the non-payment and that default was made in June or July 1906. I cannot accept this contention. The defendants sent cheques in May and June which were returned. In July they wrote (Ex.) " Please let us know whether we are to understand that you will not in future receive payments tendered for the instalment of the bond so that we may cease to go through the farce of sending a chêque every month only to be returned." It is their case that at

1. (1849) 5 M. I. A. 43.
2. (1867) 11 M. I. A. 468.

any rate up to the institution of the present suit they were ready and willing to pay. The defendants, for their own purposes, and in order to get the benefit of the law of limitation now say there was default in payment of 3 instalments in July 1906. On these facts I am prepared to hold that there was no default within the meaning of the article. Assuming there was default, it seems to me the plaintiff waived " the benefit of the provision" in May 1906 or thereabouts, when he repudiated the agreement which gave him the benefit of the provision. It was argued that waiver implied the giving up of an existing right and that the plaintiff could not be heard to say there was an existing right since he repudiated the agreement. I do not feel called upon to construe the word "waiver" in this restricted sense. In my opinion the plaintiff gave up the contract and with it the benefit of the provision contained therein. It may be that refraining to sue will not in itself constitute a waiver; (See *Seshan Pattar* v. *Veera Rághavan Pattar*[1] but here the plaintiff did not merely refrain to see. He repudiated the whole transaction. His subsequent claim on the note after the judgment of the appellate court does not in my opinion preclude him from saying he waived the benefit of the provision. For these reasons I do not think article 75 applies.

On behalf of the Respondent it was contended that article 120 applies but it seems to me the judge was right in holding that the article applicable is article 74. Under article 74 time runs from the expiration of the respective terms of payment. The right to recover the instalment due in May 1906 became barred in May 1909, the right to recover the instalment due in June 1906 became barred in June 1909 and so on. Thus the right to recover nine out of the 14 unpaid instalments is in my opinion barred.

The claim for the instalments due in February, March, April, May and June 1907 is, in my opinion not barred.

I would modify the decree of the learned judge by giving the plaintiff a decree for those 5 instalments with interest at the contract rate.

I would not interfere with the order of *Wallis* J. as to the costs and I would make no order as to the costs of this appeal.

Oldfield J :—I have nothing to add to the judgment of the learned Chief Justice with regard to the plea of estoppel and confine myself to the question of limitation.

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1. (1909) I. L. R. 32 M. 284

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It is not necessary to state the facts again. Appellant's argument is that there was a default in payment of certain instalments in 1906, that it was followed by no waiver, that time consequently began to run in respect of the whole amount still due and that the suit is therefore barred under Article 75 Schedule I Act IX of 1908.

Firstly was there a default in respect of any instalment? Respondents pleaded one for their own advantage and the plea must be scrutinized closely. There is no dispute as to the facts. There is no dispute that cheques were sent for the instalments due in May and June 1906, but were returned. In July there was no actual tender. But readiness and willingness to make one for that and the following months are implied in the working of Ex. E, in which appellants asked whether they need go through the farce of sending cheques in future, and, though respondents' attorneys gave no explicit answer to this enquiry in Exhibit D, the tenor of that communication is clearly that respondent intended to have the contract between the parties avoided and with reference to that intention dispensed with performance thereof in that and subsequent months. Throughout these, the absence of completed payments has been the result not of any failure, unreadiness or unwillingness on the part of appellants but of the conduct of the respondent alone. The provision for immediate recovery in the pro-note sued on (Ex. A) must be regarded as introduced for respondent's benefit. The construction of it, required by appellant's contention, is that he could at any time have secured the advantage of special method of recovery, though his debtors were not in fault; and that cannot have been contemplated by either party to the contract. It follows that the mere absence of completed payments, for which throughout appellants have not been responsible, cannot be treated as equivalent to the default referred to in the first column of Article No. 75. Next as to waiver. The waiver in question in the article is of the benefit of the provision for immediate recovery of the whole amount still due in case of default. The contingency in which that benefit can be taken or waived is the occurrence of a default; and, as I have held, that contingency never arose. It is therefore in my opinion useless to consider whether respondent's conduct, including the sending of Exhibit D, amounted or could in any circumstances have amounted to a waiver immediate or prospective.

But, though there was no default, it is clear that there was money due and unpaid and that respondent (apart from limitation) had a cause of action. It remains to decide what article is appli-

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cable to it. The authorities cited afford no guidance, since they deal only with cases of default and waiver of the special provision for immediate recovery. The difficulty arises from the abnormal wording of article No. 75. For in other articles, relating to breaches of an obligation to be fulfilled in accordance with the terms of a contract as for instance Nos. 53, 63, 65, 66, 73 and 74 the third column is expressed with direct reference to that date, and not to the conduct of the promisor, as it is in article No. 75 where the word "default" is used. The difference can be material only with reference to the small class of suits, such as the present in which there is no default. There may have been no intention to make any special distinction or to do more than continue the third column of art. No. 74 concisely with a reference to the result of the provision for immediate recovery. But in order to apply the article to the present case it would be necessary in consequence of my finding against the occurrence of a default, to understand the word "default" in the third column as meaning simply "failure to pay on the due date" although the wider interpretation above referred to for the word in the first column would have to be retained. This construction would be violent; and I hesitate to adopt it, the provision for immediate recovery having no direct importance in cases, such as this, in which there is no default, and its inclusion in Exhibit A affording no reason for allowing respondent a longer time, in which to sue them he would have had under any other article in a similar cause of action. Article No. 75 must I think be held applicable only to the class of suits, to which that under disposal does not belong, those in which a default has occurred and in which the provision as to waiver may be material. I would for these reasons apply article No. 74, which deals with suits on contracts not containing such a provision, or the more general article, No. 80. So these two articles are in my opinion applicable, the residuary article No. 120, for which respondent contends need not be considered.

The application of either article No. 74 or article No. 80 entails concurrence in the conclusion proposed by the learned Chief Justice; the respondent is entitled to recover the last five instalments which fell due before the date of plaint. I agree with him also as regards costs.

I therefore concur in the decree which he proposes.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

Sankarappa Naicker and others ... *Appellants* in both (Plaintiffs.)*

v

Rani Nachiar and another ... ... *Respondents in S.A. No.* 1266 *of* 1911.

In S. A. No. 1267 of 1911.

Kondama Naiker and others ... *Respondents in S.A. No* 1265 *of* 1911. *(Defendants.)*

Natural right—Owner of upper and lower lands—Right to let water flow on the lower land—Injunction—Easements Act, S. 7 illustration (a)—Conflict of natural rights.

Sankarappa Naicker v. Rani Nachiar

The right of the owner of an upper land to let his water run naturally into the adjacent lower land is a natural right and an interference with the exercise of such right entitles him to an injunction against the person interfering.

Whether in any case the owner of the upper land has exceeded his rights must be determined upon the facts of each case.

Mahamahopadhyaya Rangachariar v. *The Municipal Council of Kumbakonam*[1] distinguished, *Sangana Reddiar* v. *Perumal Reddiar*[2] not followed. *Smith* v. *Kenrick*[3] and *Subramania Iyer* v. *Ramachandra Row*[4] followed.

The owner of the upper land is not entitled to do anything that will throw on the lower land, water which would not have naturally gone there.

Smith v. *Anderson*[5] followed.

Plaintiffs and defendants were neighbouring land owners engaged in agriculture, plaintiffs owning the upper land and defendants the lower. The defendants erected a bund which prevented the water that fell on plaintiffs' land from flowing on to their land. The Judge dismissed the plaintiffs' suits following the decision in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam*[1]. *Held* reversing the judgment that plaintiffs were entitled to an injunction restraining the defendant.

Quaere: Which is to prevail where there is a conflict between the right to build and the right to let water flow.

Second appeals from the decrees of the Court of the Subordinate Judge of Tuticorin in A. S. 96 of 09 and 18 of 10 preferred against the decree of the Court of the Additional District Munsif of Tinnevelly in O. S. No. 394 of 07 and 117 of 08.

S. Doraiswami Aiyar for Appellant
V. Venkatachariar for Respondents } In S. A. 1266 of 1911.

S. Doraiswami Aiyar for Appellant
C. S. Venkatachariar for Respondents } In S.A. 1267 of 1911.

*S. A. Nos. 1266 and 1267 of 1911. 7th February 1913.

1. (1906) I. L. R. 29 M. 539.
2. (1910) M. W. N. 545.
3. (1849) 7. C. B. 566.
4. (1877) I. L. R. 1 M. 335.
5. (1894) 47 Am—Rep. 148.

Sankarappa Naicker v. Rani Nachiar

The Court delivered the following

Judgment:—The plaintiffs and defendants are conterminous landholders engaged in agriculture, the former owning the upper, and the latter the lower land. The plaintiffs allege that the defendants, who are the owners of the adjacent lower land, have erected a bund or wall which has the effect of preventing the water that fell on his (that is the plaintiffs') land from flowing to the defendants' land as it has been doing from time immemorial. The Subordinate Judge was of opinion that he was bound to dismiss the plaintiffs' claim in accordance with the rulings in *Mahamahopadhyaya Rangachariar* v. *The Municipal Council of Kunbakonam*[1] and *Sangana Reddiar* v. *Perumal Reddiar*[2]. He pointed out, however, that " these rulings are real impediments to punjah cultivation which would be impossible if the adjoining owners put up ridges and pen back water on to a man's punjah. The configuration of punjahs in the country have not provided every man's punjah with an *odai* or water course. The right of drainage for punjah is a right of necessity. The rulings in question no doubt leave out of consideration the inconvenience pointed out above," but as he was bound to follow the decisions,he dismissed the plaintiffs' claim, observing that the hardship, if any, is a matter for legislature to consider and not for the Courts. The right of the owner of an upper land to let his water run naturally into the adjacent lower land is a natural right. It has been recognised by this Court in *Subramania Aiyyar* v. *Ramachendra Row*[3] and in a series of decisions by the Calcutta High Court which are referred to in *Abdul Hakim* v. *Ganesh Dutt*[4]. See also illustration (i) to S. 7 of the Indian Easements Act. The English law on this point is stated in Kerr on Injunction, 4th Edn. p. 195 in the following terms. "When land is so located that water naturally or in the course of ordinary agricultural operations, such as by deep ploughing, descends from the estate of the superior proprietor to the inferior estate, the owner of the latter cannot do anything to prevent the course of such water. If he build a wall at the upper part of his estate so as to prevent the water from descending on it, whereby the land above is damaged, there is an actionable injury. The owner of land lying on a lower level is subject to the burden of receiving water which drains naturally or in the course of ordinary agricultural operations, such as by deep ploughing, from land on a higher level. The upper proprietor may drain his land, and the proprietor below must receive the water so drained; but the upper proprietor may not by adopting a particular system of drainage, or by introducing altera-

1. (1906) I. L. R. 29 M. 539.
2. (1910) M. W. N. 545
3. (1877) I. L. R. 1 M. 335.
4. (1885) I. L. R. 12 C. 323.

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tions in the mode of drainage, cause the drainage water to flow on his neighbour's land in an injurious manner, or obstruct the drainage of other lands by over loading the ancient drains with water." This is also in accordance with the civil law, "by which it was considered that land on a lower level owed a natural servitude to that in a higher, in respect of receiving, without claim to compensation the water naturally flowing down to it". See *Smith* v. *Kenrick*[1].

It was argued before us on behalf of the defendants that the result of applying this principle would be to prevent the defendants from ever improving their land. It may be pointed out, however that if the principle is not recognized, as pointed out ' by the judge, it may prevent the plaintiffs from carrying on their cultivation in the usual manner. It has also to be remembered that though the principle is to be maintained, it has to be prudently applied as pointed out in Kerr on Injunction. Whether in any case the owner of the upper land has exceeded his right must be determined upon the facts of each case. The decision in *Mahamahophadhyaya Rungachariar* v. *The Municipal Council of Kumbakonam*[2] has no application. In that case there was no damage caused to the plaintiffs, whereas the Subordinate Judge finds in this case that the bund put up by the defendants will have the effect of seriously interfering with the plaintiff's cultivation of his punjah land. Moreover in that case, there was a conflict of rights. The natural right of the plaintiffs was in conflict with the right of the defendants (see illustration (*a*) to S. 7 of the Indian Easements Act) to build on his land, which was in a town. There is no such natural right of the defendants in the present case. Both the learned judges who decided that case make special reference to this right of the owner of the lower land. We are therefore of opinion that that case does not apply. The case reported in *Sangana Reddiar* v. *Perumal Reddiar*[3] apparently refers to land which does not lie within the Municipality, but the learned judges who decided it follow the ruling reported in *Mahamahophadhyaya Rangachariar* v. *Municipal Council of Kumbakonam*[2] without recognising the distinction to which we have adverted. We are therefore of opinion that the plaintiff is entitled in S. A. No. 1266 of 11 to an injunction against the defendants from interfering with the exercise of his natural rights. He is entitled to his costs throughout.

It was then argued before us in S. A. No. 1267 of 1911 that the plaintiff has erected a bund which would result in increasing the

1. (1849) 7 C. B. 566. 2. (1906) I. L. R. 29 M. 539.
3. (1910) M. W. N. 545.

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volume of water which would flow to the defendant's land. On this question the Subordinate Judge has no finding. As we have already pointed out, whether the burden has been appreciably increased or not is a question of fact which must be determined in each case. It is not the law that the owner of the upper land may not interfere with the flow of water at all. But he is not entitled to do anything that will throw on the defendant's land any water which would not have naturally gone there. See the quotation supra from Kerr on Injunctions and *Smith* v. *Anderson*[1].

The decree of the Courts below is reversed; the Subordinate Judge will restore the appeal to his file and dispose of it in accordance with the above observations. The appellant is entitled to his costs in this Court. The costs in the lower Courts will be disposed by the final decree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

S. Eranhi Pakkran ... *Appellant (2nd Defendant.)*

v.

M. K. Pathumma and others ... *Respondents (Plaintiffs and 1st Defendant.)*

C. P. C. S. 11—Res judicata—C. P. C. Order 22 r. 5—Decision as to who is legal representative—Not question arising in suit—Matter collateral to suit.

Pakkran v. Pathumma

The question whether a person should be admitted as the legal representative of a deceased plaintiff to continue a suit cannot be regarded as one of the questions arising in the suit itself being only a matter collateral to the suit and any decision arrived at cannot operate as res judicata when a question arises in a subsequent suit as to succession to the deceased in respect of some other property.

Balabai v. *Ganesh*[2] *Pursotham* v. *Janki*[3] followed.

Second appeal from the decree of the Court of the District Judge of North Malabar in A. S. No. 49 of 1910 preferred against the decree of the Court of the District Munsif of Tellicherry in O. S. No. 282 of 1907.

J. L. Rosario for Appellant.

B. Sitarama Rao for *C. V. Ananthakrishna Iyer* for Respondents.

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1. 47 American Reports, 148.

* S. A. No. 781 of 1912. 7th March 1913.

2. (1902) I. L. R. 27 B. 162. 3. (1905) I. L. R. 28 A. 109.

Pakkran v. Pathumma

The Court delivered the following

Judgment :—The suit in this case was instituted by the plaintiffs as the heirs of one Kunhamed, a Mahomedan for the ejectment of certain tenants from some land leased to them by Kunhamed. The second defendant denied plaintiff's rights to succeed to Kunhamed's property as his heir and contended that the succession to his properties was governed by the Marumakkatayam law, and that he himself was entitled to the property in question as the next Karnavan of the tarward of the deceased Kunhamed. The plaintiffs contended that the question of the rule of succession to the property was *res judicata* in consequence of an order passed in a prior suit relating to a different matter instituted by Kunhamed, when a question arose on Kunhamed's death whether the present plaintiffs were entitled to continue the suit as his egal representatives. The 2nd defendant, who was a party defendan in that suit, contested the plaintiff's heirship and right to come in as Kunhamed's representative but the Court upheld their claim. The District Munsif held that the previous order would not make the question of plaintiff's heirship *res judicata* and on the merits he decided the question against the plaintiffs. On appeal the District Judge arrived at a different conclusion on the question of *res judicata* and passed a decree in the plaintiff's favour. The second defendant has preferred this second appeal. We are of opinion that the judge's view on the question of *res judicata* is wrong. The question whether a person should be admitted as the legal representative of a deceased plaintiff to continue a suit cannot be regarded as one of the questions arising for decision in the suit itself. It is really a matter collateral to the suit and one that has to be decided before the suit itself is proceeded with. The Civil Procedure Code does not provide for an appeal against an order deciding the question though the repealed Civil Procedure Code did. The view is in accordance with the opinion of the Bombay and Allahabad High Courts. See *Balabai* v. *Ganesh*[1] and *Purshotam Rao* v. *Janki*[2]. We reverse the decrees of the Lower Appellate Court and remand the appeal for fresh disposal according to law on the merits. The costs of this second appeal will abide the result.

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1. (1902) I. L. R. 27 B. 162. 2. (1905) I. L. L. 28 B. 109.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:— Sir Arnold White Chief Justice, and Mr. Justice Oldfield.

T. Ruthna Gramany and another ... *Appellants.** *Plaintiffs.*

v.

N. Veerabudra Aiyar and others ... *Respondents.* (*Defendants.*)

Practice—Appellate Side Rule 1, Original Side Rule, 335—Applicability of —Single Judge in Admission. Court—Admission of original side appeal—Competency of—Notice to respondent. Notice by appellant's Vakil, validity of—Notice undercourt's seal &c, necessity for—order without notice—Nullity or only irregular—Inaction, effect of—Hindu Law—Alienation by father—Immorality—Onus of proving—Frame of issue—Party accepting burden—can't question in appeal—No duty in Court to hear defendant's case when plaintiff makes no case.

Under Rule 1 of the Appellate Side Rules of Practice a Single Judge sitting in admission has power to excuse delay in the presentation of an appeal whether the appeal is from the original side of the High Court or from a Mofussil Court.

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It is not incompetent to the judge disposing of the application to direct notice to the respondent before he finally disposes of the matter and an order made after such notice is binding unless it is brought up on appeal or by notice of motion before the Appellate Court.

Any irregularity in the service of notice is waived by the party having notice appearing and contesting on the merits.

Per Chief Justice: Rule 335, Original Side Rules applies only to applications made after an appeal has been admitted and does not apply to an application to excuse delay in filing the appeal and notice by the appellant's vakil over his signature given to the respondents is sufficient notice under the law.

A party who has had notice of a proceeding but fails to attend on the ground that the notice is irregular is bound by the order unless he appeals against it or somehow gets it vacated.

A judge who makes an order under S. 5 of the Limitation Act excusing delay in the presentation of an appeal is not adjudicating on the appeal. *Hussain Begam* v. *The Collector of Muzzufurnagar*[1], followed.

Per Oldfield J:—There is no rule which provides for the bringing of a party before the court at the beginning of any proceeding or for his being informed of such proceeding otherwise than by a communication bearing the signature of the court or its officer and the court seal. A party is not bound by a notice which does not fulfil these requirements and an order passed in the absence of such notice is a nullity against him and need not be avoided by him.

An adjudication originally a nullity against a person only nominally a party to it cannot be validated against him by his mere inaction unaccompanied by positive conduct which raises an estoppel *Baswantappa* v. *Ranu*[2].

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*O. S. A. No. 102 of 1912. 4th August 1913.

1. (1889) I. L. R. 11 A. 176.
2. (1884) I. L. R. 9 B. 86.

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Semble:—Where an antecedent debt is established, the onus is on the son who seeks to impeach the alienaticn by the father (purporting to be for the discharge of the debt) to show that the debt is tainted by immorality and as such the alienation is not binding against him.

Where on the form of the issues, a party accepts the onus and the finding is against him, it is not open to him in appeal to turn round and say that the onus was wrongly thrown on him.

Where the plaintiff fails to prove his case, the judge is not bound to hear the defendant's case; it is open to him to say that there is no case for the defendants to answer and dismiss the plaintiff's suit.

On appeal from the decree and judgment of the Honorable Mr. Justice Bakewell dated 19th August 1912 in the ordinary original Civil Jurisdiction of the High Court and made in O. S. No. 42 of 1910.

S. Subramania Aiyar for Appellants.

M.O. Parthasarathh Aiyangar and *V.V. Srinivasa Aiyangar* for Respondents.

The Court delivered the following

Judgment:—*The Chief Justice*:—In this case an appeal from a decree of a Judge sitting on the original side of this Court was preferred 10 days after the prescribed period of limitation. An explanation was called for, and an affidavit was filed explaining the cause of delay. The case was then posted before the admission Court "for orders." In the Admission Court the learned Judge ordered that notice should go to the respondents to show cause why the delay should not be excused. The appellants' Vakil served the respondents with a formal notice of this order. The respondents other than the fifth appeared before another Judge, sitting in the "Admission Court" and shewed cause why the delay should not be excused. The judge excused the delay and admitted the appeal.

When the appeal was called on for hearing before an appellate Bench, Mr. V. V. Srinivasa Aiyangar on behalf of the 5th Respondent took the preliminary objection that the appeal was out of time. He contended that it was open to him to take this objection notwithstanding the adjudication in the matter by the judge of the "Admission Court." His points were, first, that the order of the Judge directing notice to show cause before a Single Judge, and the order of the judge excusing the delay after cause had been shewn, were made without Jurisdiction; and, secondly, that the procedure in connection with the service of the notice was not in accordance with the Rules and that on that ground the final order was bad.

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First as regards the question of Jurisdiction: It was contended that the dercee, against which the party desired to appeal, being that of a Judge sitting on the Original Side of this Court, the matter was governed by "the Rules of the High Court in its Original Jurisdiction and on appeal therefrom" and that the "Rules of the High Court in its appellate Jurisdiction" had no application. (The Rules may conveniently be referred to as the Original Side Rules and the Appellate Side Rules). The procedure in connection with obtaining an extension of time for an appeal from the original side might no doubt be regulated by rules framed under the powers under which the Original Side Rules are made. But I am not dealing now with the question of procedure but with the question of Jurisdiction. The Appellate Side Rules are made in pursuance of the powers conferred by, *inter alia* Ss. 13 and 14 of the High Courts Act (24 and 25 Vic. Ch. 104). Rule 1 provides for the exercise of the jurisdiction vested in the Court, and it says in so many words that an application for the admission of an appeal presented after the expiry of the period allowed by the law of limitation should ordinarily be heard and determined by one judge. It seems to me that on an application of this nature the Judge is not asked as an appellate tribunal, to deal with an order which has been made by another tribunal. He is asked to exercise the power given him by S. 5 of the Limitation Act and to say that an appeal may be admitted after the period of limitation prescribed therefor. This is a power which Rule (1) of the Appellate Side says may be exercised by one judge. Whether the power is invoked with reference to an appeal from a decree of a judge sitting on the Original Side of this Court or from a decree of a Mofussil Court, so far as any question of jurisdiction is concerned seems to me to be wholly immaterial. A judge who makes an order for the admission of an appeal after the period of limitation prescribed, is not adjudicating on the appeal. See the judgment of *Edge* C. J. in *Husaini Begum* v. *The Collector of Mazzafarnagar*[1]. He is exercising a power given to the Court by the Limitation Act in pursuance of a rule validly made, that the power may be exercised by a single judge. It scarcely seems necessary to consider, so far as the question of jurisdiction is concerned, whether, when a judge exercises this power in connection with an application to extend the time for appeal from a decree on the original side, he is exercising original or appellate jurisdiction. I am of opinion that the objection that the orders were made without jurisdiction fails.

1. (1889) I. L. R. 11 A. 176.

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Then as to the suggested irregularity of procedure in connection with the notice: As I have said, the Rules of the Original Side would be applicable if there were any rules on the point. The question is, are there? The judge directed notice to go and a formal notice was served on the respondents by the appellants' vakil. It was contended that this notice was bad, since the requirements of Rule 355 read with Rule 155 of the Original Side Rules had not been complied with. There are no express words in Rule 355 limiting its operation as in rule 354, to applications made after the admission of an appeal and the words in Rule 355 "any matter relating to the appeal" are no doubt very wide. Nevertheless it seems to me that rule 355 applies to applications made after an appeal has been admitted. In other words, when a question of admitting an appeal after the period of limitation has expired comes before the court, there is no "appeal" within the meaning of that rule. There is only a request by the appellant that the bar to his exercising his right of appeal should be removed. I do not find any provision in the Original Side Rules regulating the procedure when the Court is asked to exercise the powers confined by S. 5 of the Limitation Act. As it seems to me, the learned judge directed the notice to go not in pursuance of any express rule of procedure, but in accordance with the general principle that an order should not be made affecting a man's right (in this case the right to say the appeal was time-barred) without his being heard. In the absence of express rules as to the procedure in original side appeals, the practice would seem to be to post the original side appeals which are out of time "for orders" in the same way as mofussil appeals are posted under Rule 37 of the Appellate Side Rules.

We are not now considering whether a more convenient practice would not be to require a party who desires to get the benefit of the Section of the Limitation Act to apply by notice of motion on his own initiative the appeal being dismissed automatically if he does not apply. We are considering whether the order of the learned judge admitting the appeal is bad.

On behalf of the Respondents Mr. V. V. Srinivasa Aiyangar contended, in the alternative, that if theAppellate Side Rules applied those rules had not been complied with, and that consequently the order was bad. He referred to rule 76, but it is clear to my mind that this rule only applies after the admission of an appeal.

Assuming there was jurisdiction to make the order complained of, as I think there clearly was, even if there had been irregularity

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in procedure the irregularity was waived so far as the Respondents other than the fifth are concerned. They received the notice, they appeared by their Vakils in pursuance of the notice, and their Vakils showed cause against the order being made. They cannot now be heard to say the notice was irregular. Mr. V. V. Srinivasa Aiyangar who represented the 5th Respondent admitted that his client was served with the notice and he admitted that he knew his client had been served. He did not appear because he considered the notice irregular and because he was of opinion that any order which might be made would be made subject to objection at the hearing. He does not come before us by way of appeal from the order of the learned judge. (I express no opinion as to whether there is any right of appeal) and he does not come before us on notice of motion under Rule 354 of the Original Civil Rules. I do not think it is necessary to consider whether in the events which have happened Mr. V. V. Srinivasa Aiyangar on his own admissions can claim the right to be heard at this stage on the question whether the appeal should be admitted. Assuming he can I think his objection fails, and I would overrule it on the ground that the question which he asks us to deal with has already been adjudicated on by a competent tribunal.

Oldfield J :—I deal first with the question whether the learned judge's order admitting the appeal in spite of its presentation out of time was passed with jurisdiction, and I adopt the statement of the facts contained in the judgment of the learned Chief Justice. The point in issue is of some substance, because a decision against the respondents will entail that they were entitled to have this part of the case dealt with finally by one judge only, sitting in the admission court, not by two sitting as a Bench for final disposal.

It seemed to me at first doubtful, whether the powers of one judge under Appellate side Rules No. 1 were not limited to the admission of appeals, which were out of time in cases, in which no issue of process to the Respondent or witnesses was required since those rules made no provision for such issue and it is doubtful whether the Civil Procedure Code authorises at the stage in question. But the rules are made under Ss. 13 and 14 High Courts Act which do not refer to the Code, and clause 37 of the Letters Patent which directs only that in the making of Rules it is to be the guide "as far as possible." It is therefore possible to hold that the grant of substantive power to a single judge by the Rules to admit appeals implies the grant of all subsidiary powers necessary to their effective exercise, and the procedure of the learned judge, who ordered pro-

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cess to the Respondents and witnesses in this case, was therefore not open to objection. I accordingly agree with the learned Chief Justice that the learned judge's order was passed with jurisdiction in so far as it was against Respondents Nos. 1 to 4 who were parties to his proceedings and therefore must be held to have waived his objection to them based in the absence of valid notice, which I next consider.

As stated in the judgment of the learned Chief Justice, the learned judge ordered notice to the Respondents, and it was given by the pleader for the Appellants to the 5th respondent and the other over his own signature. The fifth Respondent disregarded it, abstaining from taking any part in the proceedings on the ground that he had no notice of them from any authority competent to give it. It is also objected to the notice that it specified no date for the hearing and contained nothing, by which the proceedings could have been identified on the notice boards. It is true that it did neither. But the absence of any signature by a competent authority and of the seal of the Court afford in my opinion sufficient ground for the decision of the case. It is not necessary to go through the various provisions of the Rules and Code, which have been cited, or to decide by which this case is covered, because none provides for the bringing of a party before the Court at the begining of proceedings or for his being informed of such beginning otherwise than by a communication, bearing the signature of the Court or its officer and the Court's seal. The notice issued to the fifth respondent did not fulfil these requirements and was therefore useless. It is not material that it was stated to be issued under the orders of a learned judge, when its authority was not vouched in the method, which the law explicitly directs. Nor can it improve the appellants' position that their pleader, as he explained himself issued the notice, because being ignorant of any precedent, he doubted whether the Registrar would sign one; he failed to comply with the law at his risk, and should in case of doubt or the Registrar's refusal have applied to the learned judge for explicit instructions. The notice, given by no competent authority, could impose no obligation on the 5th Respondent and the adjudication made in his absence and when he was under no duty to be present, was in my opinion a nullity as against him.

It is urged that the 5th Respondent has been dilatory in advancing his objections to the learned Judge's order and *Bishendut Tewari* v. *Nandan Pershad Duba*[1], has been cited to show that

1. (1907) 12 C.W.N. 25.

if he was not bound by it originally, his acquiescence in it and failure to take steps to have it set aside have made it binding on him. His pleader has no doubt admitted that the notice above referred to was served and that the proceedings were within his personal knowledge. But there is nothing before us to show that the 5th Respondent knew of their result, until he received notice of the admission of the appeal and date of hearing. The case cited decided, in my opinion, only that, when the delay to be excused was short and due to *bonafide* mistake, the respondents' failure to take action, prolonged for the inordinate period of two years could be taken into account in deciding whether that delay should be excused. So far in the present case the question whether there was sufficient cause for the delay has not been argued on its merits. But it can at once be said that there is no question of a similar delay on the 5th respondent's part in taking action. For the hearing of the appeal, for which he reserved his objections, was likely to take and has taken place within a much shorter time, seven months, of which two were vacation, and it is doubtful whether an application for review of the order admitting the appeal (the expedient apparently indicated in the authority under discussion would have been heard sooner, if one had been made. But whether or not, the scope of that authority must be limited in the manner suggested the proposal to consider the 5th respondent's delay (if any) as barring his present objection, would be unacceptable. An adjudication, originally a nullity against a person only nominally a party to it, cannot be validated against him by his mere inaction, unaccompanied by positive conduct which amounts to an estoppel. *Baswantappa* v. *Ranu*[1]. And no such conduct is in question here. This principle cannot be affected by the special character of the adjudication as one excusing delay in the presentation of the appeal and not confirming or dissenting from any conclusion of the Court of first instance. For its possession of that character cannot affect the necessity (which is in fact conceded) for a valid notice to the 5th Respondent, or the reasons, for which the notice given has been held invalid. If, as I hold the learned Judge's order was void against the 5th Respondent he was under no obligation to displace it and cannot be prejudiced by not having done so.

I request that for these reasons I am constrained to differ from the learned Chief Justice and to hold that the 5th Respondent is entitled to re-open and to contest on the merits the question whether the appeal is in time as against him.

1. (1884) I. L. R. 9 B. 89,

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Chief Justice:—The result is that under article 36 of the Letters Patent the opinion of the Chief Justice prevails.

[Then their Lordships heard the case on the merits and delivered the following judgment].

The Chief Justice:—On behalf of the appellants it has been contended that the burden of proof was on the defendants and that the learned judge was wrong in dismissing the suit without calling upon them.

Two points have been taken on behalf of the Respondents. (1) That the appellants having accepted the issues in the form in which they were framed, which shewed the burden of proof to lie on them were not entitled to set up the case in the Appellate Court that the burden was on the Respondents; and (2) that the burden of proof was on the appellants and they had failed to discharge it.

There seem to be some conflict of authority as to the question on whom does the burden of proof lie when sons impeach an alienation of family property made by their father on the ground that it is not binding on them. The case of *Subramania* v. *Sadasiva*[1] to which Mr. Subramania Aiyar on behalf of the appellants has called our attention no doubt supports the view for which he contended. But this case would seem to have been questioned at least on one occasion (our attention was called to an Allahabad case), and it is not easy to reconcile it with the later decisions. We have also been referred to the Full Bench decision in *Venkatramanayya Pantulu* v. *Venkatramana Das Pantulu*[2]. The only point which was considered by the Court in that case was where a debt is incurred at the time of sale or mortgage is it an antecedent debt within the meaning of the words " antecedent debt" as used in the judgment of the Privy Council in *Suraj Bansi Koer* v. *Sheo Pershad Singh*[3]. No question of onus of proof arose in that case, and no such question was considered.

Then we have the case of *Malayandi Gounder* v. *Subbaraya Vanavaraya Gounder*[4]. It is there observed that the trend of authority in this Presidency was in accordance with the view of the authority of the Full Bench in *Chandra Deo Singh* v. *Mata Prasad*[5]. The view to which apparently we were referring is the view indicated by Mr. Justice *Banerjee* and is to be found in p. 215 of the report. There he says " where a son comes into Court to

1. (1884) I. L. R. 8 M. 75.
2. (1905) I. L. R. 29 M. 200.
3. (1878) I L. R. 5 C. 148.
4. (1911) M. W. N. 50.
5. (1909) I. L. R. 31 A. 176.

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assail a mortgage made by his father or a decree passed against his father upon the mortgage or a sale threatened in execution of such decree, the *onus* is on the son to establish that the debt which he desires to be exempted from paying was of such a character that he would not be under a pious obligation to discharge it." The recent decision of the Privy Council, so far as one can judge from the short report in *Sri Narain* v. *Lala Raghubans Rai*[1] would seem to be in support of the contention which has been put forward by the respondents in this case. There Lord Macnaghten said, "In this case their Lordships entirely agree with the High Court that the Appellants have failed to prove their case. " In that case the appellants were the sons. The case which they set up was that the alienations on which the respondents relied did not bind the family property. If as would seem to be the case, so far as we can judge from the report, the Privy Council there were of opinion that the onus in that case was on the sons who were defendants, it would seem that *a fortiori* the onus would be on them when, as here, they are plaintiffs. I do not want to lay too much stress on this judgment of the Privy Council, which is very short, because we have not had the opportunity of looking into the proceedings in the Courts below, and without doing that, we might possibly be under some misapprehension as to the effect of the judgment.

The proposition put forward on behalf of the appellants was that, where an antecedent debt is established, the onus was on the son who impeaches the alienation to show that the debt was tainted by immorality and that, in all other cases the onus was on the parties who relied on the alienation. I do not think it necessary for us to consider this question further, because I think we ought to dismiss this appeal on the first ground taken by Mr. Parthasarathi Aiyangar. It is perfectly clear from the form of the issues in this case that the plaintiffs accepted the onus. The second issue is "Were the mortgage of items 1 to 10 and the sales of items 2, 3, 7, 8 and 9 not binding on the Plaintiffs"? If there were any doubt about that it would be set at rest by the terms of the second ground of appeal. It is stated thus: "The learned judge ought to have held that the plaintiffs have discharged the onus which lay upon them of proving that the debts in question were contracted by their father for illegal and immoral purposes." I do not desire to say anything which is not necessary for the purposes of this case. In this case it seems to me that the plaintiffs are not entitled having accepted the onus and having a finding against them to turn round

1. (1912) 25 M. L. J. 27.

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in a Court of appeal and, in the teeth of their own grounds of appeal, say that the onus is on the other side and that they have not discharged it. If such latitude is allowed to litigants it seems to me all sorts of inconvenient results might ensure.

With regard to the 6th defendant all I need say is that on the evidence it seems to be reasonably clear that the suggested immorality is not of a nature which would affect the title of the 6th defendant.

One other point was taken. That was that the learned Judge ought to have dismissed the suit as he did, but that he should have insisted upon the defendants going into the box. I cannot possibly accept that contention. If the plaintiff sets up a case and fails to prove his case when he calls his witnesses, it is of course open to the Judge to say, "There is no case for the defendants to answer. I dismiss the plaintiff's suit." I think we ought to dismiss this appeal.

The appellants will pay three sets of costs to the Respondents in proportion to their respective interests.

Oldfield J.—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Mottayappan *alias* Selambia Goundan ... *(Appellants.)** *(Plaintiff.)*

v

Palani Goundan and another ... *Respondents. (Defendants.)*

Evidence Act S. 92—Instrument vesting propecty in presenti—Evidence to show that vesting was intended to be postponed—Admissibility of—English and Indian Law, difference between.

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It is not open to a party to an instrument to show that the instrument was intended to have legal operation not according to its tenor but in a different manner, e. g. that an instrument which according to its tenor vests the property in the grantee at once was in reality intended to vest it only at a future time or after the death of the executant.

The practice of English courts of Equity of allowing evidence to be given that an instrument was intended to operate in a different manner cannot be followed in India as that is opposed to S. 92 of the Evidence Act.

Second appeal from the decree of the District Court of Trichinopoly in A. S. No. 1 of 1911 preferred against the decree of the Court of the District Munsif of Karur in O. S. No. 797 of 1909.

* S. A. No. 731 of 1912. 5th March 1913.

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S. Srinivasa Aiyangar for Appellant.

T. Natesa Aiyar for Respondent.

The court delivered the following

Judgment:—The suit out of which this second appeal arose was instituted by the plaintiff for a declaration that a sale deed (Exhibit 1) executed by him in favour of his deceased daughter, the wife of the 1st defendant was a nominal transaction and inoperative against him and to recover possession of the properties from the two defendants in the suit, the 2nd defendant being the 1st defendant's father. The sale deed was executed on the 21st September 1906. The vendee, the 1st defendant's wife, died on the 6th April 1909. The plaintiff alleged that the 1st defendant obtained possession of the land in question after the death of his wife. The defendant's answer was that the real vendee was the 1st defendant himself, his wife being a benamidar for him, and that the deed evidenced a genuine sale. The District Munsif found that the 1st defendant's deceased wife was not a benamidar, that no consideration passed for the sale, that the consideration recited, viz., Rs. 1,000, was much less than the real value of the lands and that it was executed, not with the intention of vesting title in the vendee immediately but to ensure her succession to the land on his death and to make it impossible for his first wife, who was alive, or for his *dayadis* to claim it in preference to the apparent vendee who was his daughter by his deceased 2nd wife. He held also that Exhibit II, dated the 2nd December 1907, by which the plaintiff consented to the transfer of patta for the land in favour of his daughter, was also intended to be a nominal transaction, the plaintiff executing it owing to improper pressure on the part of the defendants, and on the assurance of his daughter that it should not have any legal operation. He passed a decree in the plaintiff's favour. The District Munsif's finding was in accordance with the allegation in paragraph 4 of the plaint, "As the plaintiff had no male progeny and so that there may be no objections afterwards by the 1st wife and the dayadis, the plaintiff executed this nominal sale deed mentioning a small price and not for anything else." On appeal, the District Judge was of opinion that "the plaintiff intended by the sale deed (Exhibit I) to give his daughter a title to the property conveyed thereunder after his death though not in his lifetime, and both the recitals in and the execution of Exhibit II, registered patta razinamah executed in favour of the plaintiff's daughter by the plaintiff over a year after the execution of Exhibit I show that the latter deed was partially

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acted upon." Apparently, the judge meant by the statement that Exhibit I was partially acted upon, that the intention to give the daughter a title to the property after the plaintiff's death was confirmed by Exhibit II. We do not understand him to mean that, on the date of Exhibit II, the plaintiff intended to vest the land at once in his daughter, although his original object in executing Exhibit I was to enable her to succeed to the land on his death. We shall consider the legal result of these findings presently. The judge held that the plaintiff could not be permitted to aver that an instrument which, according to its tenor, vested the property in the grantee at once was, in reality, intended to vest it only at a future time or after the death of the executant. On this view, he dismissed the suit. The proposition of law enunciated by the Judge is, in our opinion, correct. The rule that the parties to an instrument cannot set up a contemporaneous parol agreement varying or contradicting its terms necessarily involves this. We are unable to accept the argument of Mr. S. Srinivasa Iyengar, the learned vakil for the appellant, that it is open to a party to show that an instrument was intended to have legal operation not according to its tenor (which he interprets to mean, in the manner its terms would operate) but in a different manner. The contention is clearly opposed to the terms of the section. Mr. Srinivasa Iyengar argues that proviso (1) to the section (92 of the Indian Evidence Act) would cover his contention. He says that an agreement that an instrument should operate in a way different from what its terms import is a fact which would entitle the party alleging the agreement to a decree or order relating to the instrument similar to fraud, intimidation etc., which according to the section, may be alleged as ground for invalidating the document or entitling the party to a decree or order relating thereto. The argument is obviously unsound. The facts which may be proved, according to the proviso, must be such as to show either that the legal requisites for a valid agreement did not exist in the case at all, or that one of the parties did not give his free consent to it or that the document does not express what was really intended to be embodied in it. It has no application to a case where the instrument represents what the parties intended to put down in writing, though it may not be in accordance with what they intended to do and with the legal result that they secretly wanted to bring about, but which for some reason they did not wish to put in writing. The very object of the section is to prevent one of the parties from asserting that they intended to do something different from what they conjointly and deliberately stated in the instrument. In this case both the parties stated in the instrument

that the property was to vest in the daughter at once. The contention that it was really to vest not at once but at a future time could not be set up or proved. The English Courts of equity have sometimes allowed evidence to be given in some cases that a document was intended to operate in a manner different from the plain and apparent meaning of its language; such as, that an instrument of sale was intended to have effect only as a mortgage. They allowed proof to be adduced not only of fraud in the bringing about or the engrossment of the instrument but in enforcing it in a manner which would be in accordance with the mode in which both the parties deliberately stated and intended to state that it should operate, but not in accordance with the mode in which they secretly intended that it should operate. The Judicial Committee of the Privy Council has decided that this could not be allowed in India it being prohibited by S. 92 of the Evidence Act. (*See Balkishen Das* v. *N. F. Legge*[1], *Achutharamaraju* v. *Subbaraju*[2], *Dattoo* v. *Ramachandra*[3], *Chellavenkata Reddy* v. *Devabatchan Meruthujayam*[4].) We do not think that *Jibun Nissa* v. *Asgar Ali*[5] or *Chandri Mehdhi Hoosan* v. *Muhammad Hoosan*[6] lays down a different rule. In the former case, it was held by the Calcutta High Court that a patta (lease) and a Kobala (sale) executed by a Muhammadan lady in favor of her nephews were brought about by fraud and without proper consideration. The grantees contended with reference to the pattah that even if it was not intended to give an immediate leasehold interest by the executant, she intended by means of the instrument that her nephews should, by means thereof succeed to her property in preference to her legal heirs. *Wilson* J. observed (p. 941) " now, in order to give effect to this contention, it must be held that, although under the terms of the deeds, Mehdi was to have a vested interest from the dates of their execution in fact he was not to have it till after the death of Delrus. There are several objections to this view, first, it would directly contradict the deeds, secondly, it would conflict with the case put forward by the defendants themselves and etc., in their pleadings and evidence." Their Lordships of the Privy Council agreed with the reasons given by *Wilson* J. for the conclusion arrived at by the High Court that no effect could be given to the deed in favour of the grantor's nephews. The case is a clear authority for the position that a party cannot be permitted to show contrary to the terms of the instrument that the estate given under it immediately to the grantee should vest in him

1. (1898) I L. R. 22 M. 149.
2. (1901) I. L. R. 25 M. 7.
3. (1905) I. L. R. 30 B. 119.
4. (1912) M. W. N. p. 164.
5. (1890) I. L. R. 17 C. 937 (P.C.)
6. (1906) I. L. R. 28 A. 439 (P. C.)

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only at a future time. It, in no way, helps the argument alleged on behalf of the appellant. The Privy Council did not hold that the pattah was in fact intended to have effect after the grantor's death or lay down that, inasmuch as it was not intended to operate till then, the executant could impeach it as void. Their Lordship's judgment proceeded on the ground that the executant proved that the pattah was not intended to have any present operation in that the grantees could not be allowed to prove that it should operate at a future time contrary to its terms. The case in *Chaudri Medhi Hoosain* v. *Muhammad Hoosain*[1] is not really in point at all. The Privy Council merely held that an instrument executed by a Mahomadan which was sought to be set aside could not be given effect to either as a pure gift or as a gift coupled with consideration. The grantee failed to prove, either delivery of possession, which would be necessary in the case of a pure gift, or actual payment of consideration, which was necessary to support it as a gift coupled with consideration. They also held that he failed to prove that the donor intended to divest himself *in presenti*, of his property. No question arose as to the admissibility of evidence to prove that a reversionary interest was intended to be given though their Lordships no doubt observed that "in executing that deed, the plaintiff did not intend to give the property to the defendant except subject to a reservation of the possession and enjoyment to himself and his wife during their lives, to which the defendant pledged himself, and that the deed was not followed by delivery of possession, but was a fictitious and benami deed and was invalid and void." *Ramalinga Mudali* v. *Ayyadorai Nainar*[2] was also referred to on behalf of the appellant. It has no bearing on the case. All that was held there was that it is open to a party to an instrument to prove that it was not intended to have any legal operation at all unless a certain event happened.

The instrument in that case had not been delivered to the grantee. There was, therefore, no completed juristic act. This is in accordance with proviso (3) to S. 92 which allows the existence of any oral agreement constituting a condition precedent to the attaching of any obligation under a contract or grant to be proved. In *Amirthammal* v. *Periasami Pillai*[3], this case was distinguished from the one then before the court. The facts found were that a Hindu widow executed a deed of sale but without receiving any consideration for it in favor of his nephew and got the tenant

1. (1906) I. L. R. 28 A. 439. 2. (1904) I. L. R. 28 M. 124.
3. (1909) I. L. R. 32 M. 325.

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to attorn to the donee. . . . . The plaintiff who was the grantor alleged that the deed was executed only with the objec. that the reversioner should not get the property after her deatht The learned Chief Justice took the plaintiff's case to be that the deed should not operate if the nephew predeceased her (an event which happened and which led to the plaintiff's instituting the suit to have the sale declared invalid) and he held that such an agreement could not be set up. *Miller* J. was of opinion that the plaintiff could show "that it was agreed between her and the transferee that the transfer should be revocable or should be suspended or postponed until the happening of a given event" and that the lower court should be called upon to give a finding on these questions. *Wallis, Munro* and *Sankaran Nair* JJ. on the appeal which was preferred in consequence of the Chief Justice's opinion having prevailed observed that "the question whether there was an oral agreement that the sale deed should not take effect until the plaintiff's death, and the further question whether such an oral agreement could be proved" did not arise as no such agreement was pleaded and they therefore upheld the grant. It is doubtful if there is any conflict between the propositions of law laid down by the learned *Chief Justice* and by *Miller* J. There can be no doubt that a condition that a deed should not continue to operate in case a certain event happens, such as the death of the grantee before the grantor could not be proved where the grant gives an unconditional estate. *Miller* J. apparently regarded an agreement entitling the grantor to revoke the instrument as a collateral one not inconsistent with the grant; and in stating that an agreement could be proved that a grant should be suspended or postponed until the happening of a given event, the learned Judge apparently meant an understanding that the instrument should have no legal operation at all until the happening of an event and not that it should operate at once but that the estate which it purports to vest in the grantee at once should vest only on the happening of the event. An agreement of the latter kind would, in substance, be a variation of the terms of the instrument, but not one of the former kind. The distinction is a real one, though its application may, in practice, be difficult in some cases. We are clearly of opinion that the plaintiff could not be allowed to set aside the document by proving that, though, according to the terms of Exh I, the land in question was to pass to the plaintiff's daughter immediately, it was really intended to pass to her only on his death any more than the defendant could be permitted to claim under the instrument a right different from that which it purports to convey. The difficulty

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still remains, what is the real substance of the finding of the District Judge. Does it amount to this, that the plaintiff intended that by virtue of the instrument in question, the property should vest in the grantee on the plaintiff's death? If so, he could not be allowed to set it up or prove it. Nor could he prove an agreement that the grant should operate only if his daughter survived him, or that it should cease to operate if she predeceased him. The Judge, apparently, accepts the plaintiff's contention that the object of Ex. I was only to prevent his senior wife and his dayadis from succeeding to the property and that it was to have no other effect. The plaintiff was to retain the right to dispose of the property, if he chose, during his life time. The grantee could not claim that a vested reversion was given to her so as to prevent the plaintiff from doing so. At the same time the plaintiff's object was not that his daughter should be able to claim the property after his death (that is, not as a legatee) but as a vendee who acquired her title on the date of the sale deed. In substance, the deed was intended to furnish false evidence against the plaintiff's wife and *dayadis*, of the land having vested in the daughter on the date of the sale deed. The plaintiff did not intend that she should take it as a bequest. There was nothing to prevent him from making a will in her favor if that was his intention. An agreement that a gift should operate only as a will could not be proved. But the agreement in this case was really not that the land should vest in the daughter from a future date, that is, on the death of the grantor but that she should hold it in order to prove that she obtained a title operating from the date of its execution. In other words it was not to operate as a present conveyance, but as false evidence to be used in future, of a conveyance operating from the date borne by it. But as the result of such false evidence, the daughter was to derive a benefit as she was to use it for getting hold of the property on the plaintiff's death. The result may be shortly put thus: The document was not to be a mere sham, the plaintiff's daughter was to take a benefit under it, she was to take the property eventually as vesting in her on the date of the sale, but subject to the plaintiff having the entire right to enjoy it during his life time and subject also to her right being defeated at the plaintiff's option. It was therefore intended to create some rights in favor of the vendee but different from what it purported to create. This does not come within the rule that an instrument may be shewn not to have been intended to create any rights at all but was brought about entirely with the indirect object of creating false evidence against third parties

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or within the rule that a party may set up and prove a parol agreement constituting a condition precedent to the attaching of any obligation under it. The case set up by the plaintiff and found by the lower appellate court is, therefore, contrary to the terms of S. 92 of the Evidence Act. The result is that the document must be allowed to have operation according to its terms. We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present;—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

The Chairman, Municipal Council Srirangam. } *Appellant** (*Defendant.*)

v.

Subba Pandithar .... *Respondent* (*Plaintiff.*)

Municipality—Street—Adverse possession—Loss of title, effect of—Limitation Amendment Act, 1900—District Municipalities Act S. 168—Right to demolish structures erected,

Chairman, Municipal Council Srirangam. v. Subba Pandithar

Power to remove encroachments conferred by S. 168 of the District Municipalities act is confined tc streets vested in the Municipality.

Where a portion of the street vested in a Municipality becomes lost to it by adverse possession, it ceases to be a portion of the street and the Municipality can no longer direct the removal of any structure upon it; *Basaveswara Swami v. Bellary Municipal Council*[1] distinguished.

Twelve years adversse possession before the Limitation Amendment Act, 1900 is sufficient to confer a title against the Municipality.

Second appeal from the decree of the District Court of Trichinopoly in A. S. No. 344 of 1910, preferred against the decree of the Court of the District Munsif of Srirangam in O. S. No. 286 of 09.

N. Rajagopalachari for Appellant.

V. Visvanatha Sastri for Respondent.

The court delivered the following

Judgment :—*Sadasiva Aiyar* J.—The Lower Courts in considering the question of possession have proceeded on the footing that the plaintiff should have had adverse possession for 30 years before suit before he could acquire title to the street space encroached upon against the Municipality of Srirangam. It is clear that if he had had possession for 19 years before the Limitation Amendment Act of 1900 came into force, that possession was sufficient to have given him a clear title as against the Municipality.

* S. A. No. 577 of 1912. 30th July 1913.

1. (1912) 23 M. L. J. 479.

Chairman, Municipal Council Srirangam. v. Subba Pandithar

Sadasiva Aiyar J.

On the question whether under S. 168 of the District Municipalities Act the Municipal Council was entitled to remove the projections and encroachments, even though the plaintiff had acquired full title to them and to the site on which the encroachment show, I have had serious doubts. In the case of *Basawaswara Swami* v. *Bellary Municipal Council*[1]. the Government was a party to the suit and their title was not lost. Further, the adverse title established there did not relate to the whole cubic space of the street belonging to the Municipality but only to the upper space portion situated over a drain space which still continued vested in the Municipality. An erection which has become lawful by adverse possession might still be an obstruction or encroachment so far as the drain space beneath it (such drain space coming under the definition of ".street") is concerned. But where the whole entire space forming a portion of the street vested in the Municipality has been effectively occupied and acquired by adverse possession against the Municipality, the whole of such space ceases to be a street, and the original encroachment or obstruction can no longer, it seems to me, be called an encroachment or obstruction in the street, because the street space encroached upon has wholly ceased to be a street.

I would distinguish the present case from *Basweswara Swami* v. *Bellary Municipal Council*[1] on this ground, though I must admit that the observations in the judgments delivered in that case (especially that of my learned brother *Sundara Aiyar* J.) are put on the broad ground that the acquisition of title by adverse possession and the loss of title in the Municipality has nothing to do with the Municipality's power under S. 168 to remove encroachments because clause (3) of S. 168 provides for compensation for the removal of lawful encroachments by the Municipality. I might, however, be permitted to remark that clause (3) relates only to encroachments lawfully made (evidently licence) under S. 67 and not to encroachments which were unlawful when made but the title to the space covered by which encroachments have become indefeasible by adverse possession.

In the result though not without hesitation, I concur in the dismissal of this appeal with costs.

Tyabji J :—The plaintiff sued for an injunction against the Municipal Council of Srirangam restraining it from entering the land referred to in the plaint. The District Judge agreeing with the District Munsif has found that the plaintiff has been in possession of the land and of the erections over it for over the statutory

1. (1912) 23 M. L. J. 479.

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Tyabji J.

period and has acquired a title to the land by prescription. This in our opinion is a question of fact and we cannot interfere with the finding in Second appeal. It seems to me to be clear that if the land belongs to the plaintiff his structure over his own land cannot be demolished by the Municipality.

It is argued before us however, that the decision in *Basweswara Swami* v. *Bellary Municipal Council*[1] entitles the Municipality under S. 168 of the District Municipalities Act to demolish the erections on the land in question. I cannot agree that the effect of the decision referred is that any erection can be considered to be an encroachment or obstruction under S. 168 of the District Municipalities Act after the land over which the erection is made has passed into the ownership of the person who has made it, and for the purposes of the question before us I see no distinction between the transfer of the ownership of the land by adverse possession and transfer in any other manner. In the case cited above the obstruction consisted of a pial (or verandah) erected over drains belonging to the Municipality and thus there was either no passing out of the ownership of the land over which the pial was erected from the Municipality to the person who had erected it, or the pial was an obstruction to the drain belonging to the Municipality in either of which cases the facts would be materially distinguishable from those with which we have to deal.

I therefore think that this appeal should be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, Chief Justice and Mr. Justice Oldfield.

W. A. Srinivasa Aiyangar. ... ... *Appellant.**

v.

The Official Assignee of Madras and another. *Respondents.*

Srinivasa Aiyangar v. The Official Assignee of Madras

Presidency Towns Insolvency Act S. 90—C. P. C. (Act V of 1908) S. 24—Insolvency petition—Transfer from the High Court to District Court—Incompetent—District Court not "competent to try"—Inconvenience—Matter for legislature.

An insolvency petition presented under the Presidency Towns Insolvency Act and pending before the High Court cannot validly be transferred to a District Court to be disposed of by it, the District Court not being a court "competent to try" such application within the meaning of S. 24 C. P. C

* O. S. A. A. No. 105 of 1912. 8th August 1913.

1. (1912) 23 M. L. J. 479.

Srinivasa Aiyangar v. The Official Assignee of Madras

That sometimes "collusive" arrests are made within the High Court's jurisdiction to bring a case within the Presidency Insolvency act where it would have been more convenient to have the estate administered in the place where it is situate is a matter for the legislature to deal with and cannot justify a transfer of the insolvency application when made.

On appeal from the order of the Hon'ble Mr. Justice Bakewell in the Insolvency Jurisdiction of this court in Insolvency Petition No. 291 of 1912.

D. Chamier instructed by *Messrs. Grant* and *Greatorex* for the Insolvent.

The Official Assignee of Madras and *Ramasami Aiyar* for Respondent.

The Court delivered the following

Judgment:—*The Chief Justice*:—This is an appeal from an order made by Mr. Justice *Bakewell* transferring an insolvency petition pending before him to the District Court of Tanjore. The learned Judge, as appears from the terms of the order purported to make it under the powers conferred by S. 90 of the Presidency Towns Insolvency Act and S. 24 of the Civil Procedure Code.

The question as to whether the learned judge had jurisdiction to make the order does not appear to have been raised before him. But Mr. Chamier who appears for the appellant (the insolvent), has taken the point here that (the judge) had no jurisdiction to make the order.

S. 90 of the Presideney Towns Insolvency Act states "In proceedings under this Act the court shall have the like powers and follow the like procedure as it has and follows in the exercise of its ordinary original Civil Jurisdiction". In S. 2 of the Act "the court" is defined as meaning "the court exercising jurisdiction under this Act," and by S. 3, the court having jurisdiction under the Act for the purpose of this case is the "High Court of judicature at Madras." This order was therefore made by the High Court of Judicature at Madras exercising jurisdiction in Insolvency. Under the Provincial Insolvency Act, 1907, "the court" is defined as meaning "the court exercising jurisdiction under this Act." The jurisdiction conferred by the two Acts are distinct, and the provisions of the two Acts differ in several important respects.

S. 24 of the Civil Procedure Code states, "On the application of any of the parties......the High Court......may at any stage transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try

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or dispose of the same." It is not necessary for me to express any opinion as to whether this court in the exercise of its ordinary original Civil Jurisdiction can make an order under S. 24 of the Civil Procedure Code. For the purpose of this appeal we assume that it can. The question then remains, Is the Court to which this petition has been transferred competent to try or dispose of the same. It seems to me to be clear that it is not, for the reason which has already been stated viz., that the two jurisdictions are distinct.

It has been suggested that there are sometimes "collusive" arrests within the jurisdiction of the High Court exercising jurisdiction in insolvency under the Presidency Towns Insolvency Act in cases where it would be convenient for the estate to be administered when the estate is situate under the Provincial Act. That may be so. If it is, it is a matter for the legislature to deal with.

I may add that this point came before Mr. Justice Wallis and in dealing with it he said that he was not prepared to make an order of the kind asked for.

We must therefore set aside the order and allow the appeal.

Oldfield J.:—I agree.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[Appeal from the Judicial Commissioner's Court of Oudh, Lucknow.]

Present:—Lord Atkinson, Lord Moulton, Sir John Edge, and Mr. Ameer Ali.

Thakur Basant Singh ... ... *Appellant.**

v.

Mahabir Pershad ... ... *Respondent.*

Basant Singh v. Mahabir Pershad

Agreement—Construction—"Share in the event of success of litigation"—Effect of—No present right to possession—A suit in ejectment not maintainable—Point arising on the documents on which plaintiff's title is founded—Not discussed in the Courts below—To be considered nevertheless.

A certain estate in the Partabghar district was owned by two joint families, the respective heads of which were Bindu Sewak and Rama Pershad.

They had made certain alienations which their descendants wanted to set aside.

Not having founds to carry on litigation, these entered into agreements with one Mahabir Prasad which were to the effect *viz.*, that in the share of each of

*A. Nos. 68, 69 and 70 of 1912. 14th March 1913.

Basant Singh v. Mahabir Pershad

them, Mahabir Prasad will be a co-sharer of one half share....he will bear the entire expenses in connection with the suit In case of success he will be entitled to proprietary possession of the share which may be decreed and thereafter, he might at his pleasure keep his share joint or have it partitioned."

Suits were accordingly instituted, with Mahabir Prasad as co-plaintiff. But soon after, the principal plaintiffs in each suit compromised the claim and allowed the suits to be dismissed against them. The question was whether under those circumstances Mahabir Prasad could continue the suits in respect of the share conferred on him by the agreement.

Held (reversing the judgment of the court below) he could not.

The agreement did not confer on him a then present right to the possession of any share in the property, the subjeet matter of the suit. That right would arise, if at all, only when success in the litigation had been achieved. Till then Mahabir Prasad was merely a partner or co-owner with his co-plaintiffs in a certain undivided share of the property. There was no present grant or assignment to him of any separate share fraction of the property by virtue proof which he could maintain a suit in ejectment.

This question though raised in the pleadings was not discussed in the Appellate Court in India but as the point arose on the very face of the documents on which the plaintiff's case was founded their Lordships felt bound to decide it.

Their Lordships could not grant relief to a litigant which they were of opinion he was not entitled to simply because those concerned for the parties in the cause, abstained from discussing in the Court from which the appeal to his Majesty is taken a vital point plainly appearing on the face of the written proof and plainly raised in the case.

Consolidated appeals from the judgment and decrees of the Court of Judicial Commissioner of Oudh, dated the 19th March 1909 and the 29th of March 1911, partly affirming and partly reversing the judgments and decrees of the Court of the Subordinate Judge of Partabgarh, dated the 22nd of July 1908, and a judgment and decree of the District Judge of Rai Berli who had partly affirmed and partly reversed a judgment and a decree of the Subordinate Judge of Partabgarh, dated the 22nd of July 1908.

Mr. De Gruyther, K. C. (with him *Mr. Dube*), on behalf of the Appellant.

Mr. Lowndes, for Respondent.

Their Lordships' judgment was delivered by

Lord Atkinson.—These are three consolidated appeals from three decrees of the Court of the Judicial Commissioner of Oudh, the first dated the 19th March 1909 and the other two the 29th of March 1911.

By the first of these, certain decrees of the Subordinate Judge of Partabgarh dated the 22nd of July 1908, were in part affirmed

and in part reversed, and by the two latter a judgment and decree of the District Judge of Rai Bareli, dated the 5th of February 1910, was also in part affirmed and in part reversed.

By this decree of the 5th February 1910 a previous decree of the same Subordinate judge, dated the 3rd of August 1909, was in part affirmed and in part reversed.

The facts out of which all this litigation has arisen are shortly as follows :—

A certain estate in five villages in the Partabgarh District was owned by two joint Hindu families, the respective heads of which were two brothers Binda Sewak and Ram Pershad, the share of the said Binda Sewak's branch being 7 annas 2 pies and that of Ram Pershad's branch 8 annas 10 pies.

A genealogical table set out in the respondent's case, the accuracy of which is not disputed, shows of what members these two families were composed :—

MADHO.

- Binda Sewak
  - *Sheopal*
  - *Chandra Bhukan*
- Ram Pershad
  - Bajrang Singh
    - Bijai Bahadur.
    - *Bhopal.*
    - Raghubar.

The persons whose names are printed in italics are plaintiffs in the two suits, numbered 548 and 549 of 1907, in which the decrees appealed from were respectively made, namely, Sheopal Singh and Chandra Bhukan Singh in the first, and Bhopal Singh in the second. In each of these suits one Mahabir Pershad, not a member of either family, but claiming an interest in portions of the joint family property under certain agreements was joined as a plaintiff.

By two deeds, dated respectively the 2nd January 1900 and 3rd October 1901, Binda Sewak purported to sell to Basant Singh (the appellant) his share of the joint family property.

Thereupon Ram Pershad, as co-sharer in the family estate, instituted two pre-emption suits in respect of these two sales, and obtained decrees therein. He subsequently, by deeds dated the 4th of June 1903 and 3rd of August 1903 respectively, purported to sell and convey to the same Basant Singh (the appellant) the share

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of the property the right to which he had thus acquired by premption, together with all but a 6 annas share of his own share of the family property. In addition he, by deed dated the 4th February 1907, mortgaged this latter 6 annas share to the same Basant Singh to secure a sum of Rs. 12,000. The mortgage was a posseissory one for a period of 25 years. Sheopal Singh Chandra Bhukhun Singh and Bhopal Singh determined to impeach all these dealings with the joint family properties as being, on several grounds, void according to Hindu Law, but they had no money to meet the cost of litigation.

Two agreements, both dated the 25th of April 1907, were accordingly entered into between them and Mahabir Pershad, the one by Sheopal Singh and Chandra Bhukhan Singh jointly and the other by Bhopal Singh. They are practically identical in terms. They provided that Mahabir Pershad should in each case finance the contemplated litigation on certain terms to be presently considered in detail.

Two actions were accordingly instituted in the Court of the Subordinate Judge of Partabgarh, the first on the 10th of August 1907, in which Sheopal Singh, Bhukhan Singh, and Mahabir Pershad were plaintiffs, and Basant Singh, Binda Sewak Singh, and Ram Pershad defendants praying for " a decree for proprietary and actual possession of 4 annas 9 pies 6. $\frac{2}{3}$ *karants* under proprietary share" in five villages therein named and for Rs. 1,704–14–9–33,36 mesne profits. In other words, it was an action of ejectment and for recovery of mesne rates.

In the second suit Bhopal Singh and Mahabir Pershad were plaintiffs, and Ram Pershad and his grandsons Bijai Bahadur Singh and Raghubar Singh defendants. The relief claimed was similar, namely to recover possession of one-sixth of the property conveyed away by Ram Pershad by the three deeds already mentioned.

In both suits a plea was filed to the effect that Mahabir Pershad was not entitled to recover possession. That point was thus distinctly raised. Both suits were contested, and both heard together.

The principal defendant in the first suit, by deed dated the 22nd of April 1908, compromised with the two principal plaintiffs in that suit namely, Sheopal Singh and Chandra Bhukhan. The deed provided, amongst other things, that the claim of these plaintiffs to recover the possession of the lands mentioned should be dismissed, and their claim for mesne profits rejected. This deed

was filed in court, and on an application made under section 375 of the Code of Civil Procedure, the suit was dismissed as against these plaintiffs. A similar compromise was entered into in the second suit with Bhopal Singh, and that suit was similarly dismissed as against him. Mahabir Pershad thus became the sole plaintiff in both suits. His claim to recover the possession of the shares of the property mentioned in them respectively thus rests entirely upon the agreements he so entered into with these plaintiffs. Even if all the impeached deeds were absolutely valid he would not be entitled to the relief he claims unless these agreements conferred upon him a right to recover possession of the undivided shares of these villages of which he seeks to recover the possession. The agreements thus became the foundation of his title. Until their true construction and the nature of the rights they confer have been determined, it is irrelevant to consider the question of the validity or invalidity of the deeds. The other is the preliminary question, and it has not only been raised, but actually ruled upon by the Subordinate Judge in his judgment delivered upon the 22nd of July 1908. In the last paragraph but one of this he, when dealing with the seventh issue, said: "The suit, however, cannot fail altogether, as was contended by defendant No. 1. Plaintiff No. 3 has acquired an interest as to half the property." The seventh issue ran thus: "To what relief, if any, are the plaintiffs entitled?" Owing to the compromise that issue came to mean to what relief is the third plaintiff, Mahabir Pershad, entitled? And the last of the reasons stated in the appellant's case lodged in these appeals is that the respondent Mahabir Pershad, is "not entitled to possession of the property in suit or to any other relief." It may well be that this question, though raised, was not much discussed on the hearing of the appeals before the Court of the Judicial Commissioner, but since the point arises on the very face of the documents on which the plaintiff's case is founded, their Lordships think they are bound to decide it. It would be quite impossible for them to advise His Majesty to grant to a litigant relief to which they were of opinion he was not entitled simply because those concerned for the parties in the cause abstained from discussing in the court from which the appeal to His Majesty had been taken a vital point plainly appearing on the very face of his written proofs, and plainly raised as this point has been in this case.

As the two agreements are practically identical in terms, it will be sufficient to consider one of them. It is elementary law that a plaintiff in an action of ejectment must recover by the strength of

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his own title, not by the weakness of his adversary's. What may be the rights or interests, if any, which the plaintiff may have under these agreements in the subject-matter of the suit are irrelevant considerations if he has not a right to the possession he seeks to recover.

The primary question for decision, therefore, is, did the agreement in the first action confer upon Mahabir Pershad at the time that action was instituted a then present right to that posssession? There is no suggestion that if he had not the right then he has since acquired it.

The provisions of the agreement setting forth the conditions upon which it was entered into, relevant on this point, run as follows:—

1. "That in the share of each declarant amounting to 2 annas 4 pies and 13¼ *Karant* Mahabir Pershad *will be a co-sharer of one-half share*, and the remaining one-half share will belong to us, the declarants, as follows:—

Sheopal Singh 2 annas 4 pies 13¼ *Karant* share.

Chandra Bhukhae Singh 2 annas 4 pies 13¼ *Karant.*"

"2. We the declarants, and Mahabir Pershad will be bound by the following conditions:—

"(a) That Mahabir Pershad will bear the entire expenses in connection with the suit from the original Court to the Court of appeal from his own pocket in the way he pleases, and if the opposite party prefer any appeal then Mahabir Pershad will have to defend the appeal also with his own costs.

"(b) That in case of *success Mahabir Pershad will be entitled to proprietary possession of the share entered in* paragraph 1 of this document or one-half of the share which may be decreed, and it will be at the pleasure of Mahabir Pershad either to keep his share joint or to have it partitioned. But during the period of jointness he will have all rights of making collections and management of the *Zemindari* share decreed.

"(c) That Mahabir Pershad will remain a *co-sharer* and proprietor like ourselves in all the *Sir* and *Khudkasht* lands and all *Zemindari* rights relating to the *Zemindari* share like ourselves, and we will have no right to keep separate possession over any *Sir* and *Khudkasht* land, nor will we raise any plea as to ex-proprietary right."

In the view of their Lordships these provisions did not confer upon Mahabir Pershad a then present right to the possession ot any share in the property the subject-matter of the suit. That right would arise, if at all, only when success in the contemplated litigation had been achieved. By the agreement it was contracted that up to that time, at all events, he, Mahabir Pershad should merely be a partner, or co-owner with his co-plaintiffs in a certain undivided fraction of the property mentioned in the first of its paragraphs. There was no present grant or assignment to him of any

separate share or fraction of the property divided or undivided. At best the contract only amounted to this, that in a certain future event he should become entitled to the proprietary possession of a certain undivided fraction of it, and then have the right to have that fraction partitioned.

The case of *Lala Achal Ram* v. *Raja Kazim Hussain Khan*[1] is wholly different from the present. There the sole owner of certain lands,who had already sold one-half of them executed a deed of sale in which it was set forth that "he has sold half the estate to the Raja for a lakh and a half rupees." He acknowledged the receipt of one lakh, the balance had to be paid on the termination of certain litigation, which the Raja was to conduct at his own expense. The statement of the amount of the consideration was, no doubt, exaggerated. But the vendor, never impeached his deed as not being a valid transfer of the property. On the contrary, he had more than once affirmed it, urged the Raja to take proceedings founded upon it, and continued to receive payments due to himself under it. The terms of the instrument are not set out at length in the report of the case, but Lord Macnaghten in delivering the judgment of the Board, after dealing with all the facts and quoting from the deed the passage already mentioned says at page 121 of the report: "Their Lordships agree with the judgment of the Judicial Commissioner that the transaction was a present transfer by Ardwan (the sole owner) of one moiety of his interest in the estate, giving a good title to the Raja on which it was competent for him to sue." The case cannot be relied upon as a guide to the true construction of the agreements in the present case.

On that construction their Lordships are clearly of opinion that neither agreement by its terms confers upon the respondent Mahabir Pershad any present right to recover the possession of the share of the property mentioned in it which he claims to recover. They accordingly think that these appeals should be allowed, that the three judgments and decrees of the court of the Judicial Commissioner, dated the 19th of March 1902 and the 28th of March 1911 respectively should be set aside, that the two judgments and decrees of the lower court, namely, that dated the 3rd of August 1909 of the Subordinate Judge and that of the District Judge of Rae Bareli dated the 5th February 1910, should be set aside, and that both the suits should be dismissed with costs, and they will

1. (1905) L. R. 32 I. A. 113; 15 M. L. J. 197; 27 A. 271.

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humbly advise His Majesty accordingly. The respondent must pay the costs of these consolidated appeals.

Solicitors for Appellant:—*Messrs. Barrow Rogers* and *Nevill.*

Solicitors for Respondent:—*Messrs. Watkins* and *Hunter.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present;—Sir Arnold White, Chief Justice and Mr. Justice Oldfield.

Khan Sahib Bangi Abdul Khadar Sahib and others ... ... } *Appellants.**

v.

The Official Assignee of Madras *Respondent.*

Presidency Insolvency Act S. 36—Object of—Cannot declare alienations voidable—S. 55 —Title voidable from accrual of trustee's title—Proceedings under S. 55—To be determined in the ordinary way.

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Property transferred by the insolvent 4 months before the order of adjudication (though under circumstances which might render the transfer voidable under S. 55 of the Presidency Insolvency Act) is not " property belonging to the debtor " within the meaning of S. 36 cl. (5). It is therefore not open to the court under that section on the examination of the transferee to declare the transaction bad under S. 55 and direct the delivery of the property to the Official Assignee.

The object of S. 36 is to enable the Official Assignee or any creditor who has proved his debt to obtain information with reference to the property belonging to the insolvent, on which proceedings might be taken for the purpose of impeaching transactions which are voidable under the sections of the Act relating to voluntary transfers fraudulent preferences, and cognate matters.

In S. 55 of the Act, "void" means only voidable and the transaction is avoided not from its date but only from the accrual of the trustee's title.

In the case of *Re Brall: Exparte P. Norton*[1] referred to.

Proceedings under S. 55 must be determined in the ordinary way i.e. by notice of motion supported by evidence which the other side has an opportunity of answering.

Appeal from the order and judgment of the Hon'ble Mr. Justice Sankaran Nair, dated 29th August 1911, in Insolvency Jurisdiction of the High Court made in Insolvency Petition No. 110 of 1910.

In the matter of A.S. Mahomed Oosman Saheb & Co. Insolvents.

D. Chamier and *M. A, Thirunarayana Chari* instructed by Messrs. Short and Bewes for Appellants.

M. D. Devadoss instructed by *M. K. Ramaswamy Iyer* for Respondents.

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*O. S. A. No. 34 of 1911. 24th March 1913.

1. (1893) 2 Q. B. 381 s. c. 10 Mor. 166.

Abdul Khadar Sahib v. The Official Assignee of Madras

White C. J.

The Court delivered the following

Judgments :—*The Chief Justice.*—This is an appeal against an order made in the insolvency of a man who carried on business in the name of Mahomed Oosman Sahib & Co. He was adjudicated an insolvent on a creditor's petition on the 18th May 1910. The order which is appealed against is an order dated the 29th August 1911. By that order the court declared the sale by the insolvent to one Abdul Kadhir Sahib who is the appellant before us, of certain houses and lands at Ambur belonging to the insolvent on the 5th January 1910, for the sum of Rs. 7,000, was void as against the Official Assignee and ordered that the said Abdul Sahib should deliver to the Official Assignee, possession of the property in question. The circumstances in which this order came to be made, so far as I can gather, appear to be these. On the 29th March 1911, a report was made by the Official Assignee in this insolvency. The only observation with reference to the report which I think it is necessary to make for the purposes of the question we have before us, is that the report contains no reference to the transaction of the 5th January 1910 which has been set aside by the order now under appeal. On that report the learned judge on the 24th April 1911 in an order which recites a motion of the Official Assignee, the reading of this report and of a report by a third party and a further report by the Official Assignee filed on the 21st April 1912 (which is not before us) ordered a commission to issue directing a certain gentleman to take down the evidence of the appellant. That order was made under the powers conferred by S. 36 of the Indian Insolvency Act which corresponds to S. 27 of the English Bankruptcy Act, 1883. There was a further order with reference to the appointment of the Commissioner, but I need not refer to that because evidence on commission was never taken, and the evidence which was directed by the learned judge to be taken under S. 36 of the Act was taken by the learned judge himself. After the evidence was taken, the learned judge made an order under S. 36 (5) of the Act. He declined to take further evidence. The original order only directed the examination of the appellant; and on an application by the Official Assignee that the other witnesses should be examined, the learned judge quite rightly—as it seems to me—upheld the objection that other witnesses could not be examined. The appellant was cross-examined at the first instance on behalf of the Official Assignee and was, then re-examined by Mr. Grant who appeared for the witnesses. The order states that the Official Assignee had sought to prove that the appellant was in possession of certain properties under an aliena-

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White C. J.

tion made on the 5th of January 1910, and that alienation having been made two years prior to the adjudication, was void as against the Official Assignee, unless it was made for consideration and in good faith. The appellant had been examined. After discussing the appellant's evidence the learned judge observes " I am satisfied that the transaction was not made in good faith or for valuable consideration. The transfer of property is void against the Official Assignee under S. 55 of the Insolvency Act and under S. 36 (5). I accordingly order Abdul Khader (the appellant) to deliver possession of the subject matter of the sale of the 5th January 1910 to the Official Assignee."

I express no opinion as to whether the transaction of the 5th January 1910 is a transaction which can be set aside under S. 55 of the Insolvency Act, if an application for that purpose is made in due course by the Official Assignee. All I say is—and I say it with the greatest respect to the learned judge—that it seems to me it was not open to him in the proceedings which were then before him, to make an order declaring the transaction void under S. 55. The materials on which the order was made was recited in the formal order dated the 29th August 1911 to which I have already referred.

Now the object, as I understand, of S. 36 is to enable the Official Assignee or any creditor who has proved his debt to obtain information with reference to the property belonging to the insolvent. On that information proceedings may be taken for the purpose of impeaching transactions which are voidable under the sections of the Act relating to voluntary transfers, fraudulent preferences, and cognate matters. The main object of S. 36 is discovery. I speak with some confidence when I say that under English practice this is so. The English practice laid down in S. 27 of the English Bankruptcy Act to which S. 36 of the Indian Act closely corresponds except that under the English Act, the application for summoning of a witness can only be made by the Official Assignee or by any creditor who has proved. No doubt under S. 36 (Sub-section. 5) there is power in the Court on the application of the Official Assignee but not of a creditor if on the examination of the witness the Court is satisfied that he has in his possession property belonging to the insolvent to order him to deliver to the Official Assignee the property which belongs to the insolvent. Now, I do not think, it can be held, that the property in question in this case at the time that this examination was held

can be said to be property belonging to the insolvent within the meaning of the sub-section. *Prima facie* it belonged to the man in whose name the title deeds stood, and who had taken a transfer of property in January 1912, *i. e.*, about 4 months before the date of adjudication. It may be that the transaction comes within the purview of one of the sections of the Insolvency Act—it may be that it comes within the purview of S. 55 which enables the court to avoid a voluntary transfer. It has been held that, under S. 47 of the English Act which is almost the same as S. 55 of the Indian Act, 'void' means 'voidable' the settlement whatever the transaction may be, being avoided not from its date, but only from the accrual of the trustee's title. See the case of Re-*Brall Exparte Norton*[1], and other authorities cited by Lord Justice Vaughan Williams in his book on Bankruptcy, 9th Edition. page 266. The transaction which the Official Assignee sought to impeach in these proceedings is the transaction which may or may not be voidable. The property which is the subject matter of the transaction cannot be treated as property belonging to the insolvent within the meaning of S. 36 (5) of the Indian Insolvency Act. The question whether a transaction amounted to a voluntary transfer within the meaning of S. 55 has been decided only on the evidence of the one witnesses who was examined under the order made under S. 36 and without any substantive application to the court for an order that the transaction was a voluntary transfer. It is true that in this case the witness who was examined was the party in whose favour the sale-deed was made; but it does not seem to me that this makes any difference on principle. It seems to me that a question of this sort must be determined in the ordinary way contemplated by the Act and the rules *i. e.*, by notice of motion supported by evidence which the other side has an opportunity of answering it. Here all that happened, was that the man in whose name the sale-deed was effected was cross-examined by the Official Assignee in proceedings under an order made under S. 36. This was the only evidence: the report of the 29th March 1911, assuming it to be evidence, does not refer to this transaction and from the very nature of the proceedings, there could be no other evidence. It may be that the witness was not in a position to put in evidence and it may be that no objection was taken at the time to the making of the order. But it seems to me, for the purposes of the question whether the learned judge had power in the circumstances in which the order declaring the transfer void, was made these considerations really have very little bearing

1. (1893) 2 Q. B. 381 s. c. 10 Mor. 166.

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on the question. I have given this case very careful consideration. I can come to no other conclusion but that the learned judge had no power to make the order in the circumstances in which it was made. I think that the order must be set aside with costs of the appeal. There will be no order as to costs in the court below. I certify for two Counsel.

Oldfield J. I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Abdur Rahim.

Veeraraghava Iyer and others ... (*defts.*) *Appellants**

v.

K. Lakshmana Iyer and others ... *Respondents*

Contract Act (Act IX of 1872) S, 69, 70—"Interest," meaning of—Existing interest—Payment not for another—Salvage—Implies pre-existing interest to save—T. P. A. S. 101—Retention of security and not creation, by.

Veeraraghava Iyer v. Lakshmana Iyer

Plaintiff obtained a mortgage of property under attachment and undertook as a part of the consideration, to pay the amount of the decree. But he failed to do so and the property was sold. The mortgagor then resorted to the defendant and giving him a mortgage, obtained money to make payment under S. 310-A with that money, he got the sale set aside. In a suit by the plaintiff upon his mortgage, defendant contended that he was entitled to priority relying upon Ss. 69, 70 of the Contract Act, S. 101 of the Transfer of Property Act and the principle of salvage lien.

Held: that the defendant was not entitled to priority.

The interest contemplated by S. 69 I. C. A. is an existing interest which the payment is intended to protect and not an interest which is created by the payment itself.

S. 70 I. C. A. has no application where the person making a payment, makes it for himself and not for the person against whom the claim for re-imbursement is made.

A claim on the ground of salvage necessarily implies an antecedent interest to protect or preserve.

S. 101 T. P. A. enables a person to retain a security and does not create a security where none was before.

Appeal from the decree of the Court of the Subordinate Judge of Tinnevelly in Original Suit No. 24 of 1906.

T. R. Ramachandra Aiyar for Appellants.

M. D. Devadoss, K. Srinivasa Iyengar, S. Srinivasa Aiyar T. R. Venkatarama Sastri, and *V. N. Kuppu Row* for Respondents.

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*A. S. No. 32 of 1909. 24th November 1912.

Veera-raghava Iyer v. Lakshmana Iyer

T. R. Ramachandra Aiyar submitted that his client was entitled to priority as his money went to save the property for the prior mortgagee. He relied upon the analogy furnished by S. 69 I. C. A. The interest that section contemplates is not necessarily antecedent interest. See *Vanimkalinga Mudali* v. *Chidambara Chetty*[1], *Denabandhu Shaw Chowdhry* v. *Jogmayi Dasi*[2]. The principle of this section and S. 70 and the doctrine of subrogation and the doctrine of salvage on which he has to place reliance in this case are all allied. See *Kutti Goundan* v. *Mahali Ammal*[3]. He relied upon the principle of *Raja of Vizianagaram* v. *Raja Setrucherla Somasekhararaz*[4] and the judgments of *Mitter* J. in *Kenu Ramdas* v. *Mozaffer Hosain Shaha*[5] and of *Mahmood* J. in *Seth Chithor Mal* v. *Shib Lal*[6]. The interest S. 69 contemplates is not even pecuniary interest. Mere attachment by another though having no valid claim against himself will do under the Section to support a claim for payment. On principles of equity, his client was entitled to be repaid before the 1st mortgagee could claim to be paid. *Chandrasakharkar* v. *Nagian Chandra*[7].

S. Srinivasa Aiyar cited *Ammani Ammal* v. *Naina Pillai Marakayar*[8] and *Raghavan* v. *Alamelu Ammal*[9].

The Court delivered the following

Judgment :—*Miller J.*—While certain immoveable property was under attachment, after a money decree and before it was sold by the Court the plaintiff obtained a mortgage of the property and undertook, as a part of the consideration thereof, to discharge the amount of the decree. He failed to do so and the property was sold. The judgment-debtor then had recourse to the appellant and giving him a mortgage on the same property, obtained from him the payment required by S. 310 A, of the former Code of Civil Procedure and got the sale set aside. The appellant now claims that his mortgage should be given priority to that of the plaintiff. Mr. Ramachandra Aiyar put his claim on four grounds. He claimed that under section 69 of the Indian Contract Act, his client was entitled to a prior charge, that he was also entitled under section 70 of that Act and, failing either of those two sections, claimed priority on the principle of section 101 of the Transfer of Property Act and lastly he claimed a salvage lien on the ground that he has saved the property for the plaintiff by his payment. Now as regards section 69 of the Indian Contract Act, the answer

1. (1906) I. L. R. 29 M. 37.
2. (1901) I. L. R. 29 C. 154 P. C.
3. (1912) 22 M. L. J. 364.
4. (1903) I. L. R. 26 M. 686.
5. (1887) I. L. R. 14 C. 809.
6. (1892) I. L. R. 14 A. 273.
7. (1906) 4 C. L. J. 555.
8. (1909) I. L. R. 33 M. 15.
9. (1907) I. L. R. 31 M. 35.

Veeraraghava Iyer v. Lakshmana Iyer

Miller J.

to his claims seems to me to be that he was not interested in the payment of the money. His only interest is that created by his mortgage. As I understand section 69, the interest must be an existing interest, an interest which the payment is intended to protect and not an interest which may be said to be created by the payment or as part of the transaction in which the payment was made or which is merely security for payment. The appellant had no such existing interest when he undertook to lend some money to the judgment-debtor and took the mortgage as security therefor. There is no interest which this payment protected. He was in no way interested in the satisfaction of the decree. Consequently the payment does not come within section 69 and I do not think it is within section 70 for the reason that the payer did not make the payment in any way for the plaintiff. It is suggested (but I do not propose to investigate the suggestion) that the plaintiff has been benefited by the payment but as I understand the decision in *Yogamba Boyee Ammani Ammal* v. *Nayina Pillay Marakayar*[1] section 70 will not apply to cases where the person who makes the payment, makes it for himself and not for the other person against whom his claim for reimbursement is made. Here there is nothing to suggest that this mortgage money was advanced by the appellant in the interests of the plaintiff and, consequently, he is not entitled to claim on that account priority over the plaintiff though indirectly he may have benefited the plaintiff. Then as to the third ground, there is no earlier security which the appellant would be entitled to retain as a shield. He is seeking rather to create a security where none was before. The further claim is as a salvor and the answer to that is again that the appellant has no interest in the property which he says he has saved. So far as I know, where charges of this kind have been allowed the cases are those in which the person who has paid money had an interest to preserve and here, as I have said in discussing the question of section 69 of the Contract Act, I think that the appellant had no interest which could support his claim to save the property at the plaintiff's expense on grounds such as those on which the decision of the Full Bench in *Raja of Vizianagaram* v. *Raja Satrucherla Somasekararaz*[2] was based. It seems to me that all these four grounds fail and that the appellant must be content to take, what he certainly in terms took, the mortgage as security for his payment, subsequent to that of the plaintiff. I would, therefore, dismiss the appeal with costs.

Abdur Rahim J.—I agree.

1. (1909) I. L. R. 33 M. 15. 2. (1903) I. L. R. 26 M. 686.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

Korapalu and another ... *Defendants Appellants.**

v.

Narayana alias Naranappayya ... *Plaintiff—Respondents.*

Korapalu *v.* Narayana

Landlord and Tenant—Agricultural lands—Joint lease—Partition among lessors—Forfeiture—Each can enforce his right set separately as regards his share—Transfer of Property Act S. 111 (g)—Act evincing intention to determine not necessary before suit.

Where a lease is given by two persons jointly and they subsequently, become divided each of them can terminate the lease to the extent of his share on the ground of forfeiture.

Gopal Ram Muhuri v. *Sakeswar Pershad Narain Singh*[1], not followed.

Sri Raja Simhadri Appa Rao v. *Pratipati Ramayya*[2], followed.

In agricultural leases which are not governed by the Transfer of Property Act the lessor is not bound to do any act prior to instituting the suit showing his intention to take advantage of the forfeiture.

Padmanabayya v. *Ranga*[3] and *Ramakrishna* v. *Bharayya*[4], referred to.

Second appeal from the decree of the Court of the Subordinate Judge of South Canara in A. S. No. 384 of 1910 preferred against the decree of the Court of the District Munsif of Karkal in O. S. No. 394 of 09.

B. Sitarama Rao for Appellant.

K. Y. Adiga for Respondent.

B. Sitarama Rao.—One of the joint lessors cannot put an end to the lease given by them. The fact that were was a partition among them subsequently is immaterial. *Gopal Ram Mohuri* v. *Shakeswar Pershad Narain Singh*[1], *Radha Prasad Wasti* v. *Esuf*[5], *Harendra Narain Singh Choudhry* v. *Moran*[6], *Gholam Mohiuddin Hossein* v. *Khasim*[7], *Ebrahim Pir Mahomed* v. *Cursetji Sorabji De Vitre*[8]. Whether the principle of S. 111 T. P. A. applies or no, the election must be made by all the joint lessors. And that ought to be not later than the plaint. *Raja Simhadri Appa Row* v. *Pratipath Ramayya*[2], is not ad idem. There is a difference between cases of notice to quit and forfeiture. Then again where several tenants in common lease out you may presume that each is

*S. A. No. 1593 of 1912. 24th July 1913.

1. (1908) I. L. R. 35 C. 807.
2. (1905) I. L. R. 29 M. 29.
3. (1910) I. L. R. 34. M. 161.
4. (1912) 23 M. L. J. 715.
5. (1881) I. L. R. 7 C. 414.
6. (1887) I. L. R. 15 C. 40.
7. (1904) I. L. R. 31 Cal. 786.
8. (1887) I. L. R. 11 B. 844.

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leasing out his own share. There is no scope for any such presumption in the case of Hindu joint families. Under the common law, a condition was not divisible and had to be exercised by all. This is changed now by statute but the common law it is that should guide us. Ss. 37, and 109 do not apply to this case both because this is an agricultural lease and because this is not the case of property passing from the hands of one into the hands of many.

K. Y. Adiga relied upon *Raja Simhadri Appa Row* v. *Pratipathi Ramayya*[1], and submitted that the principle of Ss. 37 and 109 applied. Either the principle of Transfer of Property act applied in which case S. 109 also applied. If the principle did not apply there, an act antecedent to suit which S. 111 requires and which forms the basis of the Calcutta, decision is not necessary, the cause of action being complete by the breach of the conditions of the lease. As the other co-owner also elects to determine the lease the decree of the Lower Court is right.

B. Sitarama Rao replied.

The court delivered the following

Judgments:—*Sadasiva Aiyar* J.—The defendants No. 2 and 3 are the appellants. The 6th and 7th defendants own the other half under an alienation by the 5th defendant, who was the former owner of that other half. The defendants appellants were mulgeni tenants under a lease executed by the plaintiff and the 5th defendant jointly in 1889. The lease deed contained a forfeiture clause for non-payment of rent. The plaintiff gave notice in July 1909 to the defendants to give up the lands, as they had incurred forfeiture by non-payment of rent; and the suit was brought in September 1909 by the plaintiff on behalf of himself and the fifth defendant (whose alienees are defendants No. 6 and 7) to eject the defendants Nos. 2 and 3 from the entire lands. The Lower Appellate Court decreed the suit so far as the plaintiff's half share was concerned on the following grounds.

(*a*) Though the original letting of 1889 was jointly by the plaintiff and the 5th defendant the plaintiff had become separately entitled to one half of the lands and was entitled to enforce the forfeiture clause separately as regards his half share.

(*b*) As regards the contention of the defendants Nos. 2 and 3 that under S. 111 (*g*) of the Transfer of Property Act, when the lessee breaks the condition which provides that on such breach the lessor may re-enter, the lessor must do some act showing his

1. (1908) I. L. R. 29 M. 29.

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intention to determine the lease before the lease is determined under such forfeiture clause. The plaintiff's notice of July 09 had the legal effect of the doing of some act showing the intention to determine the lease required by S. 111 (*g*).

The defendants Nos. 2 and 3 contend before us

(*a*) that the original lease of 1889 could not be split up so as to enable the plaintiff alone to do an act expressing his intention to take advantage of the forfeiture clause as regards his half share.

(*b*) that the notice of 1889, if properly construed, does not indicate a present intention on the plaintiff's part to determine the tenancy in accordance with the forfeiture clause but only a contingent future intention. As regards joint lessors the judgments pronounced in *Sri Raja Simhadri Appa Rao* v. *Pratipathi Ramayya*[1], contain very instructive observations. There the plaintiff and the 3rd defendant were joint owners of certain lands, but afterwards became by a partition decree common owners of the said lands. Sir *Subramania Aiyar* J. held that the plaintiff (tenant in common) may have ejectment as against the lessees of the land to the extent of the plaintiff's interest and he relied upon the English cases of *Cutting* v. *Derby*[2] and *Doed Whayman* v. *Chaplain*[3] *Sankaran Nair* J. relying on certain Indian cases hesitated to follow the English law as regards the right of a tenant in common to eject the common lessee from the former's particular share of the leased lands. But he considered it unnecessary to give a final opinion on that question as, on other grounds, he concurred in the conclusion of Sir *Subramania Aiyar* J. He held that under the principles of law embodied in Ss. 37 and 109 of the Transfer of Property Act, a joint owner who has by division become the owner of a specific share is entitled to enforce separately all the rights appertaining to the particular land which fell to his share as against the lessee just as if he had given a separate lease of his own share alone originally to the lessee. *Sankaran Nair* J. in effect held that even though Ss. 36 and 108 may not directly apply to agricultural leases in the Madras Presidency the principles embodied in those sections ought to be followed by Indian Courts."

Thus taking the view of either Sir *Subramania Aiyar* J. or *Sankaran Nair* J. it is clear that Calcutta cases of *Gopal Ram Mohuri* v. *Shakeswar Pershad Narain*[4], which are not binding

1. (1905) I. L. R. 29 M. 29.
2. (1776) 2. W. B. L. 1077.
3. (1908) 3. Taunton. 119 and 120.
4. (1908) I. L. R. 35 C 807.

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upon us and which were relied upon by the appellant's vakil are opposed to the decisions of this High Court in *Sri Rajah Simhadri Appa Rao* v. *Pratipatti Ramayya*[1], and I prefer to follow *Sri Rajah Simhadri Appa Rao* v. *Pratipatti Ramayya*[1] going to the other question whether the principle embodied in S. 111 (g) of the Transfer of Property Act should be followed in such cases, in other words whether the mere breach by the lessee of the covenant of forfeiture gives a sufficient cause of action to the lessor to bring the suit in ejectment or whether it is further necessary that the lessor should do some act showing his intention to determine the lease before he brings the suit in ejectment, it was held in *Venkatramana Bhatta* v. *Gunduraya*[2], that there should be a separate act done prior to the institution of the suit shewing such an intention, that such separate act alone can determine the lease and that the mere bringing of the suit is not such an act. The case of *Venkatramana Bhatta* v. *Gunduraya*[2], assumed that the Transfer of Property Act was applicable to the facts of that case. But in *Padmanabhayya* v. *Ranga*[3], it was pointed out that the Transfer of Property Act did not govern the lease in question in *Venkatramana Bhatta* v. *Gunduraya*[2], and that this fact was overlooked in that case. The case of *Padmanabhayya* v. *Ranga*[3], definitely held that where the lease is not governed by the Transfer of Property Act a landlord can maintain his suit for ejectment on forfeiture by the tenant without the landlord's having done any prior act evincing his intention to determine the lease. This case of *Padmanabha* v. *Ranga*[3], was followed in *Ramakrishna* v. *Bharayya*[4], by the learned *Chief Justice* and *Sankaran Nair* J. again distinguishing *Venkatramana Bhatta* v. *Gunduraya*[2], on the ground that it was not brought to the notice of the Judges who decided that case that the lease in question was not governed by the Transfer of Property Act. The provision in S. 111 of the Transfer of Property Act (about a further act being necessary besides the breach of the covenant in the forfeiture clause before a suit could be brought) was probably a relic brought over into that Indian statute from the antiquated technicality of the old English Common Law which required the formality of re-entry by the lessor of the leased lands before the lease could be determined for breach of covenant; but this formality is unnecessary in the case of leases not governed by the Transfer of Property Act. As said in *Padmanabhayya* v. *Rangayya*[3], the forfeiture is complete "when the breach of the condition or the denial of the title occurs. But as it is left to the

1. (1905) I. L. R. 29 M. 29.
2. (1912) I. L. R. 31 M. 403.
3. (1910) I. L. R. 34 M. 161.
4. (1912) 23 M. L. J. 715.

lessor's option to take advantage of it or not, the election was not a condition precedent to the right of action but the institution of the action was simply a mode of manifesting the election." I would put it even more strongly by saying that, as the breach of the condition gives rise to a cause of action at once there is strictly no question of *election between two different* rights but there is only an election whether the lessor is to retain the right created or to give up the right. *The retention* requires no definite physical act while the waiver does. The word 'election' is not the appropriate word to use as regards the bringing of the action based on the right created in the plaintiff by the forfeiture. The word 'election' should be used only where the lessor has elected by an act to waive the right created by the tenant's default. There are two alternative elections, the one giving rise to a right and the other not giving rise to that right but only one election to waive the right created.

I therefore think that no act was at all necessary on the part of the plaintiff to take advantage as regards his share of the lands of the forfeiture clause in the lease deed. On this view it is unnecessary to consider the other contention raised by the appellant that the acts relied upon by the plaintiff, namely the notice to the 1st defendant in July 1909 and the acceptance of the Sodi chit are not acts showing an intention to determine the lease. In the result the second appeal fails and is dismissed with costs.

Tyabji J.—I am also of opinion that in this case the plaintiff may enforce the forfeiture clause of the lease with respect to his moiety of the land, notwithstanding that those who are entitled to the other moiety have waived the right to enforce the forfeiture clause by receiving their moiety of the rent.

The Transfer of Property Act is not directly applicable; and it seems to me that the principle underlying S. 111 of that Act ought not to be applied with stringency in a case like the present where the lessee is prompt in taking steps which leaves room for doubt that he intends to enforce the forfeiture. I take it that apart from the historical reasons to which my learned brother has alluded and which do not apply in India the rule introduced in S. 111 is now upheld in order to prevent a tenant from being subjected to such doubts. That reason for upholding the rule is not present in his case.

I would therefore dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, KT. Chief Justice and Mr. Justice Oldfield.

Khan Sahib Bangi Abdul Khader Sahib (deceased) and others ... ... } *Appellants.**

v.

The Official Assignee of Madras ... *Respondents.*

Abdul Khader Sahib *v.* The Official Assignee of Madras

Presidency Insolvency Act S. 56—" Fraudulent preference "—Test of—Pressure, not sufficient—" Substantial, effectual or dominant motive "—Pressure notwithstanding, if payment would not have been made but for desire to prefer—Report of the Official Assignee—Evidence when—Only when Assignee authorised or empowered to report—Rule 116, Presidency Insolvency Act—Ultra vires.

The question for the court under S. 56 of the Presidency Insolvency Act when a payment to a creditor is impeached on the ground of undue preference is, what was the substantial effectual or dominant view with which the debtor made the payment.

To protect the creditor, it is not sufficient that there was some pressure by him or previous to the payment. Even if the payment would never have been made but for such pressure it is fraudulent preference if it is also a fact that the payment would not have been made but for the desire to prefer him.

In re Bell [1]. followed.

Semble Sec.104 apart, the report of the Official Assignee is prima facie evidence of the matters reported only when the matter is one with regard to which the Official Assignee is directed or empowered by the provisions of the Act to make a report. In criminal proceedings, the report is not evidence though the Official Assignee is authorised by S. 104 to make a report for the purposes of prosecution.

Rule 116 if it is to be construed as making the report for any purpose evidence of the facts stated therein, is *ultra vires.*

Putting the report at its highest it is only evidence of the facts stated therein.

Appeal from the Order and Judgment of the Hon'ble Mr. *Justice Sankaran Nair,* dated 29th August 1911, in the Insolvency Jurisdiction of the High Court and made in Insolvency Petition No. 110 of 1910.

In the matter of Mahomed Oosman Sahib and Company—Insolvents.

D. Chamier and *M. A. Thirunarayanachariar* instructed by *Messrs. Short, Bewes & Co.* for Appellants.

M. D. Devadoss instructed by *M. K. Ramaswamy Iyer* for Respondent.

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* O. S. A. No. 33 of 1911. 3rd April 1913.

1. (1892) 10 Mor. 15 at 18.

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The court delivered the following

Judgment:—The order against which the present appeal is brought is an order made on the application of the Official Assignee under S. 56 of the Insolvency Act setting aside a transaction as a fraudulent preference. The appellant is the father-in-law of the insolvent who is now dead. On May 9, 1910 the insolvent made a transfer of his stock in trade to persons carrying on business under the name of Abdul Latheef Sahib and Co. This was the act of insolvency on which on May 18, 1910 the order of adjudication was made on a creditor's petition. There was no appeal against this order, and the Official Assignee took possession of the stock transferred to Abdul Latheef and Co. There were various proceedings in the insolvency with a view to establish the insolvent's right to these goods and there was also a suit for the same purpose which was dismissed by *Wallis* J. on the ground that an order made by the Court in insolvency exercising a jurisdiction under S. 7 of the Act should not be set aside by suit. The appellate Court (Appeal No. 4 of 1912) took the same view.

It is clear therefore that the transfer of the stock in trade of May 9, 1910, must be taken to have been made with intent to defeat creditors. The fact that this transaction was intended to defeat creditors is we think a relevant fact with regard to the question, whether the insolvent made the payment on May 14, five days later which is impeached as a fraudulent preference with a view to giving the creditor, to whom the payment was made, a preference over the other creditors within the meaning of S. 56 of the Act. The payment was made to a near relation of the insolvent's father-in-law. There can be no question that at the time of the payment he was unable to pay his debts as they became due. The learned Judge was of opinion that the insolvent intended to file his schedule when he made the transfer on May 9. We do not think there is anything to show this. As a matter of fact the order of adjudication was made on a creditor's petition. We should think it more likely that the insolvent was anxious to stand off an adjudication to a time when the transfer of stock on May 9 and the payment of Rs. 10,000 on May 14, could not be impeached. It is not disputed that the Rs. 10,000 was paid to Abdul Razack, a son of the appellant, on May 14, in respect of a promissory note for the amount executed in 1908. This payment left a sum of Rs. 1,800. odd still due for interest. Abdul Razack stated on his examination that he told the insolvent he must pay the money or otherwise a suit would be filed. Abdul Razack admitted that when he got the money

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he knew of the transfer of the stock on May 9, and he said the insolvent told him he had got the money from Abdul Latheef. There is evidence that between 14th and 18th certain other creditors were paid. The appellant on his examination stated that when his son received the Rs. 10,000 he (the appellant) believed that the business was being carried on in the usual way. The evidence of pressure rests on the oral testimony of the appellant and his son. There is no letter by the appellant. The two letters written by the insolvent in April and November 1909 (Exhibits I and II) do not refer to any demand for the payment of the money due on the promissory note.

On this evidence can it be said, that the payment to the appellant was made with a view to prefer the appellant? We do not think the evidence as to pressure can be relied upon. Assuming there was some pressure that is not sufficient. Even if the payment would never have been made but for the importunity it is fraudulent preference if it is also the fact that the payment never would have been made but for the desire to prefer the creditor. Per *Vaughan Williams* J. in *re Bell*[1]. The present case as it seems to us does not fall within the principle of *Sharp* v. *Jackson*[2] where the object of the payment was to shield a man from the consequences of his own conduct. We do not overlook the fact that the Official Assignee's application was made till nearly a year after the alleged fraudulent preference was given. The explanation is that the Official Assignee was not aware of the payment until in response to a demand for a payment of an alleged debt of some Rs. 300 made on the appellant by the Official Assignee. The appellant swore his affidavit on January 12, 1901, in which he claimed interest on the promissory note and admitted the receipt of the Rs. 10,000. The explanation of the delay is not altogether satisfactory but we do not think the delay in itself is sufficient ground for declining to make an order if the facts bring the case within the Section. If, on the proved or admitted facts we put to ourselves, the question to paraphrase the language of *Vaughan Williams* J. *In re Bell*[1], was the substantial, effectual or dominant view with which the debtor made this payment, the preference of his father-in-law? We think the answer must be in the affirmative.

We think the learned judge was right in his conclusion. On the hearing of this appeal it was contended on behalf of the Official Assignee that the Official Assignee's report was evidence of the facts

1. (1892) 10 Mor. 15 at 18. 2. (1899) A. C. 419.

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relied on in support of the application. We feel considerable doubt as to this. We think the recital in the formal order of the Court rightly distinguishes between the report and the evidence adduced in support of the application. The recital runs "upon reading the notice of motion............ ....and the report,............and upon hearing.................the evidence adduced herein etc."

Mr. Devadoss, on behalf of the Official Assignee relied on R. 117. This rule, though reproduced as one of the rules made under the Act of 1909 is, we are told, a reproduction of a rule made under the Act of 1848. Terms of the rule are no doubt wide enough to render the report *prima facie* evidence of the matter reported upon for all purposes, and on any application which the Official Assignee may make to the Court. As at present advised we should be disposed to hold (leaving S. 104 out of consideration for the moment) that the report is *prima facie* evidence of the matter reported only when the matter is one with regard to which the Official Assignee is directed or empowered by the provisions of the Act to make a report (See Ss. 38 and 79). The Official Assignee is empowered to make a report under S. 104 for the purposes of prosecution. But this stands on a different footing. We do not think it could be reasonably contended that the report of the Official Assignee is *prima facie* evidence in Criminal Proceedings.

The only provision in the Act so far as we can see, which makes the report of the Official Assignee's evidence is S. 39 (4) which provides that on an application for discharge the report of the Official Assignee shall be *prima facie* evidence. The fact that there is an express provision in the discharge sections goes some way to indicate that in other matters the report is not evidence. If rule 116 is to be construed as making any report for any purpose evidence of facts stated therein, we should be disposed to hold it is *ultra vires*. It is certainly not covered by any of the special purposes mentioned in the rule-making section (S. 112 of the present Act of 1848) under which the rule in the first instance appears to have been made. S. 9 (5) of the English Bankruptcy Act of 1890 which replaces S. 8 of the Act of 1883, provides that for the purposes of that section the report of the Official Receiver shall be *prima facie* evidence of the statements therein contained. The rules made under the English Act of 1883 do not contain any rule which makes, the report of the Official Assignee's evidence, but it has been held that in certain cases when the Official Receiver is directed or empowered by the Act to make a report, his report is

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prima facie evidence; See *Ex parte Campbell*[1] (scheme of arrangements under S. 18 now S. 29 of the Act of 1890), *Re Horniblow*[2] (Small Bankruptcies under S. 121).

Putting the report at its highest, it can only be evidence of the facts stated therein.

There is an allegation in the report before us that the insolvent has been guilty of gross fraud. This, as it seems to us, is a question for the Court. However we do not desire to express any final opinion on the point we have discussed.

So far as this appeal is concerned we have been able to deal with it on the evidence which is on the file apart from the report.

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Velusami Naicker and another ... *Appellants** —(*Petitioners.*)

v.

Bommachi Naicker ... *Plaintiff*—(*Respondent.*)

Res judicata—Basis of—Judgment in favour of a party—Application for execution—Decision that land is cultivable—Whether res judicata in restitution proceedings in respect of subsequent year's profits—Inconsistent position—Rule against—Improvements—The holder of a decree reversed, effected by—Cannot claim.

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Respondent got a decree against appellant for possession and for mesne profits. On appeal the decree was reversed. In the meanwhile respondent had obtained possession in execution as well as mesne profits. On the reversal of the decree appellant obtained re-delivery of the properties and repayment of the amount he had paid as mesne profits. The present application was for mesne profits during the period the respondent was in possession. The case for the appellant was that the lands were cultivable, and that the mesne profits should be assessed on that basis while the respondent's case was that they were uncultivable contrary to what he had set up in the previous proceedings. On the previous occasion appellant having failed to produce any evidence as to his allegations, the Court had accepted respondent's contentions contentions and assessed mesne profits on the basis that the lands were cultivable. It was contended for the appellant that either the decision in the previous proceeding operated as res judicata or that the respondent was estopped from taking up a position inconsistent with what he then took.

Held that the previous decision did not operate as res judicata and also that the respondent was not estopped.

The basis of the rule of res judicata is that the parties had the opportunity of fighting out their present quarrel on a previous occasion. The doctrine is not based on the intrinsic effect to be attached to an adjudication by the Court

1. (1885) 15 Q. B. D. 213. 2. (1885) 2 Mor. 124.

* C. M. A. No. 142 of 1912. 19th March 1913.

alone but on a rule of public policy that a question which has once been fought out should not be reagitated between them again.

It necessarily involves that the case of both parties is the same on both occasions.

A party *against whom* a judgment has been rendered is not permitted to show that it is erroneous whether as plaintiff or as defendant in a subsequent proceeding, but not a party in whose favour it is rendered; the latter may be prevented from doing so where to permit will contravene the principle of not allowing a person to derive an inequitable benefit by adopting inconsistent positions; but the principle of res judicata has no application to such a case except where the subject matter of the two proceedings and not merely a point at issue is the same.

The rule against a party being allowed to take up inconsistent positions applies only where a party seeks to defeat his opponent by successive inconsistent positions as in *Ekabhar Sheik* v. *Hara Bewah*[1] or when having obtained a benefit by adopting one position he afterwards tries to assume a different and contradictory position while retaining the advantage already obtained by his former position.

A party who alleges but fails to establish a certain state of facts is not estopped in a subsequent suit between the same parties and concerning the same subject matter from alleging a different and inconsistent state of facts.

A party who is put into possession of properties under a decree of Court which is subsequently reversed is not entitled to be paid the value of improvements effected by him while in possession; *Mathumsa Rowthen* v. *Apsa bin*[2] distinguished.

Appeal from the order of the Court of the Subordinate Judge of Madura in E. P. No. 17 of 1911 in O. S. No. 21 of 1903.

T. R. Venkatarama Sastri and *A. Visvanatha Aiyar* for Appellants.

M. O. Parthasarathi Aiyangar and *S. Gopalasami Aiyangar* for Respondents.

The Court delivered the following

Judgment:—The appellants in this case were the defendants in O. S. No. 21 of 1903 on the file of the Subordinate Court, Madura West. The respondent, who was the plaintiff in that suit, obtained a decree against the Appellants for certain lands together with mesne profits from the date of the suit to the delivery of possession. The respondent obtained possession in execution as well as mesne profits from the 30th July 1903 (date of the plaint) to the 13th December 1904. The decree in O. S. No. 21 was reversed by this Court on appeal. The appellant obtained re-delivery of the properties in question and re-payment of the amount he had paid as mesne profits. The present application is for the mesne profits during the time that the respondent was in possession, that is, from

1. (1910) 13. C. L. J. 1. 2. (1911) 21 M. L. J. 969.

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the 13th December 1904 to the 9th November 1910. "The dispute relates to the profits of items Nos. 1, 2, 5, 6, 7 and 8. The Subordinate Judge disallowed any profits for items Nos. 1, 6 and 7 on the ground that they were uncultivable lands. He also held that three fourths Kuli of item No. 2 was cultivable and 13 kulis of item No. 5 was not cultivable. He allowed profits on the cultivable lands at 7 kalams per kuli for punja and 10 kalams per kuli for nanja lands. Item No. 1 alone was originally nunja, the remaining items being punjah.

The first point argued by Mr. Venkatrama Sastri on behalf of the appellants is that the respondent is estopped from contending that any of the lands now held to be uncultivable by the Subordinate Judge were really of that character and that moreover the question whether they are cultivable or not is *res judicata* by reason of the order of the Subordinate Judge in E. P. No. 67 of 1905 in which the respondent obtained judgment for mesne profits against the appellants between the date of the plaint in O. S. No. 21 and the date of delivery of possession to the Respondent. These pleas arise out of the circumstance that, in E. P. No. 67 when the possessions of the parties were the reverse of what they are now, their respective contentions were exactly the opposite of what they are now; that is, while the respondent then urged that all the lands were cultivable, the appellants pleaded that those now in dispute were all waste and uncultivable. After a Commissioner had reported on the question, the Subordinate Judge held that the lands which have now been held to be uncultivable were cultivable with reasonable diligence and awarded mesne profits to the respondent for the period in question. It is admitted that there has been no alteration in the character of the lands after the respondent obtained possession in execution. With respect to the first contention of estoppel, apart from the bar of *res judicata*, the argument urged is that a party cannot be permitted to take up inconsistent positions in the course of the same litigation and to profit by doing so. The respondent retorts by saying that the appellants are equally estopped from adopting a position inconsistent with what they assumed in E. P. No. 67. We are unable to uphold this argument of estoppel. The rule against a party being allowed to take up inconsistent positions has really no application to the circumstances of this case. It applies only where a party seeks to defeat his opponent by successive inconsistent positions as in *Ekabbar Sheik* v. *Hara Bewah*[1] or when having obtained a benefit by adopt-

1. (1910) 13 C. L. J. 1.

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ing one position he afterwards tries to assume a different and contradictory position while retaining the advantage already obtained by his former position. See Halsbury's Laws of England Vol. 13 p. 364; Black on Judgments Vol. 2 para 632 where the author observes, "But it is held, in some of the cases, that a party who alleges but fails to establish a certain state of facts is not estopped in a subsequent suit between the same parties, and concerning the same subject matter from alleging a different and inconsistent state of facts." The appellant in this case failed to prove the contention he urged in the respondent's previous application for mesne profits. The respondent seeks to obtain no advantage under the order on that application as he has paid back the amount got by him from the appellants in obedience to that order.

We are also of opinion that the argument of *res judicata* must equally fail. The parties then occupied positions which were the reverse of their present contentions. The rule of *res judicata* cannot apply in such a case. It is, no doubt, true that it is immaterial in determining the applicability of the rule that the petitioner in the one case was a respondent in the other, provided their respective contentions are the same. But the basis of the principle is that the parties had the opportunity of fighting out their present quarrel on a previous occasion. The doctrine is not based on the intrinsic effect to be attached to an adjudication by the Court alone but on a rule of public policy that a question which has been once fought out between the parties should not be re-agitated between them again. It necessarily involves that the case of both the parties was the same on both the occasions. A party *against whom* a judgment has been rendered is not permitted to show that it is erroneous whether as plaintiff or defendant in a subsequent proceeding, but not a party in whose favor it was rendered; the latter may be prevented from doing so, where to permit it will contravene the principle of not allowing a person to derive an equitable benefit by adopting inconsistent positions; but the principle of *res judicata* has no application to such a case, except where the subject matter of the two proceedings and not merely a point at issue is the same. It would be extraordinary to hold that a party is concluded by a decision against his adversary. An illustration of the unreasonableness of such a view is afforded by the manner in which the finding in E. P No. 67 was arrived at with regard to item No. 1 in this case. The Commissioner whose report was adopted by the Subordinate Judge based his conclusion with regard to the character of the item, on the ground that the 2nd

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defendant, one of the present appellants, did not do what it was essential for his case that he should do, namely, to point out paimash No. 14. Can he be permitted to say that a finding based on his failure to do something should be availed of by himself against his opponent whose interest then was to disprove his contention? We are of opinion that it would be unreasonable to do so. We disallow this contention also.

On the merits, we see no reason to differ from the view taken by the Subordinate Judge who has fully examined the evidence in the case. We agree in the reasons he has given for his finding.

The respondent has presented a memorandum of objections claiming the value of certain improvements made by him between the dates of the decree of the Subordinate Judge in O. S. 21 and the judgment of this court in appeal reversing it. We cannot accept the contention that a party to the litigation is entitled to receive for the improvements made by him *pendente lite* with the full knowledge of the risk he runs in doing so. It cannot be held that he made the improvements *bona fide* when he was bound to be fully aware that the decree that he had obtained might be reversed in appeal. No authority has been cited which would justify a contrary view. The rule laid down in *Mathumsa Rowthan* v. *Apsa Bin*[1] with regard to an auction purchaser who is not a party to the suit being entitled to compensation for improvements made by him when he is subsequently ousted from possession on account of the sale being set aside, is not applicable to a party to a litigation concerning immoveable property making improvements during the progress of the contest between the parties. The Privy Council has held that a party to a suit who purchases properties in court auction will not have the privileges of a stranger purchaser. See *Zainalabudinkhan* v. *Muhammad Ashgar Ali Khan*[2]. See also *Sadasiva Aiyar* v. *Muthusabapathi Chetty*[3]. We therefore disallow the memorandum of objections also. Both the appeal and the memorandum of objections are dismissed with costs.

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1. (1911) 21 M. L. J. 969. 2. (1887) I. L. R. 10 A. 166.
3. (1881) I. L R. 5 M, 106.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar, and Mr. Justice Tyabji.

Appavu Chettiar ... *Appellant.** (*Plaintiff.*)

v.

Nanjappa Goundan, and others ... *Respondents.* (*Defendants Nos. 1 to 9 & 11*).

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Mortgage—Payment to one of two co-mortgagees—Valid discharge—Production of mortgage deed by mortgagor—Onus of proof of discharge—Shifting of—Admission in written statement of co-mortgagee—Relevancy of—Evidence Act Ss.17, 19, 21—Pleadings—Object of—Finding on issue—Practice.

Payment to one of two co-mortgagees is a valid discharge of the mortgage debt *Mannava Annapurnamma* v. *Akkayya* [1] followed.

Plaintiff's assignor and the 10th defendant were co-mortgagees under the suit bond. Plaintiff sued to recover half of the amount due alleging that they were each entitled to a half and the 10th defendant had collected her half. Defendants 2 and 7 subsequent alienees of the property from the 1st defendant 'mortgagor' pleaded that the 1st defendent had paid off the mortgage to the 10th defendant and produced the mortgage bond bearing an endorsement of discharge purporting to be made by the 10th defendant. 10th defendant supported defendants 2 and 7 and further pleaded that the whole money belonged to her. Plaintiff did not admit the genuineness of the endorsement. Defendants produced no evidence to prove discharge.

Held: the production of the mortgage deed by defendants 2 and 7 raised the presumption that the debt has been discharged and it lay on the plaintiff to rebut the presumption.

Held by Sadasiva Aiyar J: The admission by the 10th defendant in her written statement was evidence under S. 19 of the Evidence Act of the discharge and the fact that her statement was not marked as an Exhibit did not matter as the statement had been relied on in the Lower Courts.

Where no other evidence is adduced in a case except written admissions in pleadings, it is advisable that such records should be marked as Exhibits and then referred to as evidence in the judgment of the Court.

Per Tyabji J. The statement of the 10th defendant was not an admission within the meaning of S.19 and even if it was, as it was not relevant under S. 21 or any of the succeeding sections, was not admissible in evidence against the plaintiff.

Statements contained in pleadings do not prove themselves and some proof must be given of them before they can be considered part of the evidence in the case.

S. 58 of the Evidence Act cannot be relied upon as making it unnecessary to prove statements.

The object of pleadings is to bring the parties to an issue. They can and must be looked at only for one purpose *i.e.*, to be informed of the allegations and contentions of the parties. They cannot be taken as proof of those allegations and contentions.

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*S. A. No. 1748 of 1910 2nd May 1913.

1. (1913) 24 M. L. J. 333 (F. B.)

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An admission in a pleading is a different thing from such an admission as is contemplated in the 17th and the succeeding sections of the Evidence Act.

By an admission in pleadings is generally understood a concession made by one of the parties that a fact alleged in the pleading of the opposite party need not be proved. It narrows down the question before the Court.

Per curiam: There must be a specific finding on each issue in the form of a categorical reply to the question involved.

Appeal from the decree of the District Court of Coimbatore in Appeal Suit No. 31 of 1910, preferred against the decree of the Court of the Temporary Subordinate Judge of Coimbatore in Original Suit No. 27 of 1907.

S. Varada Chariar, for Appellant.

T. M. Krishnaswami Aiyar for Respondent.

S. Varadachariar:—The question in this Second Appeal as to whether payment to one of two co-mortgagees is a valid discharge of the mortgage debt is concluded by authority. *Mannava Annapurnamma* v. *Uppala Akkayya*[1]. There is one other question. The mere statement by the co-mortgagee (10th defendant) of having received full satisfaction is not sufficient. The District Judge ought to have found whether there was payment or not and in the absence of such finding the judgment cannot stand. There is no evidence of any payment.

T. M. Krishnaswami Aiyar:—The second point has not been raised in the grounds of appeal to this court. The absence of any finding on the truth of the payment to the 10th defendant is explicable on the ground that this point was never contested by the plaintiff in the Lower Court. Assuming the appellant is entitled to argue the question there is ample evidence in the case of the payment from which the lower courts could have found the truth of the payment. The written statement of the 10th defendant the co-mortgagee that she received the full mortgage amount is on record and it is evidence against the plaintiff under S. 19 of the Evidence Act. More especially at this stage when the 10th defendant is dead the admission by her against her own interest becomes admissible under S. 32 of the Evidence Act.

S. 19 of the Evidence Act read with the illustration makes the position clear. Under the section the statement should have been made by a person against his interest with reference to a position or liability. Then if in a suit against that person that statement would be admissible as evidence it would be admissible as

1. (1913) 24 M. L. J. 333 (F. B.)

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against third persons if it is necessary to prove as against them the position or liability of the person making the statement. The statement of the 10th defendant will be relevant against her in a suit brought by or against her and it is necessary to establish the 10th defendant's position as against the plaintiff. S. 19 therefore literally applies.

Again the statement which constitutes the admission is a statement made to the court in the same suit. It is unnecessary to give proof *aliunde* of the admission.

Further the admitted circumstances which the District Munsif has adverted to viz.,the speculative character of the suit, the length of time after which the suit was brought, the possession of the mortgage deed and the title deeds with the purchasers among others conclusively show that the mortgage must have been satisfied.

S. Varadachariar in reply. S. 19 has no application to the present case. S. 17 defines an admission Ss. 18–20 state by whom the statements have to be made. S. 21 prescribes how such admissions are to be used. Under this section an admission can be used only against the person making it. The admission made by the 10th defendant in this case cannot be used against the plaintiff. The illustration to S. 19 is much wider than the section and if such an admission is not provided for in S. 21 as to the mode of user such admissions are irrelevant. There is no position or liability in this case to be established as against the plaintiff's appertaining to the 10th defendant. Further the admission of 10th defendant in the written statement must be put in evidence against the plaintiff and the plaintiff must be allowed an opportunity to establish his case that there was no payment.

T. M. Krishnaswami Iyer in answer to *Tyabji* J. The meaning of S. 19 is made clear by the illustration. The word 'position' is wide and is not confined to merely the legal character of a person but also includes cases like the present. The illustration only exemplifies the section.

The interpretation of Sec. 21 put by the other side leads to this that statements by 3rd persons under Ss. 18, 19 and 20 cannot be used in evidence at all. The real meaning of S. 21 is that all admissions are relevant and hence admissible under S. 5 but subject to the condition in the latter part of the same section in that such admissions cannot be proved on behalf of the persons making them. The words "and may be proved as against the person who makes them" do not involve the negative that admissions made by stran-

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gers can in no way be proved; for if that were so, statements constituted admissions made by 3rd persons under Ss 18, 19 and 20 would become excluded altogether.

It is not necessary to have any extraneous proof of the admission of the 10th defendant's written statement. The written statement is a verified statement any falsity in which would render the party liable to a criminal prosecution. Of course a statement denying a particular fact in the plaint may not be an admission but a statement made to the Court in the written statement affirming a fact does not cease to be an admission because it is made in the written statement.

The Court delivered the following

Judgments:—*Sadasiva Aiyar*, J.—The plaintiff is the appellant before us. The allegations on which he brought the suit are:—

(*a*) The plaintiff's assignor and the 10th defendant were co-obligees under the mortgage bond (Exhibit I), dated 1895, executed by the 1st defendant, and each was entitled to one-half of the mortgage amount lent under it.

(*b*) "The plaintiff understands that the 10th defendant has collected the amount due for her half share in the mortgage-deed."

(*c*) As the original of the plaint-mentioned mortgage bond (Exhibit I) is with the 10th defendant and as she refuses to give it to the plaintiff, this suit is brought on a registration copy (Exhibit A).

The plaintiff sued for recovery of Rs. 750 (half of the principal sum mentioned in Exhibit I) with interest, Rs. 2,152-8-0 (about three times the principal), by sale of the mortgaged properties. The defendants Nos. 2 and 7 (subsequent alienees of the mortgaged properties) pleaded among other defences that, in April 1896 itself, their predecessor-in-title had paid up the whole mortgage amount to the 10th defendant and had got back the mortgage bond, Exhibit I, with the endorsement of full discharge signed by the 10th defendant. The 10th defendant supported the defendants Nos. 2 and 7 by her own written statement and further pleaded that the whole money under the mortgage belonged to her and hence she had received the whole amount long ago.

The 2nd and 5th issues settled in the case are: "Is the discharge pleaded by the defendants true and valid?" and "Is the discharge given by the 10th defendant, a co-obligee, valid and binding as against the plaintiff and his assignor?". At the hearing before the Subordinate Judge, the plaintiff relied upon the 10th

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defendant's admissions made in her written statement to the effect that she had received the whole of the mortgage amount and returned Exhibit I with the endorsement of payment made by her thereon, as evidence of the fact of such payment as against the plaintiff. The Subordinate Judge evidently accepted the 10th defendant's said admission as evidence against the plaintiff of the fact of such payment. The Subordinate Judge considered issues Nos. 2 and 5 together, issue No. 2 relating to the fact of discharge. He refers to the fact that the mortgage document, Exhibit I, "is produced by 2nd defendant and not by plaintiff" evidently to indicate that such production by the 2nd defendant is *prima facie* proof of discharge by payment. In *Bhog Hong Kong* v. *Ramanathan Chetty*[1], their Lordships of the Privy Council say "the promissory-note which was sued on and the security..............are at present in the hands of defendants. *Prima facie, therefore,* the presumption is, where you find the instrument of a debt and the security for that debt in the hands of the debtor, that the debt has been discharged; but Mr. Haldane, for the respondents, *while admitting that that presumption is a strong one, and that the burden of proof is upon him to rebut that presumption,* contends that the evidence is such as to rebut the presumption." The same question was considered long ago in *Chuni Kuar* v. *Udai Ram*[2], where it is said that "in the event of his" (the debtor's) "producing the bond" the plaintiff should show that it had not been discharged by payment, and that the defendant was ordinarily "bound to prove" discharge "either by evidence of the fact" of payment "*or the production of the bond* or both." The Subordinate Judge in deciding the issues Nos. 2 and 5 relied also on the fact that "the 10th defendant in her written statement admits the full discharge." The Subordinate Judge further says "Admittedly, the mortgage-deed was with 10th defendant and she has returned the document with an endorsement of full discharge" etc. The Subordinate Judge dismissed the plaintiff's suit, finding on the issues Nos. 2 and 5 that "the payment of the whole debt to 10th defendant as admitted by her" is a valid discharge and that the plaintiff cannot sue on the bond as if half the amount thereof was still due. He therefore dismissed the plaintiff's suit without going into the question whether the plaintiff and the 10th defendant each lent half the money or the 10th defendant lent the whole of the mortgage money under Exhibit I (1st issue in the case) and into the other questions raised by the issues Nos. 3, 4, and

1. (1902) I. L. R. 29 C. 334. 2. (1883) I. L. R. 6 A. 73.

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6 to 9. In his appeal to the District Court, the plaintiff raised twelve contentions in his appeal memorandum. The 4th and 5th contentions are as follow: "The lower court has attached undue importance to the written statement of the 10th defendant. The lower court is wrong in assuming that the discharge pleaded by the defendants is true. There is no evidence adduced by the defendants about the discharge pleaded by them and the suit should therefore have been decreed for the plaintiff." The District Judge says on the point "10th defendant said she was paid off in full, and so she has been according to the bond itself and her *written statement*...........the 10th defendant admits full payment of the mortgage amount *and the fact that 2nd defendant who should have paid off the mortgage is the party who produces the discharged deed is strong evidence that it really has been paid off.*" I take it that the District Judge treating (*a*) the 10th defendant's admission in the written statement as evidence of full payment and discharge as against the plaintiff and (*b*) the production of the document (Exhibit I) by the 2nd defendant as also evidence of such full payment and discharge as against the plaintiff, dismissed the plaintiff's appeal.

The grounds of second appeal are five, namely:—The decree of the lower court is contrary to law.

The mortgage-deed having been executed in favour of two persons and the promise to pay having been made to both of them, the District Judge is wrong in supposing that one of them can give a discharge for the whole mortgage amount so as to bind the other.

The District Judge erred in holding that the payment of the whole mortgage amount to one of the two mortgagees can in any way absolve the mortgagor or the properties mortgaged from liability for the other mortgagee's share of the amount.

The District Judge is wrong in holding that the plaintiff's remedy, if any, is only against the other mortgagee and that he has no right to compel the mortgagor or his assignees to pay him his share of the mortgage money.

The Lower courts ought to have tried the other issues arising in the case and found the same in favour of the plaintiff.

The 1st ground is the general ground. The grounds Nos. 2 to 4 raise the very same contention in three different ways and it is therefore necessary to consider only the 3rd ground. The 5th ground is that the lower courts ought to have tried the other issues,

that is, the issues other than the issues Nos. 2 to 5. This ground clearly means that, because the lower court's view on issue No. 5 that " payment of the whole mortgage amount to one of the two mortgagees can in any way absolve the mortgagor or the properties mortgaged from liability for the other mortgagee's share of the amount " (3rd ground of second appeal) was wrong, therefore, the suit ought to be remanded for trial of the other issues. I cannot find anything in any of the grounds mentioned in the second appeal memorandum raising the contention that the lower court erred in relying (*a*) on the admission of the 10th defendant in her written statement in coming to a finding against the plaintiff that the whole amount had been paid to her, and (*b*) on the production of Exhibit I by the 2nd defendant in coming to the same finding as to discharge. (I shall not refer to the 10th defendant's admission in her written statement that she endorsed full discharge on the bond before returning it). Nor do the grounds of second appeal raise any contention that the plaintiff was prevented by the Subordinate Judge from adducing evidence that the 10th defendant received only half the amount of the bond and that the bond, though in the 2nd defendant's possession, had not been fully discharged. On the other hand, the wording of the 3rd ground of second appeal indicates that the appellant assumes the correctness of the District Judge's finding as to "payment of the whole mortgage amount" to the 10th defendant.

Under these circumstances, I think that we should not allow the plaintiff to raise the question before us that the lower courts had no legal evidence to go upon for coming to the conclusion that Exhibit I had been discharged by full payment. In fact, it was clear to me from the way in which Mr. Varadachariar for the 2nd appellant began his arguments in this case that the contention as to there being no legal evidence as to discharge was an after-thought, the only contention raised by the grounds of second appeal (namely, the legal question whether payment to one co-mortgagee can be effective as against the other) having been decided against the appellant by a recent decision of the Full Bench (two years after this second appeal was filed) in Appeal No. 218 of 1909. Even if this contention about absence of legal evidence could be allowed to be taken, I am clear that the production of the bond by the 2nd defendant shifted the onus of proof on the plaintiff, and there is no contention in the second appeal grounds that the plaintiff was prevented from giving evidence on the 2nd issue. I am further inclined to hold that the admission in the 10th defendant's written statement is evidence

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of such payment against the plaintiff also under section 19 of the Indian Evidence Act. I shall very briefly set down my reasons for this opinion. S. 19 of the Indian Evidence Act is as follows:— "Statements made by persons, whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability." It must be admitted that the wording of the section is highly abstract and involved, but I suppose that most of the rules of evidence, touching, as the subject does, on metaphysical and psychological considerations, are always difficult to formulate in words so as to be understood at once. The framers of the Indian Evidence Act seem to have felt that the section was "metaphysically" worded (so to say) and appended as an illustration as follows:—

"A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B."

Reading the section and the illustration together, it seems to me clear that the Legislature intended that a party to a suit can use the statement of even a third party, if the statement of the third person contained an admission against the interest of that third person and could have been used against the third person if he sues or was sued in connection with a matter involving the position or liability affected by that admission. Cunningham in his book on Evidence says that section 19 of the Act does make all such admissions by third persons relevant evidence, though in England such admissions would not be admissible in evidence "except under the conditions stated in section 32 (3)". As Cunningham adds, "*what weight would be given to such a statement would, of course, depend on the circumstances*", but as regards the *relevancy* of such a statement under the Indian Evidence Act, I feel clear. *Usually*, courts should not act upon such *admissions* (of third persons) *alone* as sufficient evidence. But if those third persons have had a joint interest with the party to the suit against whom the statement is put forward as evidence or if there are other strong admitted circumstances (as in this case) leading to the conclusion that that statement is very probable, a court might accept the statement as sufficiently shifting the onus of proof. Usually,

however, such an admission by third persons is relied on only on corroboration of the other evidence in the case proving the same fact. Almost every judgment dealing with complicated facts relies on such admissions against the interest of another party to the suit or even of a third person as corroborative evidence.

That the written statement of the 10th defendant was relied upon as evidence by the 2nd defendant before the Subordinate Judge and the District Judge was not denied by the plaintiff's learned vakil, and the practice of the lower courts does not require statements in the written pleadings of parties or in affidavits receivable in evidence to be regularly marked as documents before they could be acted upon as evidence. Where no other evidence is adduced in a case except written admissions in pleadings, which admissions are relevant evidence under section 19 or section 32 of the Indian Evidence Act, it is advisable that such records should be marked as exhibits and then referred to as evidence in the judgment of the court. I also agree with my learned brother that the contentions raised by the issues Nos. 2 and 5 in the case should have been kept more apart from each other in the judgments of the lower courts. I further think that it would have been much more satisfactory if, before acting on the admissions contained in the 10th defendant's written statement and on the fact of the production of the mortgage-deed by the 2nd defendant for his finding on the 2nd issue, the learned Subordinate Judge had called upon the 2nd defendant to adduce some oral evidence also in the usual way as to the payment and discharge. But, as I said before, I think that section 19 of the Indian Evidence Act does make the admission in the 10th defendant's written statement relevant evidence against the plaintiff. In a recent case before *Sundara Aiyar* J. and myself, (S. A. No. 1613 of 1908) *Sundara Aiyar*, J. considered the effect of section 19 of the Indian Evidence Act and held that the admissions of a third person against his own interest, when it affects his position or liability and when that position or liability has to be proved against a party to the suit, is relevant against that party. A statement whereby "a man charges himself with the receipt of sums of money" is, in most cases, an admission against his interest. Statements against interest are "presumed to be entitled to credit because the regard which men pay to their own interest may safely be considered as a sufficient guarantee against their prejudicing themselves by any erroneous statement and the assumed tendency of the declarations precludes the probability of any fraudulent statement." I know that "the greater number of cases decided upon this subject" in

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England "refer to written entries", but, as Phillips says in his Law of Evidence, "there seems to be no reason why the admissibility of such evidence should be limited to statements in writing". Whether other facts (other than the statements against interest) mentioned in the same document which contains the statement against interest could be relevant evidence against third persons under 32 (3) of the Indian Evidence Act is a question which does not arise in this case and it is unnecessary to say anything on that matter.

Even if my views on the points as to the 10th defendant's written statement having been taken by the lower courts as (a) duly placed before them as evidence at the trial and (b) legally admissible as relevant evidence against the plaintiff, are erroneous, there were sufficient materials before the lower courts (namely the production of Exhibit I by the 2nd defendant, etc.) to justify their conclusion on the 2nd issue in the absence of rebutting evidence on the plaintiff's side, and (as I have further stated already) the finding of the lower courts as to receipt of the whole amount of the mortgage money by the 10th defendant is really not attacked in the memorandum of second appeal.

I would therefore dismiss this second appeal with costs.

Tyabji, J.:—This appeal arises out of a suit in which the plaintiff claims the principal amount of Rs. 750 with interest by the sale of the properties mentioned in the plaint. The plaintiff alleges that his assignor advanced on the mortgage mentioned in the plaint the said sum of Rs. 750, and that the 10th defendant advanced a like sum on the same mortgage.

The defence is, first that no portion of the mortgage debt amounting in all to Rs. 1,500 was paid by the plaintiff's assignor but that the whole of it was paid by the 10th defendant; secondly, (and this is the point mainly involved in the present proceedings) that the whole of it had been paid off to the 10th defendant and that, as the 10th defendant was, according to the plaintiff, a co-mortgagee with the plaintiff's assignor, such payment was a discharge so far as the mortgagors were concerned. This contention was supported before us on the recent decision of the Full Bench in *Mannava Annapurnamma* v. *Uppala Akkayya*[1] by which, sitting in this Court, we are bound. The plaintiff did not prefer any claim in the alternative or otherwise against the 10th defendant, whose position as a defendant in the suit, against whom no relief is sought, but who sides with the other defendants, has been the cause of some confusion.

1. (1913) 24 M. L. J. 333 s. c. 13 M. L. T. 268,

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Ten issues were framed by the District Judge before whom the case was placed for settlement of issues. The 2nd issue was "Is the discharge pleaded by the defendants true and valid", and the fifth, "Is the discharge given by the 10th defendant, a co-obligee valid and binding as against the plaintiff and his assignor?"

The learned Subordinate Judge dealt with only these two issues, and his Judgment ends with the words, "In the above view I think it is needless to try the other issues". As to whether the whole mortgage debt had been paid off, the question of fact which is involved in the 2nd issue, the learned Subordinate Judge seems to record no finding; he merely says, "the possession of the document by the female naturally leads to the inference that the entire bond amount must have been paid by her". This furnishes no answer to the question of fact whether or not the whole debt had been paid by the mortgagor to the 10th defendant.

I think this is an extremely unsatisfactory way of recording a finding, if it can be considered to be a finding at all. *Sir Lawrence Jenkins* C. J. in *Dagdu* v. *Bhana*[1] pointed out the importance of having issues settled with precision. It would however be mere waste of time to settle issues, if, after they are settled by the District Judge, the Subordinate Judge in pronouncing judgment does not answer them definitely, but leaves the matter to be inferred from his reasoning however cogent his reasoning may be. It may, in some cases, be convenient to discuss two or more issues jointly, but that does not justify the absence of a specific finding on each issue, in the form of a categorical reply to the question involved.

On turning to the basis on which the learned Subordinate Judge deals with the two issues it will be found that the sentences preceding the sentence above quoted do not refer to any piece of evidence other than the fact that the mortgage-deed is produced by the assignee of the mortgagor. The learned Subordinate Judge proceeds, so far as I can follow, entirely on that fact and on the allegations in the pleadings, and apparently his chief ground of decision is that the allegations on the part of the plaintiff are improbable or less probable than those on the part of the defendants. The learned Subordinate Judge would have done well if he had tried to keep clear in his mind the difference between legal evidence and the probabilities of the allegations contained in the pleadings.

Had the trial and decision of this case been in strict conformity with the procedure laid down by law, it would have been a legitimate

1. (1904) I. L. R. 28 B. 420.

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matter for comment that the first defendant failed to go into the witness box for proving the alleged endorsement on the mortgage deed on which he relied, and it might have had to be considered whether the inference from such failure would not be sufficiently strong to permit of holding that the money had not been paid. The reference by the Subordinate Judge to what purports to be the 10th defendant's endorsement of full discharge on the mortgage deed is made without any warrant. There was no such endorsement before the Court. No evidence was given of any such endorsement having been made, and the document contains a note on it by the plaintiff's pleader to the following effect: "I accept the genuineness of the document, except the endorsement of discharge appearing on the back of it."

The judgment of the learned District Judge seems to me to be equally unsatisfactory. There is a similar absence of any specific finding on the various issues before the Court; he deals with the question under consideration in the following terms "10th defendant said she was paid off in full and so she has been, according to the bond itself and her written statement. That is to say, that in the matter of a joint mortgage wherein the shares of the mortgagees are not specified, one, the 10th defendant, admits full payment of the mortgage amount, and the fact that the 2nd defendant, one of the 1st defendants's vendees, who should have paid off the mortgage is the party who produces the discharged deed, is strong evidence that it really has been paid off. On these facts the Sub-Court dismissed the suit. Plaintiff appeals. In my opinion, as between the mortgagor and mortgagees the debt is cleared and this suit cannot be plaintiff's remedy". Then, he proceeds to discuss the question whether, if the whole of the mortgage money has been paid to one of the co-mortgagees, it constitutes a discharge of the mortgage debt as against the other co-mortgagees also and answers the question in the affirmative.

We are asked to proceed on the basis that the whole mortgage money has been paid off, it being contended that fact is proved by the allegation contained in the written statement of the 10th defendant to the effect that she had received the whole of the mortgage debt. That allegation is put forward before us as amounting to an admission under section 19 of the Indian Evidence Act, and it is contended that, being made in the written statement of one of the parties, it is already on record and, therefore, may be considered to be evidence in the case.

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If we accede to this argument, the result will be that a fact on which the parties are at issue (see the 2nd issue) will be assumed to have been proved as against the plaintiff by the very fact of its being alleged in the pleading of one of the defendants, by the very allegation which is necessary to be made in order that the issue may arise and but for which allegation the party making it would have been precluded from contesting the converse of his own allegation ; further that such allegation furnishes in itself the proof of its own truth and that though the person making the statement is a party on the record and presumably present in court, she need neither make the statement on oath in open court nor be subjected to cross-examination. This seems to me a startling result, but it has been argued before us that the result is brought about by the Indian Evidence Act.

But for the opinion expressed by my learned brother I should have said that I have no doubt that it cannot be so and should have thought it unnecessary to consider for this purpose the sections of the Indian Evidence Act relating to admissions in detail, as I now proceed to do.

Before doing so, however, I must point out that the statement in question is contained in the pleadings of the parties to these very proceedings. " The whole object of pleadings" in the words of Sir George Jessel, M. R. "is to bring the parties to an issue" (*Thorp* v. *Holdsworth*[1]) and when we speak of an admission in a pleading it seems to me to be a different thing from such an admission as is contemplated by the 17th and the following sections of the Indian Evidence Act. By an admission in pleadings we generally understand a concession made by one of the parties that a fact alleged in the pleading of the party opposed to him need not be proved. It narrows down the question before the Court. Unless a statement in a pleading is in the nature of such a concession, it can hardly be considered to be a fact admitted in the pleadings for the purposes of the proceedings in which the pleadings are originally filed. When a statement of fact contained in the pleadings does not narrow down the issues, then it should either not have been made in the pleadings at all and may consequently be struck off, or it must give rise to a fresh fact in issue—its function in the last alternative being (for our present purposes) to make it permissible for the parties to adduce evidence in order to prove or disprove the existence of the fact alleged. That being the function of the statement in the pleading, can that statement itself be adduced as proof of its own truth ?

1. (1876) 3 Ch. D. 637 at p. 639.

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When a party to a proceeding states that his contention is that a certain fact exists, can raising that contention be proof of the fact alleged to exist?

But assuming that the 17th and the following sections of the Indian Evidence Act apply, does the statement of the 10th defendant made in her written statement fall within the scope of those sections? The law of evidence relating to admissions is contained in sections 17 to 30 of the Indian Evidence Act. Admissions being a particular species of statements, they are distinguished from all other statements by reference to two classes of matters: first by reference to their nature or signification, secondly, by reference to the persen making them (who may be shortly referred to as the declarant). Thus, in the 1st place, section 17 deals with the essential nature of such a statement, *viz.*; that it must "suggest any inference as to any fact in issue, or relevant fact." Next, sections 18, 19 and 20 deal with the question as to who the declarant must be; S. 18 provides that the declarant must be either a party to the proceedings or his agent; Ss. 19 and 20 provide that the declarant may in certain cases be neither a party to the suit, nor his agent, but some such third person as is referred to in those sections. So far, the sections merely define admissions and distinguish them as a species of the genus of statements generally; and the definition of particularization is effected, as I have already stated, by reference first to the nature of the statement and secondly by reference to the relationship that the declarant bears to the proceedings. It is only when we reach S. 21 that we have for the first time any provision about the relevancy or admissibility of such a statement as may fall under the definition of 'an admission: S. 21 is general; sections 22 and 23 deal with special cases in which admissions are or are not admissible in evidence; sections 24 to 29 deal specially with the class of admissions which are made in criminal cases, or confessions; finally S. 30 deals with the effect in evidence of an admission.

The general scheme of the law therefore is that in the first place in Ss. 17—20 an admission is defined or descriminated from other statements; then in Ss. 21—29 it is laid down when an admission is relevant, finally S. 30 deals with the weight to be given to an admission. Hence before a statement can be proved as an admission, it must fall first under S. 17 (as to its nature), next under Ss. 18, 19 or 20, as regards the declarant; finally, under one of the sections between 21 to 29, as regards its admissibility.

Now the statement, the relevance or admissibility of which has to be determined, is the statement by the 10th defendant that she has received payment of the whole sum due on the mortgage. First, as to the nature of the statement, it must fall under S. 17. Next, with reference to the declarant, the statement must fall under one of the Ss. 18, 19 or 20. Thirdly with reference to the relevance or admissibility, it must fall under S. 21 or one of the following sections.

I think it does fall under S. 17, as it is a statement suggesting an inference as to the fact whether the whole money has been paid (which is a fact in issue).

The second and third points require consideration in detail.

In connection with the second point mentioned above *viz.*, that having reference to the person who must have made the statement which is sought to be proved as an admission, I should have thought that reliance would be placed on S. 18 which refers to the statements made by parties to the proceedings, this statement being made by one of the parties. Had that section been relied on then it might have become necessary to consider whether any paragraph other than the first paragraph of that section has any, and if so what, bearing on the present question. The section however that is relied upon is the 19th and not the 18th; and it is contended that S. 19 not only *determines* the narrow point which in my opinion it determines, *viz.*, by whom a statement may be made before it can be considered to be an admission within the terms of the Indian Evidence Act; but it is contended that S. 19 is wide enough in its own terms for determining whether or not a particular statement is admissible in evidence. That section consists of a rather involved complex sentence, but if it were printed in the following form

Statements

(1) made by persons whose position or liability it is necessary to prove as against any party to the suit,

are admissions,

(2) if such statements would be relevant,

(*a*) as against persons

(*b*) in relation to such position or liability in a suit brought by or against them, and

(3) if they are made whilst the person making them occupies such position or is subject to such liability", it would be clear in

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the first place that the main proposition contained in the section lays down that certain statements are admissions not that they are relevant: in the second place, that before a statement can be considered to be an admission under section, 19, there are three qualifications which the statement must have—two of them having reference to the person making the statement, or the declarant, *viz.* (1) that he must occupy some such position or liability as is necessary to be proved against any party to the suit, (2) he must be occupying such position or be subject to such liability when he makes the statement. The third qualification has reference to the nature of the statement, *viz.*, (3) that the statement is such that in a suit brought by or against the declarant it would be relevant (*a*) as against the declarant (*b*) in relation to such position or liability. This third qualification is, in my opinion, both necessary and sufficient to restrict the operation of the section in accordance with what I have stated to be the object of this section, *viz.*, not to lay down that certain statements are relevant or admissible but merely to add to the category of persons who may be the declarants. The statement referred to in S. 19 becomes admissible only provided that they satisfy the requirement of S. 17, as regards their nature, and S. 21 or any of the following sections, as regards their relevance. In short, S. 19 provides, in my opinion that in certain cases the declarant need not be a party to the suit, and that section must be read with direct reference first to S. 17, which provides (*inter alia*) that a statement must be made by the persons thereinafter mentioned in order to fall within the definition of an admission, and S. 19 must secondly be read with reference to sections 21 *et seq* which provide when statements that are admissions are relevant.

When the learned pleader for the respondent tried to argue that a reference to section 19 was sufficient in order to show that the statement in question was admissible in evidence, he naturally encountered some difficulty and he had to fall back upon the illustration and had to argue that the illustration went beyond the section. The illustration does go beyond the section in so far as it illustrates not only who may be the declarant of an admission, but also lays down that "the statement (therein referred to) is a relevant fact;" the proposition, that the said statement is a relevant fact is, it will be noticed, qualified in two ways, first that it is relevant only against A, and secondly that it is so if A denies that C did owe rent to B. The illustration exemplifies S. 19 in so far as it says that the statement is an admission

but as the facts postulated in the illustration conform with the provision of sections 17 and 21 and not merely with the provisions of S. 19, it is laid down that, in the circumstances referred to, the statement is not merely an admission but also relevant.

As I have already stated, the learned pleader for the respondent had perforce to abandon the attempt at bringing the statement now before us within the terms of the S. 19, but contended that the illustration to that section was on all fours. Now, it seems to me to be clear that the illustration would be applicable in its terms only if the 10th defendant had undertaken to collect the mortgage debt due to the plaintiff's assignor and had been sued by the plaintiff for omission to collect the mortgage debt, and then the 10th defendant had pleaded as her defence that there was no default on her part in as much as no money was due under the mortgage; in such circumstances a statement made by the mortgagor (not the co-mortgagee, the 10th defendant) that as a matter of fact some moneys were due to the plaintiff which the 10th defendant had omitted to collect, would have been (it is clear) admissible under the illustration to S. 19. The facts in that illustration, are not, it seems to me parallel to the circumstances of the present case. Supposing the landlord (B in the illustration) had sued his tenants for rent due, and had also for some reason made A party to the suit, alleging that A was his agent for collecting the rent, but claiming no relief against A, and A had denied that he was B's agent, the defence on the part of A and of the tenants being that rent was due to A, and not to B, and that the tenant had paid the rent to A and were not bound to pay it to B, could then the allegation of A (in his written statement) of having received the money, coupled as it would be with his allegation that he was entitled to receive it on his own behalf, and denial that there was any liability on his part to the landlord be itself evidence as between the landlord and his tenants that no rent was due?

The illustration to section 19 does not seem to me to cover the present statement, because the illustration is so framed that the statement therein referred to falls under the provisions of the sections covering the third of the three considerations to which reference has been made above, *viz.*, of sections 21—29 which provide in what cases admissions are relevant—whereas the present statement does not fall under any out of the said Ss. 21—29. The section that is relevant for the present purpose is S. 21, which provides that "admissions are relevant and may be proved as against the person who makes them or his representative in

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interest; but they cannot be proved by or on behalf of the person who makes them or his representative in interest." I need not refer to the exceptions mentioned in S. 21 as the present statement does not, it is clear, fall under any of them. Now, in this case, the alleged admission is sought to be proved against the plaintiff. The plaintiff is not the person who made the statement. Is he the representative in interest of the person who made it? In my opinion it would be straining the language of the section to hold that one co-mortgagee is the representative in interest of another co-mortgagee. What interest does the plaintiff derive from the 10th defendant? If there are any persons who derive any interest as far as this suit is concerned from the 10th defendant, they are the defendants who say that they have been discharged from liability by reason of the discharge given to them by the 10th defendant.

But even if it be assumed that the whole of the reasoning on which I have proceeded so far is fallacious, and the statement in question is relevant under the sections of the Indian Evidence Act which have been referred to, still it is clear that some proof of it must be given before it can be considered to form part of the evidence in the case and before the court can take cognizance of it. It is contended, either that it was brought to the notice of the court in such a manner as to render proof of it unnecessary, or that the written statement of the 10th defendant proves itself. I cannot accept either of these contentions; it seems to me that they cannot withstand careful consideration.

In support of the contentions last referred to, reliance was placed in the first place on S. 58 of the Indian Evidence Act. S. 58 provides that certain facts need not be proved: that a person need not prove the existence of such of the facts alleged by him to exist, and relied upon by him, as are referred to in section 58. Now, the facts referred to in section 58 include two sets of facts; first, those facts which both the parties have agreed to admit, and secondly, those, which by any rule of pleading, they are deemed to have admitted. It is clear that the fact now in question has not been admitted by both the sides; the plaintiff denies it. It is equally clear not only that by the rules of pleading the fact in question is not deemed to have been admitted, but it is one of the main facts in issue. Hence I am unable to understand how S. 58 can operate so as to make it unnecessary to prove the statement in question.

The next head of argument was that pleadings form part of the records of the court, and like affidavits, they are one form of adducing evidence before the court. No authority was cited for the proposition that the fact in question could be proved on affidavits, or that one of the ways of giving evidence of fact is for the party relying on it to allege it in his or her pleadings, or that, if the facts come to the knowledge of the court otherwise than through the medium of legal evidence, the rights of the parties can be decided on a consideration of such facts; and I am unable to find any support for these propositions. Pleadings, as I have already said, in my opinion, can and must be looked at only for one purpose—to be informed of the allegations and contentions of the parties. They show conclusively what are the allegations and contentions comprising the case that a person makes and raises before he comes into court. They do not prove that those allegations and contentions are true. Had they furnished any proof of the allegations on which the parties are at issue, the law would not have laid down that, in undefended cases, it is necessary for the plaintiff to adduce any evidence for proving the allegations he has made in his plaint.

Finally, even if we could assume that, by some entanglement of the law of admissions, this statement can be considered to be an admitted fact within S. 58 (though the proposition, as I have already said, appears to me to be opposed to all the principles of the law of evidence), it seems to me to be a matter to be borne in mind that there is a discretionary power to call for proof even of facts which may be considered to be admitted under S. 58, and I am not prepared to say that there may not be cases when the failure to exercise this discretion may be so grossly improper, as to make it incumbent upon the court to interfere even in second appeal.

For these reasons, I am of opinion that what has been considered as an admitted fact in this case is not so, and that, even if the 10th defendant's statement above referred to can be considered an admission within the terms of the Indian Evidence Act, and thus a relevant fact, then it has not been proved in any manner required or permitted by the law of evidence. It follows that, if the case of the respondents had rested on that statement alone, I should have been of opinion that they must fail on the materials which are now before the court.

There is however one other circumstance which has been referred to above and must be considered; it is that the instrument creating the mortgage debt is produced by the alienees of the

debtors, and this no doubt creates a presumption that the debt has been paid off. Such presumption may of course be very weak in a case where there are several joint creditors (as is alleged in this case). The instrument may be handed over by one of the joint creditors to the debtor under such circumstances as to raise no presumption of discharge at all, as against the joint creditors other than the one who had custody of the instrument of debt. It may well happen that the joint creditor gives back the instrument creating the debt as soon as his own interest in retaining it in his possession is over, that is, as soon as the debt is discharged to the extent to which he is interested in recovering it, so that the instrument creating the debt may go into the possession of the debtor without the debtor having paid the whole debt, but merely that portion of the debt which was the rightful due of the joint creditor who had the custody of the instrument of debt. On the other hand, it is only natural to presume that, if the plaintiff or his assignor had had any interest in the retention of the mortgage deed by the 10th defendant, there would have been some safeguard against the 10th defendant yielding up the deed without the consent or knowledge of the plaintiff or his assignor, and, in the circumstances of this case, it seems to me that we should not be wrong if we proceed on the basis that the burden of proving that any debt is still due on the mortgage deed lay on the plaintiff, and, if it is so, there is no doubt that the plaintiff had not discharged that burden; nor among the grounds of appeal is it complained of that the plaintiff was prevented from adducing any evidence in support of his case.

I should however have been loth to base my decision on the mere ground that the burden of proof had not been discharged in a case of this nature which had been tried as this case has been tried, had I not after giving the case my best consideration come to the conclusion that a remand would result ultimately in the same way as the case stands at present. It seems more than likely that the omission to prove the endorsement on the mortgage deed was through a mere oversight, and that the attention of the parties and of the court was not drawn to the fact that its genuinenesss was not admitted by the plaintiff's pleader; it is possible that the plaintiff was not anxious to bring that omission to the notice of the defendants, and even that for the purposes of the suit it was conceded by the plaintiff that the whole amount of the mortgage debt was discharged. The 10th defendant is now dead, and it would seem that proof could now be given not only of the endorsement of discharge by her, but even of her statement in what was her written state-

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ment, when she was a party to the suit under section 32 (2) of the Indian Evidence Act. If this were done (and it could be done by mere formal evidence) it would be extremely difficult for the plaintiff to adduce any evidence which could displace the effect the evidence which would then be before the court on behalf of the defendants; had the plaintiff had any evidence in support of his case and in rebuttal of the inference from these facts, it would and ought to have been indicated, even if by some error in procedure it was not actually adduced in court.

Before bringing however this judgment to a conclusion I wish to express once more my view that, if the proceedings at the trial had been conducted with a due regard to the real questions at issue and to the law of evidence and of procedure, the parties might have been saved much unnecessary expense and our decision could have been arrived at on a far more satisfactory basis than is now available.

For the reasons that I have stated, I agree that this appeal should be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair.

A. Krishnasami Aiyar ... *Petitioner.**

v

Chandravadana ... *Respondent.*

Cr. Pr. Code S. 488—"Child"—Meaning of—"maintain herself"—Prostitution not a profession in the eye of the law—Public policy.

Krishnasami Aiyar v. Chandravadana

The word "child" in S. 488 Cr. Pr. Code means a person who has not attained the full age i. e, age of majority.

It is against public policy to recognise prostitution as a profession by which a girl might earn her livelihood and 'maintain herself' within the meaning of that section and the law will not treat it as such.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Deputy Magistrate of Ranipet Division in Miscellaneous Case 80 of 1908.

T. Narasimha Aiyangar for *T. Rangachariar* and *K. Parthasarathy Aiyangar* for Petitioner.

C. Sydney Smith for the Public Prosecutor.

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* Cr.R.C. No. 400 of 1912 & Cr.R.P. No. 317 of 1912. 21st February 1913.

Krishnasami Aiyar v. Chandra-vadana

The court made the following

ORDER:—An order was passed under S. 488 Criminal Procedure Code directing the petitioner to pay to each of his illegitimate daughters maintenance at the rate of Rs. 7 (seven) a month. He now applies for an alteration of such allowance on account of a change in his and their circumstances.

The Petitioner is a pleader and he alleges that his income has been considerably reduced of late. The Magistrate finds that his income might be fluctuating but that there has not been such a change as would justify a reduction in the rate of maintenance awarded. In revision I cannot interfere with that finding.

The eldest daughter is now said to be 17 years old, and it is urged that she is no longer a "child unable to maintain itself" under S. 488. The word "child" has not been defined in the Criminal Procedure Code. In England it has got apparently various statutory definitions. But in the absence of any definition or anything to the contrary in the Act I am of opinion that a "child" is a person who has not reached full age. It is only then that she becomes competent to enter into any contract or enforce her claims; as this daughter has not attained the age of majority, i. e. 18, I think she is a "child" within the section.

Then it is urged that she is able to maintain herself. Her mother is a dancing girl and a prostitute. She and her sisters live with her. The Petitioner has, the Magistrate finds, failed to prove his allegation that his daughter already follows that profession. But it is said that at that age they become dancing girls and follow that life. But the law will not treat prostitution as a profession by which a girl might earn her livelihood and "maintain itself" under S. 488 Cr. P. C. It is against public policy to do so.

It is also said that this woman might earn a livelihood by honest labor. It is not alleged that she belongs to the labouring class. She has not been married nor has the petitioner made any attempts to get her married. There is no evidence to show that any employment was or is open to her.

For these reasons I must hold that no such change of circumstances has been proved as would entitle the petitioner to any modification of the order.

The Petition is therefore dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present;—Mr. Justice Sankaran Nair and Mr. Justice Bakewell.

Mangalasami Thevar and others ... *Appellants** in all cases.

v.

Satayappa Porandan and others ... ... *Respondents.*

Mangalasami Thevar *v.* Satayappa Porandan

Practice—Procedure—Revenue Courts—Estates Land Act—Suit by one of several co-sharers—Making others defendants on their refusal to join—Maintainability.

The general rule of procedure viz., that a person entitled to sue who refuses to join as a co-plaintiff may be impleaded as a defendant applies also to Revenue Courts.

Pramada Nath Roy v. *Ramani Kanta*[1] followed.

In this case the suit by one of two co-sharers for rent making the other co-sharer a defendant was dismissed on the ground that the both of them should have been plaintiffs. *Held*, reversing the judgment, that the suit was maintainable.

S. 3 cl (5) of the Estates Land Act does not apply when two persons are admitted to be entitled as co-sharers, and there is no dispute that either of them alone is the landlord.

Second appeals from the decree of the District Court of Ramnad at Madura in A. S. Nos. 576 and 578 to 583 of 1910 preferred against the decrees of the Court of the Special Deputy Collector of Ramnad in Summary Suits 720 and 956 of 1909, 1010 and 1012 of of 1910 and 1049 and 1050 of 09.

C. S. Venkatachariar for appellant.

The respondent not represented.

C. S. Venkatachariar submitted that the general rule of procedure that one of the many persons entitled jointly to a relief may sue making the others defendants when they are unwilling to join as plaintiff is applicable to Revenue Courts. The right to sue is a common law right and not the creation of the Estates Land Act and unless the Estates Land Act curtails the right, the general incidents attach to the enforcement of such right *Pramada Nath Roy* v. *Ramani Kant Roy*[1]. Neither Sec. 3 Cl. (5) 2nd paragraph nor Sec. 194 cl. (1) is applicable to a case like the present. There is no dispute between the co-sharers that either of them is not entitled to collect rent. The definition of "land holder" in Sec. 3 does not necessitate such a conclusien.

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* S. A. No. 1960 to 1966 of 1911. 19th February 1913.

1. (1907) I. L. R. 35 C. 331 (P. C.)

Mangalasami Thevar v. Satayappa Porandan

The Court delivered the following

Judgment :—It does not appear that there is any dispute beween the 2nd defendant and the plaintiff as to which of them is the landholder and the second paragraph of S. 3 (5) of the Estates Land Act does not apply to these cases.

In the absence of any provision to the contrary we are of opinion that the general rule of procedure applies, viz.,—that a person entitled to sue who refuses to join as a co-plaintiff may be impleaded as a defendant; *Pramada Nath Roy* v. *Ramani Kanta Roy*[1].

The decrees of the District Judge are accordingly reversed, and the cases are remanded to him for decision. Costs will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar, and Mr. Justice Tyabji.

Chakrapani Misro ... *Appellant.**

v.

Sadasiva Sodangi and others ... *Respondents.*

Tenant-in-common—Never in possession—Purchaser from—Joint possession with other tenants-in-common—not entitled to.

Chakrapani Misro v. Sadasiva Sodangi

Sadasiva Aiyar J. (*Tyabji* J. dubitante)

The purchaser of a portion of the common land from some of the tenants-in-common (who had never actual possession) suing for exclusive possession on the footing that the others had no right therein on failure to prove his right to exclusive possession will not be entitled to a decree for joint possession.

Watson & Co. v. *Ramachandra Dutt*[2], followed. *Narani Bhai Vagibai* v. *Ramchod Premchand*[3]. distinguished.

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Ganjam at Berhampore in A. S. No. 137 of 1911 preferred against the decree of the Court of the District Munsif at Aska in O. S. No. 676 of 1909.

Dr. S. Swaminadhan for Appellant.

T. Prakasam for Respondents.

The court delivered the following

Judgments :—*Sadasiva Aiyar* J :—The plaintiff (appellant) as purchaser in Court auction of 13 Charanams in a suit, to which some of the tenants in common of 150 Charanams of lands including

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*S. A. 1979 of 1911. 22nd July 1913.

1. (1907) I.L.R. 35 C. 331.

2. (1890) I. L. R. 18 C. 10. 3. (1901) I. L. R. 26 B. 141.

these 13 Charanams were parties sued to obtain exclusive possession of the said 13 Charanams out of the 150 Charanams on the allegation that the said 13 Charanams were in exclusive possession of his Judgment-debtors, and that the principal defendants Nos. 1 to 10 had no rights therein. The findings of fact are that, though the 150 Charanams belonged in common to defendants Nos. 1 to 10 and to the plaintiff's Judgment-debtors, the plaint 13 Charanams had been peaceably enjoyed by the defendants Nos. 1 to 10 alone all along for more than 15 years. On this finding, the suit for exclusive possession was dismissed.

It is urged in Second appeal that the plaintiff is entitled at least to joint possession with defendants Nos. 1 to 10 of the said 13 Charanams of lands with defendants Nos. 1 to 10. I think that the ruling in the well-known case of *Watson and Company* v. *Rambhund Dutt and others*[1], establishes that a decree for joint possession ought not to be passed in such cases in favor of tenants in common who never had actual possession. The case of *Naranithai Vaghjibhai* v. *Ramchod Premchand and another*[2], quoted by the appellant's learned counsel was the case of a Hindu co-parcener who was kept out from the joint possession of the family property, to which possession he was entitled by Hindu Law, owing to a stranger having been put into exclusive possession by other members of the co-parcenery.

The weight of the Privy Council decision in *Watson & Co.* v. *Ramachandra Dutt*[1], which applies to the rights of tenants in common cannot be affected by the decision in *Narani Bhai Vagibai* v. *Ramchod Premchand*[2], which refers to the rights of a Hindu co-parcener in a Joint Hindu family.

The Second appeal fails and is dismissed with costs.

Tyabji J:—I have a certain amount of doubt in my mind whether the principle referred to in *Watson & Co.* v. *Ramachandra Dutt*[1] on which my learned brother bases his judgment, is applicable in every case when the plaintiff is a purchaser from some out of several tenants-in-common and prays to be given joint possession of a specific portion of lands belonging to all the tenants-in-common, and whether such a plaintiff must necessarily be referred to a partition suit. In the circumstances of this case, however, I am not prepared to dissent from my learned brother.

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1. (1890) I. L. R. 18 C. 10.   2. (1901) I. L. R. 26 B. 141.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Ramasami Chetti ... ... *Defendant (Appellant).**

v.

Ramanathan Chetti ... ... *Plaintiff (Respondent.)*

Limitation Act (Act IX of 08) S. 12—Stamp papers, called and copy ready both on Saturday—Papers supplied and copy taken delivery of on Monday—Exclusion of Sundays—" Time requisite for obtaining copies.

Ramasami Chetty *v.* Ramanathan Chetty

On an application for a copy of an order (sought to be appealed against) stamp papers were called for on a Saturday and supplied on the ensuing Monday Similarly the copy was posted as ready on a Saturday and taken delivery of on the ensuing Monday. *Held* that the party was entitled to have both the Sundays excluded as time requisite for the obtaining of copies under S. 12 of the Limitation Act.

Civil Miscellaneous second appeal from the decree of the District Court of Ramnad in A. S. No. 690 of 1911 presented against the order passed by the Court of the Principal District Munsif of Paramakudi in E. P. No. 79 of 11 in E. A. No. 316 of 1911 in O. S. No. 853 of 1899.

K. Balamukunda Aiyar for Appellant.

K. Srinivasa Aiyangar for Respondent.

The Court delivered the following

Judgment :—The District Judge is wrong in holding that the appeal to his court was out of time. Stamp papers for a copy of the order of the first Court applied for by the appellant were called for on the 1st of July 1911 and were supplied on the 3rd but the applicant could not deposit the stamps on the 2nd as it was a Sunday. Again the copy applied for was ready on the 15th July and was taken out only on the 17th, but the 16th was a Sunday; the copy could not therefore be taken out on that day. Both the 2nd and 16th of July therefore must be excluded in the time requisite for obtaining the copy. See *Bechi* v. *Ahsan Ullah Khan*[1]. Deducting the two days, the appeal was presented on the 30th day after the order of the 1st Court and was, therefore not barred by limitation. We reverse the order of the lower appellate Court and remand the appeal for disposal according to law. The cost of this second appeal will abide the result.

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* C. M. S. A. No. 8 of 1912. 20th March 1913.

1. (1890) I. L. R. 12 A. 461.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :— Mr. Justice Sadasiva Aiyar.

Parathy Valappil Moideen ... ... *Petitioner**
(*Counter Petitioner*).

Cr. P. C. S. 488 cl. (4)—Mopla father—Children governed by Marumakkathayam law—Living in Tarwad house—Well-to-do Tarwad—Refusal to live with father—No ground for disallowing maintenance—"Unable to maintain"—Physical inability and not to want of means.

A Moplah father is not entitled to the custody of his children who are governed by the Marumakkathayam law. *In re* Moideen

S, 488 cl. (4) disentitles to maintenance only a wife who refuses to live with her husband without sufficient cause and does not disentitle a child who is living with its lawful guardian.

Inability to maintain referred in that section relates to absence of sufficient maturity of physical and mental development in the child rendering it in consequence unable to earn its living by its own efforts and does not refer to inability through poverty or absence of means. The fact therefore, that the children belong to a well-to-do Tarwad, is not a ground for disallowing maintenance to them when claimed under the section against the father.

Petition under SS. 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of the Joint Magistrate of Tellicherry Division in Mis. Case No. 8 of 13.

C. Kunhiraman for petitioner.

The Court made the following

ORDER.—This is an application by the father of two children who has been ordered under S. 488 of the Criminal Procedure Code to pay to the mother of the children Rs. 6 a month for their maintenance. The petitioner is a mopla who has divorced his wife who lives in her own tarwad house with her children, the parties being governed by Marumakathayam law though Mussalmans in religion. The grounds of the petition are: (1) the lower Court erred in law in ordering the petititner to pay for the maintenance of the children who belong to a well-to-do tarwad; (2) the lower Court erred in law in directing the petitioner to pay for the maintenance of the boy who is ten years of age and to whose custody the petitioner is entitled, and (3) the petitioner having expressed his willingness to take the boy and maintain him, the order of the lower Court with regard to the boy is illegal.

As regards the second ground, the petitioner might be entitled to the custody of the boy if the parties were governed by the

* Cr.R.C. No. 349 of 1913 & Cr.R.P. No. 282 of 1913. 14th July 1913.

In re Moideen

Sadasiva Aiyar J.

Mahomedan law, but as they are governed by the Marumakkathayam law, this contention fails.

As regards the 3rd ground the petitioner being willing to take the boy and maintain him has nothing to do with his liability to give the boy maintenance when the boy is living with his natural guardian. S. 488 cl. (4) disentitles to maintenance, only a *wife* who refuses to live with her husband without sufficient cause and does not disentitle a child who is living with its lawful guardian.

As regards the first ground, the fact that the children belong to a well-to-do tarwad has nothing to do with the liability of a father who has sufficient means to maintain his child and neglects to do so. It was argued by Mr. Kunhiraman that under S. 488 (1) it is only a child who is unable to maintain itself that is entitled to claim maintenance and that a child whose tarwad has got means to support it cannot be said to be a child unable to maintain itself. I think the inability referred to in the section relates to absence of sufficient maturity of physical and mental development in the child rendering it in consequence unable to earn its living by its own efforts and does not refer to inability through poverty or absence of means. This view is supported by the principle underlying the decision *In the matter of the petition of W. B. Todd*[1] where it was held that a child deaf and dumb and unable to maintain itself is entitled to maintenance although it may have arrived at the age of majority. I therefore reject this petition.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH]

Present:— Sir Arnold White, Kt. Chief Justice, and Mr. Justice Miller and Mr. Justice Oldfield.

Muthukrishna Aiyar and others ... *Appellants*.* *Plaintiffs.*

v.

Veera Raghava Aiyar and others ... *Respondents.* (*Defendants.*)

Transfer of Property Act, S. 130—Mortgage of a debt—Transfer of actionable claim—Mortgagee—Only person entitled to sue—Neglect to sue and debt barred—Liable to account for amount of debt.

Mortgage of a debt is a transfer of an actionable claim within the meaning of S. 130 T. P. A. and vests in the mortgagee all the rights and remedies of the mortgagor subject to certain equities in favour of the latter. As such

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* L. P. A. No. 147 of 1912. 22nd April 1913.

1. (1873) 5. N. W. H. C. R. 237.

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the only person entitled to sue for the debt is the mortgagee and if he omits to sue and allows the debt to become time barred, he is accountable to the mortgagor for the amount of the debt.

Mulraj Khataw v. *Vishwanath Prathuram Vaithya*[1] and *Shyama Kumari* v. *Rameshwar Singh*[2] followed.

Appeal under S. 15 of the Letters Patent against the decision of this Court in S. A. No. 949 of 1911 preferred against the decree of the District Court of Madura in A. S. Nos. 409 and 391 of 1910 in O. S. No. 715 of 09 on the file of the Court of the Principal District Munsif of Madura.

C. V. Anantakrishna Aiyar for appellant.

K. N. Aiya for Respondent.

The court delivered the following

Judgments:—*Chief Justice.*—Under Exhibit A the defendants mortgaged to the plaintiff a house and a promissory note which had been executed to the defendants by a third party as security for money owing by the defendants to the plaintiffs. The promissory note was not endorsed to the plaintiffs. It became time barred, and the question is whether on the taking of accounts the plaintiffs should be debited with the amount due on the note. It was not suggested that the plaintiffs could sue on the note. It was contended that the note was evidence of a pre-existing debt due by the 3rd party to the defendants, that that debt was by the mortgagee assigned to the plaintiffs and that the plaintiffs being the parties who were entitled to sue for the assigned debt were under an obligation to the defendants to do so before the right to recover the debt became barred by limitation. The promissory note refers to a pre-existing debt due by the 3rd party to the defendants, but I have had some doubt whether on the documents alone coupled with the fact that the maker of the note attested the mortgage to the plaintiffs—and that is all we have to go on—there is evidence of a pre-existing debt. No attempt appears to have been made to show that there was no debt (in the court of first instance the defendants sought to show that the amount due on the note had been paid) and I think we are warranted in holding that there was a debt. The mortgage thereof was in my opinion a transfer of an actionable claim within the meaning of S. 130 of the Transfer Property Act which vested in the transferee the rights and remedies of the transferor, subject to the equities which remained in the transferor by reason of the fact that the transfer was by way of security. This is in accordance with the decision of the Privy Council, in the recent case of

1. (1912) 24 M. L. J. 60. 2. (1904) I. L. R. 32 C. 27.

Muthukrishna Aiyar v. Veera Ragbava Aiyar

White C. J.

Mulraj Khataw v. *Visvanath Prabhuram Vaidhya*[1] which does not appear to have been reported when this appeal was argued before *Sundara Aiyar* and *Sadasiva Aiyar* JJ. In the Privy Council case the contest was between a party who held an assignment in writing of a policy and parties holding a deposit of the policy by way of security which was earlier in date than the assignment in writing. Their Lordships held in favor of the party holding the written instrument. In the judgment they observe, with reference to the assignment in writing: "It may well be that although absolute in form it was intended to be only by way of security so as to be subject to a right of redemption, but this does not affect the rights of the parties under the circumstances of the present case." And again "He (the party claiming under the instrument) has an absolute right to the proceeds of the policy." The rights of the transferor being vested in the transferee by the express words of the section, the transferee is the only party entitled to sue, and this being so, he is, I think, accountable to the transferor for having allowed the remedy to become time-barred.

I do not think any useful purpose will be served by a discussion of the English authorities. The cases turn on the language of S. 25 (6) of the English Judicature Act, 1873. In the Privy Council decision to which I have referred, their Lordships observe, "The error [of the court in India] arose from the learned judges not having appreciated that the positive language of the section precluded the application in India of the principles of English Law on which they based their decision".

I only propose to refer to one authority the decision of the Privy Council in *Shyam Kumari* v. *Someshwar Singh*[2]. There the mortgagors assigned to their mortgagee a debt due to them from a third person, and in taking the account of what was due to the mortgagee, the Courts in India debited him with the amount of the debt though he had not received it.

It was held, that it lay upon the mortgagee to use reasonable diligence to recover it from the debtor, and it appearing that no serious attempt had been made to do so it was held that it had been rightly debited in the account.

I think this appeal fails and should be dismissed with costs.

Miller J:—I am of the same opinion. After the recent decision of the Privy Council in *Mulraj Khataw* v. *Visvanath Prabhuram Vaidhya*[1] it seems impossible to contend that a hypothecation

1. (1912) 24 M. L. J. 60. 2. (1904) I. L. R. 32 C. 27.

Muthukrishna Aiyar v. Veera Raghava Aiyar

Miller J.

of a debt is not a transfer of an actionable claim within the meaning of S. 130 of the Transfer of Property Act. Their Lordships held that by that section a writing is required to effect a charge on an actionable claim. It follows that the remedies of the mortgagor are transferred to the mortgagee of the debt and he is entitled to recover the sum due from the debtor and if so entitled then he is rightly made liable if he without justification allows the debt to become irrecoverable (*Shyam Kumari* v. *Rameswar Singh*.[1]

In the present case an attempt was made in the Court of first instance to show that by agreement the 1st defendant was to recover the amount of the debt, but the District Munsif held that the provisions of Ex. A were clear, and there was no need to consider the oral evidence and it seems that the point was not pressed either in the District Court or here at the hearing of the second appeal, and we were not asked by the appellant to re-open the question on the evidence and must therefore proceed on the footing that there was no contract altering the position of the parties. We must deal with the case on the provisions of S. 130 apart from any contract. The plaintiffs endeavoured but failed to prove that the debt mortgaged had been by him paid to the 1st defendant and did not so far as I can see ever allege that the promissory note which was handed over to the plaintiff did not represent a debt which could be assigned. I find no difficulty therefore in accepting the view taken by all the Courts which have dealt with the matter so far, that what was mortgaged was a debt evidenced by the promissory note.

That being so it lay upon the plaintiffs to show that they were not in fault in allowing the recovery of the debt to be barred by limitation and they made no attempt to show that. There it was contended that the 1st Defendant was equally entitled to recover debt and therefore the plaintiffs cannot be made liable, the default was as much that of the one as of the other.

But the remedy open to the 1st defendant as creditor had passed by S. 130 of the Transfer of Property Act to the plaintiffs: what was retained by the 1st defendant was his right to redeem the mortgage. This contention is therefore of no avail and moreover was not so far as I can see raised at any previous stage of the case. I concur in dismissing the appeal with costs.

Oldfield J.—I concur in the decisions of my learned colleagues for the reasons given by them and I have nothing to add.

1. (1904) I. L. R. 32 C. 27.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Sri Raja Inugunti Prakasa Rajaningaru and others. ... ... } *Appellants* (Legal representatives) of the Plaintiff.*

v

Yeranki Peda Venkata Rao ... *Respondent (2nd Deft.)*

Inugunti Prakasa Rajaningaru v. Venkata Rao

Evidence recorded by Court not competent to try—Admission of, by consent—Validity of—Rules of evidence—Waiver of the benefit of.

Facts admitted in evidence being themselves relevant, provisions of law intended to test the credibility of witnesses or to enable the trying judge to make the test himself are not of such an important character that parties cannot waive the benefit of those provisions.

A suit was first instituted in the court of the District Munsif of Peddapur. On appeal, the District Judge of Rajamundry held that the pecuniary value of the suit was beyond the jurisdiction of the District Munsiff and ordered the plaint to be presented to the proper court; the plaint was accordingly presented to the Sub Court of Cocanada. At the trial, parties agreed that the oral evidence recorded at the former trial might be taken as evidence in the case. The District Judge on appeal held that notwithstanding the parties' consent, the Court could not act upon that evidence as the court that took it had no jurisdiction at all to act in the matter and remanded the case for taking evidence. On appeal, *held* that the Sub Judge did not act illegally in admitting the evidence, with the consent of parties.

Appeal from the order of the District Court of Godavari at Rajahmundry in A. S. No. 162 of 1909 preferred against the decree of the Court of the Subordinate Judge of Cocanada in O. S. No. 50 of 1907.

P. Narayana Murthi and *P. Somasundram* for Appellants.

V. Ramesam for Respondents.

P. Narayanamurthi and *Somasundaram* :—My submission is that the procedure adopted by the sub judge is only an irregularity which can be cured by the consent of parties. It does not affect the jurisdiction of the court. The rule that the judge should take down evidence himself is only intended for the benefit of parties and they can waive it. It is not founded upon any fundamental principles of public policy. Deposition on former occasions are admissible under S. 33 and I submit that the case in *Rami Reddi* v. *Seshu Reddi* [1] is not correctly decided Order 18 Rule 15 shows that the rule contained in Order 10 Rules 4 and 5 is not an inflexible rule. I rely on *Jugatandai* v. *Din Dyal*[2], *Maho-*

*C. M. A. No. 158 of 1912. 13th February 1913.

1. (1881) I. L. R. 3 M. 48.
2. (1864) 1 W. R. 310.

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med v. *Oomda*[1], *Sreenath* v. *Goluk*[2], *Naranbhai* v. *Narphankar*[3], *Ramayya* v. *Devappa*[4], *Jadu Rai* v. *Kani Shah*[5] 13 American Cycl. p. 1020 p. 1024. There is the distinction between relevancy and admissibility; if the evidence is otherwise irrelevant consent of parties cannot make it relevant. But there is no question that the present evidence is relevant.

V. Ramesam:—I concede that the evidence is relevant but submit that the principle that evidence should be taken is founded on grounds of public policy and cannot be violated.

The Court delivered the following

Judgment:—This is an appeal against the order of the District Court of Rajahmundry reversing a decree of the Subordinate Judge of Cocanada and remanding the suit for fresh trial. The Subordinate Judge had disposed of the suit on the merits but solely on evidence recorded by the Munsif's Court of Peddapur. This suit was first instituted and tried in the latter Court, but its decree was reversed on appeal on the ground that the pecuniary value of the suit was beyond the jurisdiction of a Munsif's Court and the plaint was returned for presentation to the proper court. The plaint was subsequently re-presented in the Subordinate Court. The parties presented a statement at the trial of the suit consenting to the evidence recorded at the former trial by the Peddapur Munsif's Court being treated as evidence in the suit and dispensing with any further evidence. The District Judge held that notwithstanding the consent of the parties the Subordinate Court's procedure in acting on the evidence recorded in the Peddapur Court was illegal. He was of opinion that as all the evidence in the case was illegally admitted, the suit had virtually not been tried on the merits and must therefore be remanded for fresh trial. The contention of the appellants in this appeal is that the evidence in question was not illegally admitted by the Subordinate Judge; and that the order of remand cannot therefore be upheld. It is argued that as there was no objection raised on the admission of the evidence on the ground of irrelevancy, as to which see *A. B. Miller* v. *Babu Madho Dass*[6] and the objection raised in the Court of appeal related purely to the manner in which relevant evidence should be brought on the record of the suit, the consent of both parties disentitled the respondent to

1. (1869) 13 W. R. 184.
2. (1871) 15 W. R. 348.
3. (1867) 4 B. H. C. R. A. C. J. 98.
4. (1905) I. L. R. 30 B. 103.
5. (1886) I. L. R. 8 A. C. 571, 605.
6. (1896) I.L.R. 19 A. 76 at 92 (P.C).

Inugunti Prakasa Rajaningaru v. Venkata Rao

any objection to it in the appellate Court. The District Judge, while apparently of opinion that irregularities in the mode of taking evidence might be cured by the consent of parties, considered that this principle should not apply to the present case, as the Munsif of Peddapur, who recorded the evidence, had no jurisdiction to try the suit and the proceedings before him were pronounced to be *coram non judice*. On appeal we are of opinion that the distinction drawn by him is not well founded. In *Maharajah Jugutender Bunwaree* v. *Din Dayal Chatterjee*[1] and *Lakshman Govind* v. *Amrit Gopal*[2] statements made by witnesses in a former suit were held to be admissible with the consent of the parties. In *Syed Mahomed* v. *Oomdah Khanum*[3] deposition not taken before the Judge who completed the trial were admitted though there was no legislative provision allowing this to be done. See also *Naranbhai Vrigbhukandas* v. *Naroshanker Chandra Shankar*[4] and *Jadhu Rai* v. *Kanizak Husain*[5]. In *Sreenath Roy* v. *Gobuck*[6] evidence given in a suit to which the person consenting was not a party and had then no opportunity to test by cross-examination was held to be rightly admitted. In *Ramaya bin Subaya* v. *Devappa Ganapaya*[7] it was held that consent made evidence, which might be recorded illegally or without jurisdiction by the trying judge at the disputed locality admissible. The *ratio decidendi* in all these cases was this—the facts admitted in evidence being themselves relevant, provisions of law intended to test the credibility of witnesses or to enable the trying judge to make the test himself are not of such an important character that parties cannot waive the benefit of those provisions. They are not rules of public policy which the parties cannot waive. See 13 American Cyclopœdia of Law and Procedure p. 1014. An appellate court is called upon to decide facts on evidence not taken before itself. The Legislature has recognised several exceptions to the rule requiring the oral evidence in a case to be taken before the trying judge. This requisite is dispensed with, in cases where a suit is transferred from one court to another and where there is a change of judge in the trying court owing to death, transfer or other cause. See O. 18 R. 4 Civil Procedure Code. We do not think that the circumstance that the appellate Court in the previous suit held that the Munsif who recorded the evidence had no jurisdiction to try the suit is material. That does not affect the validity of the consent of the parties which is the reason for the

1. (1864) 1 W. R. C. Rulings 310.
2. (1900) I. L. R. 24 B. 591.
3. (1869) 13 W. R. 184.
4. (1167) 4 B.H C.R. A.C.J. 98.
5. (1886) I. L. R. 8 A. 576 at 596
6. (1871) 15 W. R. 348.
7. (1905) I. L. R. 30 B. 109.

admission of evidence not recorded in the suit. It is unnecessary to express an opinion on the question whether in cases falling under S. 33 of the Evidence Act evidence recorded by a court can be regarded as not given in a judicial proceeding on the mere ground that the decree of the Court was subsequently set aside for defect of jurisdiction over the causes although *In re Rami Reddi* and *Seshu Reddi*[1] is an authority against the admission of such evidence in subsequent proceedings between the parties. We hold that the Subordinate Judge was justified in acting on the evidence recorded in the previous suit, set aside the order of the District Judge and remand the appeal for fresh disposal according to law. The costs of this appeal will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Bodi alias Lakshmappa and others ... *Defendants. Appellants**.

v.

Venkatasami Naidu and another — *Respondents.*

Hindu law—Will—Devise of ancestral property—Birth of son after will—Death of son, leaving father absolute owner—Validity of the devise—Construction—"Support the widow after her death perform funeral ceremonies and then take full possession"—Meaning of.

At the time, a will was executed, the testator had no sons and was competent to dispose of the property the subject of devise which was ancestral. Subsequently a son was born to the testator but the son dying, the testator became again, at the date of his death absolute owner of the property.

Held: the fact that the testator ceased to have power of testamentary disposition over the property for sometime by the birth of the son did not have the effect of making the will totally inoperative and the will passed the property to the legatee.

Shib Savitri Prasad v. *The Collector of Meerut*[2], followed.

Held further: a provision in the will that "the legatee should support the widow during her life, after her death he should perform her funeral rights and then take full possession of all the properties" did not confer any right of possession on the widow but only made the property during her life-time subject to her right of maintenance.

Second appeals from the decree of the Court of the Temporary Subordinate Judge of North Arcot in A. S. Nos. 132, 130 and 131

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*S. A. Nos. 1372 to 1374 of 1911. 5th March 1913.

1. (1881) I. L. R. 3 M. 48. 2. (1906) I. L. R. 29 A. 82.

Bodi *v.* Venkatasami Naidu

of 1910 respectively preferred against the decrees of the Court of the District Munsif of Chittoor in O. S. Nos. 112, 110 and 111 of 1907 respectively.

The Hon'ble Mr. T. V. Seshagiri Aiyar and *V. Bashyam* for Appellants.

T. R. Ramachandra Aiyar and *T. R. Krishnasawmi Aiyar* for Respondents.

The court delivered the following

Judgment:—The suit in this case was instituted by a legatee under a will executed by a Hindu, for recovering the properties devised to him. The first defendant is the widow of the testator, various pleas were raised in answer to the plaintiff's claim, but it is unnecessary to refer to them all, as the contentions in this second appeal have been confined to the points of law raised. The first of them is that the will ceased to be legally operative, as it related to the ancestral property of the testator and as a son was subsequently born to him, by which he ceased to have any power of his testamentary disposition over the property. It is admitted that the testator was quite competent to dispose of the property by will at the time when he executed it. Mr. Seshagiri Aiyar, the learned Vakil for the appellant argues that the cessation of the testator's absolute estate in the property in consequence of the subsequent birth of a son had the effect of revoking the will in law. He relies on the statement of the law in England as laid down in Jarman on Wills, Vol. I with regard to freehold lands (p. 161) before the enactment of the Wills Act. The learned author says "under the old law, it was essential to the validity of a devise of freehold lands, that the testator should be seised thereof by the making of the will, and that he should continue so seised without interruption until his decease." The appellant argues that this is a general principle of law which is applicable to wills in this country, although it is no longer the law in England in consequence of the enactment of the Wills Act. The next sentence in the learned author's treatise however shows that the observation in question is really made only with respect to cases where the testator subsequent to his will alienates the land devised by his own act. It does not appear that he means to state that a change in the nature of the estate possessed by the testator in consequence of supervening external events and not due to his own voluntary act or to a sale directed by a court would have the effect of revoking the will. Mr. Seshagiri Aiyar refers also to a passage in 40 American Cyclopaedia p. 1207. "An involuntary conveyance of property previously devised also removes it from the

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operation of the will and has the effect of revoking the will to the extent of the property conveyed." It is not clear that this passage goes further than that cited from Jarman, and that the involuntary conveyance referred to is meant to comprise anything more than a conveyance directed by a Court. He refers also to a note at p. 1212 where reference is made to *Long v. Aldred*[1] in the following terms. "Where a woman executed a will and then married and subsequently became a widow, her will which was revoked by the marriage was not revived by the death of her husband." The passage is of no use to the appellant, for it only lays down that, when a will is revoked by an event which has that effect in law, a subsequent event which makes the testator again competent to make a will, will not revise it. The revocation having taken effect, the will ceases to have any validity and the testator if he desires to dispose of his property by a testament must execute a fresh will. The same rule applies where the revocation of a will is made by means of an instrument executed for the purpose. If such an instrument is itself subsequently revoked, the revoked will would not thereby revive. Apart from the fact that the earlier English authorities do not seem to go to the extent contended for by Mr. Seshagiri Aiyar, we do not think that the rule in question should be applied in this country on the ground that it embodies a general principle of law. In the first place, we cannot accept the argument that the sound rule of law with regard to wills is embodied in the earlier rule and not in the Wills Act. It is admitted that, according to the latter a will is to be understood as speaking at the death of the testator and its validity is to be determined accordingly. 1 Vict. Ch. 26 S. 23 says "No conveyance or other Act made or done subsequently to the execution of a will, or relating to any real or personal estate therein comprised, except an act by which such a will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such Real or Personal Estate as the testator shall have power to dispose of by will at the time of his death." The same principle applies to cases of conversion by operation of law, as, by an Act of Parliament or by an order for sale pronounced by a Court. The reason of the earlier rule was that a will was regarded as a conveyance speaking at the time of its execution but the disposition made thereby to come into effect after the death of the testator. (See Williams Real Property p. 242, 19th Edn.) It was therefore held that, if the property ceased to belong to the testator subsequent to the will, it ceased in law to have any operation. The principle applicable in this country is that adopted in the English Wills Act that a

1. (1825) 3 Add. p. 48.

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will has the same effect as if it were executed at the time of the testator's death. See S. 77 of the Succession Act which lays down the rule as to the interpretation of Wills. Moreover as pointed out in *Subba Reddi* v. *Doraisami Pathen*[1] the statutory law of Wills here has not adopted the principle that a will should be deemed to be revoked in consequence of a change in the circumstances of the testator or a change with respect to his right to the property disposed by the will. (See S. 57 of the Indian Succession Act). It cannot be doubted that property which a person does not possess at the time of the will may be validly bequeathed. There is no reason why the same principle should not apply with respect to property which he owns absolutely both at the time of the bequest and at the time of his death, but with respect to which he loses the right of testamentary disposition during some time between the two dates. In the present case, the change resulting by the birth of the son consisted in the conversion of the testator's absolute right in the property disposed of to the fluctuating right of a Hindu co-parcener in joint family property. But the fluctuation eventually resulted in his acquiring absolute estate again before his death. We see no reason for holding that this intermediate alteration in the character of his right in the property should render invalid a disposition which he could validly make, both when he executed the will and when the will came into operation in law. S. 4 of the Probate and Administration Act vests the property of a testator in his executor excepting that which would have passed by survivorship to some other person. The effect of the section is merely to prevent the vesting of the property which the testator had no right to bequeath at the time of his death. Survivorship has the effect of rendering a will invalid only with respect to property which the testator could not dispose of at the time of his death. All other dispositions made by him are valid. Mr. Seshagiri Aiyar was not able to cite any decided case in respect of his contention. On the other hand, there is a dictum of the Allahabad High Court against him. *Shib Sabitri Prasad* v. *The Collector of Meerut*[2]. We hold that the will was not revoked by the subsequent birth of a son to the testator.

The next contention urged for the appellant is that the plaintiff is not entitled to the property before the death of the testator's widow. There is no substance in this contention. The will does not vest any estates in the widow. Her right under it is only to maintenance. The provision that the plaintiff should support the

1. (1907) I. L. R. 30 M. 369. 2. (1906) I. L. R. 29 A. 82 at. 85.

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widow during her lifetime and that, after her death, he should perform her funeral rites and then take full possession of all the properties bequeathed to him means no more than that, during her lifetime, the property should be subject to her right of maintenance. This is made perfectly clear by a later provision in the will.

The last contention raised is that, inasmuch as the will provides that, in case a son or sons are born certain specified properties and all other properties which the testator might subsequently acquire should go to him or them and inasmuch a son was in fact born, the plaintiff has no right to any property in consequence of the birth of the son excepting such as might in fact pass to such son. In the result we dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

A. Balasubramania Chetti and others ... *Appellants.**

v.

Swarnammal and another ... *Respondents.*

Decree—Construction—Inadvertent omission of words—Supplying of—C.P. C. S. 141—Execution Proceeding—Applicability to—Order. II r. 2—Successive applications for execution of different portions of decree—Maintainability of.

Balasubramania Chetti v. Swarnammal

A decree in a suit for possession of certain immoveable property and mesne profits awarded mesne profits till the date of plaint and subsequent profits "till the date of delivery or for three years whichever is the shorter period".

Held, as it was clear that there was an inadvertent omission of the words "from the date of the decree" after the words "three years", the decree was rightly construed as entitling the plaintiff to mesne profits for three years from the date of the decree.

Notwithstanding the alteration in language in S. 141 C.P.C , that section has not the effect of making the procedure of suits applicable to execution proceedings *Safdar Ali* v. *Kishun Lal*[1] followed.

Held accordingly that the rule contained in O. 2 R. 2 C. P. C. did not apply to execution proceedings and the decree holder was not prevented by reason of his having applied for only three years' mesne profits from the date of the plaint from subsequently applying for the remaining years' profits to which he is found entitled.

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* C. M. A. 259 of 1911. 26th February 1913.

1. (1910) 12 C. L. J. 6.

Balasubramania Chetti v. Swarnammal

Dismissal of a suit for mesne profits after the date of a decree for possession on the preliminary ground that such a suit will not lie cannot preclude a party from seeking to recover the same as covered by the decree in the suit for possession.

There is nothing in the Civil Procedure Code to prevent a decree holder from presenting successive applications for realising different portions of what he is entitled to under his decree.

Appeal from the order of the court of the Subordinate Judge of North Arcot in C. M. P. Nos. 216 and 184 of 1911 in E. P. No. 8 of 1911. (O. S. No. 4 of 04 on the file of the District Court of Salem),

L. A. Govindaraghava Aiyar for Appellants.

C. V. Anantakrishna Aiyar for Respondents.

The court delivered the following .

Judgment:—This appeal relates to proceedings in execution of a decree. The decree which was passed in a suit for possession of immoveable property and mesne profits awarded mesne profits till the date of plaint i.e. till the 23rd March 1904 and subsequent profits "till the date of delivery or for three years whichever is the shorter period." It is clear that there is here an inadvertent omission of the words 'from the date of the decree' after the words "three years". We agree with the Subordinate Judge in holding that the sentence must be construed as entitling the plaintiff to mesne profits for three years from the date of the decree. But it is contended that the plaintiff is barred from making this claim on account of certain prior proceedings. One bar pleaded is that the decree in O. S. 1185 of 09 on the file of the District Munsif's Court of Tirupathur which was instituted by the plaintiffs for mesne profits for three years from the date of the plaint, precludes this application. This objection was not pressed in the Lower Court and it was conceded that the suit was dismissed on the preliminary ground that a fresh suit for mesne profits subsequent to the date of the decree was not sustainable. It is now argued that it was also dismissed on the ground that the plaintiff ought to have included his present claim in his previous suit and not having done so he was barred from suing again by O. II R. 2 Civil Procedure Code. Assuming that this was the case the Court merely held that a fresh suit could not be sustained. This does not preclude the plaintiff from claiming subsequent profits, in execution of his previous decree. It is next contended that in any event Order II Rule (2) Civil Procedure Code bars the present claim, because the plaintiff made a previous application for execution in which he sought to

recover mesne profits only for three years subsequent to the plaint and not for the further period included in the present application It is argued that S. 141 C. P. C. makes the rules applicable to execution petitions by laying down that the procedure prescribed in this code in regard to suits shall be followed, as far it can be made applicable in all proceedings in any court of civil jurisdiction and reference is made to *Safdar Ali* v. *Krishna Lal*[1] in support of the argument, when the Calcutta High Court held that rule 9 of Order IX of the Civil Procedure Code providing for the restoration of a suit dismissed for default was applicable to an order passed under Order XXI either under Rule 98 or Rule 99. We shall presently deal with this. But we do not think that the change in the language of S. 647 of the Old Code of Civil Procedure was intended to make any alteration in the law. The Privy Council held in *Thakur Pershad* v. *Sheik Fakir Ullah*[2] that execution proceedings must be regarded as a continuation of the suit and that S. 647 of the Old Code of Civil Procedure (Act XIV of 1882) which enacted that the procedure prescribed in the Civil Procedure Code should be applicable in all proceedings other than suits and appeals did not make the Code applicable to execution proceedings. An explanation was added to the section by S. 4 of Act VI of 1892 to make this clear. This explanation has been omitted in S. 141 of the present Code. We do not think that this shows that it was intended to declare that execution proceedings are not a continuation of the suit. It was on general principles that the Privy Council held that a suit includes proceedings in execution, and the word 'suit' in S. 141 must therefore be understood as including execution. This is the view adopted by Messrs. Woodroffs and Amir Ali' in their notes to S. 141. When the words of a consolidating statute are clear, their effect cannot be cut down by a comparison with the language of earlier statutes. See Article 180 of the Limitation Act which shows that several successive applications may be made for the execution of a decree. That also shows that it could not have been the intention of the Legislature to apply to execution proceedings provisions laid down with regard to suits only. The procedure to be followed in appeals and execution applications is specifically laid down in the Civil Procedure Code. S. 141 is intended to apply to other proceedings in Civil Courts such as probate etc.

With regard to *Safdar Ali* v. *Kishun Lal*[1] it does not appear whether the order dismissing the previous application was passed

1. (1910) 12 C. L. J. 6. 2. (1894) L. R. 22 I. A. 44. s.c. 17 All. 106.

Balasubramania Chetti v. Swarnammal

under Rule 98 or Rule 99 of Order XXI of the Code of Civil Procedure. If it was passed under Rule 99, S. 141 might perhaps be applicable as the proceedings would not be between parties to the suit and the application might perhaps be treated as an independent original proceeding. If the order was under Rule 98, then S. 141 would not be applicable. The facts of the case are not stated in the report. We do not therefore feel pressed by the decision. This case was distinguished in its facts in the later case in *Asim Mandal* v. *Raj Mohan Das*[1] and the observations with regard to S. 141 are dissented from. We hold that the application is not barred by Order II Rule 2 of the Code of Civil Procedure which is not made applicable to execution applications by the Civil Procedure Code. We see nothing in the code to prevent a decree-holder from presenting successive applications for realizing different portions of what he is entitled to under his decree. Lastly it is argued that the 4th defendant is not liable to be personally arrested in the execution of decree. The plaintiff waives his right ff any, to arrest him. He will therefore be declared not liable to be arrested. We dismiss the appeal with costs with the modification mentioned above.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

Govindachetti and others ... *Petitioners**

v.

Perumal Chetty and another ... *Respondents.*

Charter Act S. 15 Cr. Pr. Code S. 144— Evasion of—Arbitrary and successive renewal of orders under—Magistrate under—To use his own discretion—District Magistrate's general instructions.

Govinda Chetti v. Perumal Chetty

The object of S. 144 Cr. Pr. Code is to enable Magistrates to make provisional orders for the purpose of tiding over temporary emergencies.

To use the section, by successive and arbitrary renewal of orders thereunder, for the purpose of permanently or for an indefinite period restraining persons from carrying on processions in public streets is an evasion of the code which the High Court has power under S. 15 of the Charter Act to prevent.

A Magistrate acting under S. 144 Cr.P.C. has to use his own discretion and come to a conclusion whether an order under the section is called for and ought not to allow himself to be wholly guided by the District Magistrate's general instructions.

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*Cr. R. C. No. 458 of 1913 and Cr. R. P. No. 969 of 1913. 1st September 1913.

1. (1910) 13 C. L. J. 532.

Govinda Chetty v. Perumal Chetty

Petition under Ss. 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the order of the District Magistrate of Salem in Criminal Petition No. 8 of 1913 presented against the proceedings dated 27th June 1913 on the file of the Sub-Magistrate of Salem.

L. A. Govinda Raghava Aiyar for Petitioner.

The Public Prosecutor on behalf of Government.

R. Sadagopachariar and *C. Ragagopala Aiyangar* for 2nd Respondent.

1st Respondent was unrepresented.

The Court made the following.

ORDER:—*Sadasiva Aiyar J.*—In the absence of the Polic Sub-Inspector's report of the 22nd June 1913 on the basis of whicl the Salem Town Sub Magistrate passed his order of the 27th Jun 1913, I cannot see my way to hold that the said order passed unde S. 144 of the Criminal Procedure Code was an order passed withot jurisdiction. The said report of the Sub-Inspector of Police is n part of the record sent to us and before we could send for and obta it the two months during which the order is to remain in force wou expire and there would be no use in revising the order after it spent.

I would, therefore, dismiss this petion, but I do not think it i appropriate to make some observations with reference to the procee ings of the Lower Courts. The Sub-Magistrate's proceedingsf 15th July 1913 lend some justification to the argument addressedo us by the petitioner's learned Vakil that the Sub-Magistrate condered himself legally bouud by the 'District Magistrate's ord' which prohibits the procession evidently in perpetuity. The S-Magistrate while he ought to give due and very great respect to e advice of the District Magistrate, ought to have used his n judicial mind on the Sub-Inspector's report and have come to is own conclusion whether a temporary and emergent order uer S. 144 ought to have been passed. The general instructions ofhe District Magistrate are not legally binding on the Sub-Magistratin particular cases. Again there is some force in the petition's learned Vakil's contention that the Magistracy at Salem are, uler the shelter of S. 144 of the Criminal Procedure Code, (which rtes to the passing of provisional orders to tide over temporary emeencies and in cases where "immediate prevention or speedy reme is desirable")—the Magistracy are, under the shelter of that seon,

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Sadasiva Aiyar J.

trying to clutch at a much more extensive jurisdiction namely a jurisdiction to prohibit the petitioners by a permanent injunction from taking processions throughout an indefinite future period along the streets of Salem. I have no doubt that under S. 15 of the Charter Act, we are entitled to prevent such indirect evasion by the Magistracy of the law as laid down in S. 144 (See *Ramjit Singh* v. *Luchman Prasad*[1] *Satish Chandra Roy* v. *The Emperor*[2] *Gopi Mohun Mullick* v. *Taramoni Chowdrani*[3] and *Queen-Empress* v. *Pratap Chundur Ghose*[4] the observations in which cases indicate hat the arm of the law is long enough to prevent such evasion of he Code by the arbitrary and successive renewals of orders passed nder S. 144 and that the powers given to the High Court under lause 15 of the Charter Act are sufficient to prevent such vasion.

The District Magistrate's order of the 23rd July 1913 refusing set aside the Sub-Magistrate's order of the 22nd June 1913 does ot state that there was again a temporary emergency and a contiing or existing insufficiency of the Police force to protect the titioners in exercise of their rights. Unless such a ground is pressly mentioned and is *prima facie* established in any future der passed in connection with this question the presumption, uld, in my opinion, be very strong that the order was passed rely in order to evade the provisions of S. 144 and that the gistracy are attempting to give themselves a much more extended jusdiction than is covered by S. 144 of the Criminal Procedure Cde.

With these observations I would dismiss this Revision Petiti.

Miller J:—I agree in the order proposed, and entirely concur in y learned colleague's observations as to the attempt which, there ses reason to fear, the District Magistrate of Salem is making, to obin a jurisdiction wider than that given him by S. 144 of the Co of Criminal Procedure.

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1. (1902) 7 C. W. N. 143.
2. (1906) 11 C. W. N. 79 at p. 82.
3. (1879) I. L. R. 5 C. 7 at p 19.
4. (1898) I. L. R. 25 C. 852.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis.

Mullangi Venkatarangam Chetty and another ... *Plaintiff.**

v.

M. Venkatasubbammah and others ... ... *Defendants.*

Hindu Law—Charitable endowments—Widow—Alienation of trusteeship—Reversioners—Right of—Suit for removal—C. P. C.S. 92—Scope of—No bar to-Evidence Act S. 32 cl (5)—Statement as to one's own adoption—Relevancy of—Length of time—Proof of formalities &c, dispensed with—Proof of enjoyment of rights, as adopted son—Sufficiency of.

Where a widow alienated the trusteeship of a charity which descended to her from her husband Venkatarangam Chetty v. Venkatasubbammah

Held (1)that the alienation did not by itself determine her estate in the office but that the reversioner could sue for her removal on that ground.

(2) That it was a proper ground for her removal.

(3) That S. 92 C. P. C. would not bar the suit.

The scope of Sec. 92 C. P. C. is to protect the public and it is not aimed at the infringement of individual rights and should not if possible be so construed as to deprive individuals whose rights have been infringed of their remedy.

If a general administration of the trust which includes the removal of a trustee is necessary to provide an efficient remedy for the infringement of the individual right, such general administration may be granted without regard to the provisions of S. 92.

Statement by a deceased person that he is the adopted son of another made before any question is raised as to his adoption is relevant under S. 32 Cl. 5 for the purpose of proving his adoption. That section does not require that the statement should be by a person other than the person whose relationship is in question.

Where adoptions have taken place so long back that actual evidence that all the proper formalities have been observed cannot reasonably be expected, it is quite sufficient to show that the persons in question have always been treated as adopted and have enjoyed the rights of adopted sons.

Venkata Subba Row & *Radhakrishnaiya* for plaintiffs.

C. P. Ramaswamy Aiyar and *G. Krishnaswamy Aiyar* for defendants.

The Court delivered the following

Judgment :—This is a suit brought by the next reversioner of the deceased Subbaraya Chetty, who died in 1899, against his widow Mullangi Venkata Subbammah, who on his death became trustee for her life in succession to him of the charity which is the subject of his suit. On the 12th December 1900, finding, according to her evidence, that she was old and unable to manage the charity

* C. S. No. 280 of 1911. 11th February 1913.

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and that the reversioner Thumbu Chetty, was also old and infirm and left her to do what she liked with it, she alienated it to the 2nd and 3rd defendants who were maternal relations of her husband. The plaintiff's claim that they are the next reversioners and that this alienation of the trust was illegal, and they ask for a declaration that they are the present trustees of the endowment referred to and entitled to possession of the bazaars and to conduct the charities specified in the schedule, that the alienees may be declared to be the nearest reversioners and to have become entitled to the present enjoyment of the office by reason of the alienation and that, if necessary, the defendant may be removed from her office as trustee of the endowment.

Now it is not denied on the part of the defendants—it could not be denied, that the widow has no power to alienate the trusteeship; their main defence rests upon this that the plaintiffs are not the next reversioners of the 1st defendant's husband and have no rights in the matter. The plaintiffs are the sons—it has not been seriously disputed—of one Mullangi Venkanna who according to their case was the adopted son of Mullangi Venkatarangam, adopted by his wife Annapoornammal after his death. In the very deed of release Exhibit A, by the 1st defendant to the 2nd and 3rd defendants, it is recited that this Mullangi Venkatarangam was a close relation of the 1st defendant's husband, Mullangi Subbaraya Chetty, and for some years had managed the charity during his lifetime and that his widow, under his directions, had handed it over, after his death, to Subbaraya Chetty who had then become of age to manage it himself. In view of this and other evidence in the case, it is not now disputed by the defendants that this Venkatarangam was a *dayadi* of the 1st defendant's husband and the only question that remains as to the pedigree is whether it has been proved that the plaintiff's father Venkanna was the adopted son of Venkatarangam. Now the alleged adoption must have taken place, if it took place at all, a very long time ago, as Venkatarangam would appear to have died about the year 1862—at least it is so stated in a plaint filed by the defendant—and only one old lady has been called to speak to it and she gives, as might be expected, a very confused account, at any rate as to the date. But there is a strong body of documentary evidence and evidence of conduct going to establish the adoption. Though it is proved that there were in existence two *dayadis* of the deceased Venkatarangam one Thumbu Chetty and 1st defendant's husband Subbarayalu, yet it is most clearly proved that even after the death of Annapoorni the property of the deceased Venkatarangam were

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enjoyed by this man Venkanna who always described himself Mullangi Venkanna as his son; and that this enjoyment which was known to the reversioners was acquiesced in by them and no claim was ever put forward on their behalf. A rather weak suggestion was made by one of the witnesses that the 1st defendant's husband who was a Sub-Registrar was a man of too much dignity to assert any title to these properties, but I think that may be disregarded ; and it certainly cannot apply to the other *dayadi* Thumbu Chetty. Now under S. 50 of the Evidence Act I think that the conduct of all parties is very strong evidence that there really was an adoption. Then there is important documentary evidence contained in sale deeds and mortgages by the deceased Venkanna and in his will in which he describes himself as the adopted son of Venkatarangam.

This evidence has been tendered and admitted under sub-section 5 of Section 32 of the Evidence Act which says that " when a statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised, " it is admissible. Mr. Kristnaswami thought to argue that though Venkanna must have had special means of knowledge whether he was adopted or not, his statement was inadmissible because it related to his own relationship. Therefore what his contention came to is this—that he wished to read the section thus : " When a statement relates to the existence of any relationship by blood, marriage or adoption between persons other than the person making the statement. " Not only are those words not there and therefore there is no justification for inserting them, but such a construction of the section would make illustration (k) wrong ; because illustration (k) says " where the question is whether A, who is dead, was father of B, a statement by A that B was his son is a relevant fact ; and if a statement by the father that B was the son is a relevant fact, I cannot see why a statement by B that A was his father should not equally be a relevant fact ; and I am not satisfied that there is any English authority to the contrary, if that were material. It seems to me that on the plain wording of the section this evidence is admissible. Then it comes to this, this man Venkanna not only inherited the property of Venkatarangam without objection but also disposed of it in these various documents which have been put in. And then we have his will in which he described himself as the adopted son of Venkatarangam ; and as shewing his connection and his relations with the husband of the 1st defendant

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there is this very noteworthy circumstance that he made Subbarayalu his executor and provided that if Subbarayalu decided to adopt one of his sons no objection was to be raised to such adoption. There is absolutely no reason for supposing that that will was not made *bonafide* and did not represent the real state of the relations existing between the parties.

For the defence we have only had some exceedingly unsatisfactory and mostly interested evidence. The first witness, however, for the defence, who was called to speak to the granting, or non-granting of certain temple honours to the plaintiffs and their father, stated that Venkanna was the 1st defendant's husband's *dayadi.* And the second witness, the 1st defendant who made the alienation in favour of the 2nd and 3rd defendant and is interested in supporting it, in her examination-in-chief, only went so far as to say " I am not aware whether Venkatarangam had adopted Venkanna " and she had to admit that she knew, but said that she did not know if the plaintiffs were sons of Venkanna. This evidence seems to me exceedingly unreliable. Venkanna, she says, used to go to her house and there were disputes ; he used to say we are dayadis ' ; My husband used to say ' you are not blood relations, you are not our dayadis '. " I have no hesitation whatever in disbelieving this evidence. It appears further both from her evidense and that of the 3rd defendant that, when as Venkatarangam's widow she sold a house which formed part of her husband's estate, she and the purchasers considered it necessary to take a release from the plaintiffs in which their present claims are clearly stated by them, and to pay them Rs. 1,200 in consideration of their giving up all objection to her alienations.The plaintiffs appear to be now in poor circumstances owing to the alienations made by their father, but it certainly seems to me a very strong circumstance in support of their case that this release should have been taken. The evidence of the 3rd defendant did not impress me as satisfactory. He did not admit that he actually took the plaintiffs to Mr. Venkatasubba Row to give instructions for the preparation of the plaint, but he admits that he went there and that he gave instructions as to whole of the pedigree except the adoption. As against his evidence here I set his conduct in insisting on getting a release from the plaintiffs when he became one of the purchasers of the property I have mentioned. The only documentary evidence relied on on the other side is a plaint which was filed in 1873 by another *dayadi* against Subbarayalu the 1st defendant's husband and Annapoornammal. It complains that certain property belonging to that branch had been looked after by

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Annapoornam's husband Venkatarangam during his lifetime and had afterwards been looked after by the 1st defendant's husband Subbaraya Chetty during the lifetime of the widow of the last owner, and that, on her death, Subbaraya Chetty was appropriating the rents and profits to himself, and that he and Annapoornam—so it is alleged—were seeking to have the property registered .in their own names. All that appears with regard to this suit is that five years afterwards in 1878 it was dismissed for want of prosecution. It does not even appear that any pleadings were ever filed on the other side, or even that the parties were served, except in so far a Vakil appeared for them on the occasion when the suit was dismissed. I do not think that any reliance whatever is to be placed upon what is asserted or omitted in a plaint of that character and it is of course possible that the plaintiff in that suit may have been interested in ignoring or denying the adoption now in question.

On the whole I have come to the conclusion that the plaintiffs have made out their case. It is true that there is no satisfactory evidence on which I should be prepared to act as witnesses who actually saw the adoption. Nor is there any such evidence that the adoption was made with the consent of the *Sapindas*? As to that, there is the indirect evidence of conduct, because I find that Venkanna was treated as the adopted son of Venkatarangam by the 1st defendant's husband for years, when it would have been for his interest to dispute his adoption if he could. According to the well-known cases which have been referred by Mr. Venkatasubba Rao in the case of adoptions which occured, at any rate forty years ago, one cannot expect actual evidence that all the proper formalities were observed, and it is quite sufficient to shew that the parties have always been treated as adopted and have enjoyed the rights of adopted sons. I find, therefore, that, in so far as the adoption is concerned, the plaintiffs have established their claim. The next question is, to what reliefs are plaintiffs entitled. That the alienation was illegal is not disputed nor is it claimed that the suit is barred by limitation. A case in (*Pydigantam Jagannadha Row* v. *Rama Doss Patnaik*)[1], was referred to as to the consequences of illegal alienation of this kind. As I read that case, all that was meant to be laid down was, not as was first contended for the plaintiffs that the effect of the alienation was to determine the estates of the trustee and let in the next reversioner to see for the removal of the trustee in a proper suit. The language of Mr. Justice *Subramania*

1. (1904) I. L. R. 28 M. 197; 14 M. L. J. 67.

Aiyar at pages 200 and 201 seems to me to be susceptible of that meaning and such a position also seems to me to be in accordance with good sense.

It is, however, contended that under S. 92 of the Code of Civil Procedure no suit lies to remove a trustee of a public charitable endowment without the sanction mentioned in the section. The new section no doubt provides, sub section (2), that no suit claiming any of the reliefs specified in sub-section (1), one of which is removing any trustee, should be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section; and at first sight that would appear to be a bar to the present suit. Even so the scope of the section is to protect the rights of the public, and it is not aimed at the infringement of individual rights, and should not, if possible, be so construed as to deprive individuals whose rights have been infringed of their remedy. In Woodroffee and Ameer Ali's Edition of the Code, page 350 (first edition) the learned authors discuss the question and appear to be of opinion that such a case does not come within it and that, if a general administration of the trust which has included the removal of the trustee is necessary to provide an efficient remedy for the infringement of the individual right in question, such general administration may be granted without regard to the provisions of the section. Applying these principles to the present case, I hold that in view of what has happened it is necessary for the protection of the plaintiff's rights as reversioners that the 1st defendant should be removed from the office of trustee by reason of misconduct in alienating it to the 2nd and 3rd defendants, and I accordingly remove her and declare that the plaintiffs as next reversioners are entitled to succeed as trustees and give them a decree against the defendants for possession of the trust properties with costs.

The trustees to file an account of trust properties that came to their hands since 12th December 1900, and the case to be referred to Chambers for taking the necessary accounts, defendants 2 and 3 to file accounts within two months, and seven days for objections.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, Chief Justice, and Mr. Justice Oldfield.

S. Ranganatham Chetty *alias* Narayana-swamy Chetty ... ... } *Appellant** *Plaintiff.*

v.

S. Lakshmiammal ... ... *Respondent.* *Defendant.*

Ranga-natham Chetty *v.* Lakshmi-ammal

Res judicata between co-defendants—Test—Conditions under which defendant could appeal when suit dismissed—C.P.C. (Act V of 1908) S. 11—Competency of the original Court to try subsequent suit—Principles discussed—Combination of causes of action and institution of suit in higher tribunal—Effect of res judicata not taken away—Negligence of guardian ad litem—Answer to plea of res judicata against minor.

Where a plaintiff cannot get at his right without the court trying and deciding a case between co-defendants, such decision will operate as *res judicata* in a subsequent suit between the co-defendants.

Cottingham v. *Earl of Shrewsbury*[1] followed.

If a defendant is aggrieved by such adjudication he has a right of appeal notwithstanding the dismissal of the suit against him.

Krishna Chandra Goldar v. *Mahesh Chandra Saha*[2] followed.

For the purpose of determining whether or not the adjudication is appealable it is open to the parties to go behind the decree and see what really the adjudication was.

In a suit by a creditor of the present plaintiff and his father to declare that an alienation by the plaintiff's father in favour of the present plaintiff and the present defendant was in fraud of creditors, in the alternative for a declaration that the plaintiff's ½ share in the property was liable for the debt, the present defendant pleaded that the alienation was not in fraud of creditors and that the property belonged to herself exclusively and not the plaintiff also (who was made a co-defendant in the suit). The court held that the alienation was not in fraud of creditors. It also held on the alternative claim that the property belonged exclusively to the present defendant.

Held that that decision operated as res judicata as between the present plaintiff and defendant.

A party cannot deprive an adjudication of the force of res judicata by combining the claim litigated upon with other claims and bringing the action in a higher tribunal

Negligence of the *guardian ad litem* is valid answer to the plea of res judicata against a minor party ; *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*[3] followed.

On appeal from the Judgment of the Honourable Mr. Justice Bakewell dated 8th October in the Ordinary Original Jurisdiction of this Court in C. S. No. 320 of 1910.

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*O. S. A. No. 95 of 1912. 23rd July 1913.

1. (1843) 3 Hare 627.
2. 9 C. W. N. 584.
3. (1894) I. L. R. 22 C. 8.

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White C. J.

K. Ramachendran for Appellant.

P. V. Duraiswami Mudaliar for Respondent.

The Court delivered the following

Judgment:—*White C. J.*—In this case the suit was dismissed by Mr. Justice Bakewell on the ground that the plaintiff's claim was barred as *res judicata* by reason of the decision in a suit which was brought in 1902 in the City Civil Court. The plaintiff appeals. The question arises in this way. In 1902 a man who had obtained a decree against the present plaintiff and the present plaintiff's father in the Small Cause Court brought a suit in which the present plaintiff's father was the 1st defendant, and the present plaintiff's step-mother was the third defendant. In that suit he claimed two reliefs. The main relief claimed was a declaration that a certain deed of sale which had been executed by the present plaintiff's father and which purported to be in favour of the present plaintiff and the present defendant was in fraud of creditors. He claimed by way of alternative relief that, if the deed of sale was held to be good, it should be declared that a quarter share of a certain house that is to say a half of the half share which was in dispute in that case and with which only the present suit is concerned, was the property of the present plaintiff and was available for the satisfication of the decree which the plaintiff in the City Civil Court suit had obtained. The present defendant, who was the 3rd defendant in that suit, pleaded that she was the absolute owner of the half share mentioned in the plaint in that suit. At that time the present plaintiff was a minor and he was then represented by a guardian who was an officer of the Court. The guardian in his written statement put the plaintiff to proof of the allegations mentioned in the plaint. At the trial of the suit, the Judge of the City Civil Court came to the conclusion that the deed of sale impeached by the judgment-creditor was good and the suit was dismissed. In dealing with the alternative claim put forward by the Judgment creditor the learned Judge held that under the deed of sale in question the plaintiff took no interest and that the interest in the property passed to the present defendant, the third defendant in that suit. The claim for alternative relief put forward by the plaintiff in that suit was the subject of a specific issue, and that issue only arose for determination in the event of the Judge of the City Civil Court holding that the deed of sale was good. The issue was in these terms "whether the said half share is the absolute property of the third defendant and the 2nd defendant has no share in it." What the learned judge held

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was. "Third defendant explains that as she was childless and as she took the sale deed when 1st defendant was seriously ill, 2nd defendant's name was also included in the document at her desire. This is quite probable. As the whole consideration for the sale deed passed from her, she is the absolute owner of the property, and 2nd defendant is not entitled to anything except what she may choose to give hereafter out of her free-will and affection". There was a decree passed in accordance with that judgment. The decree starts with a recital that the 'plaintiff sues for a declaration that a half or alternatively (the word 'alternatively' does not appear in the decree') one-fourth share in the undermentioned house etc., is liable to be attached". But in the operative part of the decree all that is said is that the suit is dismissed, and in view of the decision of the City Civil Court Judge that may well be the proper form of the decree, because he held first that the deed of sale was good and secondly that all the interest under the deed of sale did not in whole or in part become vested in the Judgment-debtor but in a third party. In that state of things it may well be that the decree, was correct in omitting the adjudication as between the 2nd and 3rd defendants.

Then in 1912 the plaintiff brought the present suit, and in this suit he asks for a declaration that he is entitled to the whole of the house in question. Half of the house passed to the plaintiff by inheritance from his father. The other half of the house was the subject matter of the suit in 1902. Alternatively the plaintiff claims in the present suit that if the deed of sale which was impeached in the suit of 1902 is valid, he may be declared entitled to one-fourth share in the plaint house, under the said sale deed the quarter share, that is half of the half share in question in the former suit going to the present defendant under the sale-deed. I think I have stated all the facts necessary for the consideration of the question whether the learned Judge was right in holding that the present claim is barred as being res-judicata. It is no doubt that it is an adjudication as between the defendants. It is not contended on behalf of the appellant, and it could not be contended, that in no case can an adjudication as between co-defendants operate as res-judicata of a question subsequently raised between the co-defendants. The test which the learned Judge applied in dealing with the question was the test which was laid down in the case of *Cottingham* v. *Earl of Shrewsbury*[1] and the test was thus defined. "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants the court will try and decide that case and the co-defen-

1. (1843) 67 E. R. 530; 3 Hare 627.

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dants will be bound. And the learned Judge referred to Bombay, Calcutta and Allahabad decisions in which that test was approved. We may also refer to a Madras decision, *Yusuf Sahib* v. *Durgi*[1] in which the question arose and was considered by this Court. There the learned Judges held that the decision in a previous suit on a matter raised and actively contested between co-defendants in such suit will operate as res judicata in a subsequent suit in which such co-defendants are arrayed as plaintiff and defendant. It seems to me, that, applying either test, the test in this case is satisfied and the result is that the decision does operate as res judicata. Applying the test laid down in *Cottingham* v. *Earl of Shrewsbury*[2] the City Civil Court Judge could not have decided the claims put forward by the plaintiff without deciding the case as between the co-defendants. The first claim was that the deed of sale was bad; alternatively if the deed of sale was good, the plaintiff took an interest in the property. As between the 2nd and 3rd defendants in that suit the contest was this. The son said " I take a half share the other defendant, the mother said ' I take the whole of the house'. That was the contest raised in the mother's pleadings. I think the plaintiff's claim in the suit of 1902 in the view the Judge took as to the validity of the sale deed could not be decided without an adjudication as between the two defendants and that there was a contest between the two defendants. It has been suggested that the guardian who appeared for the present plaintiff in that suit was negligent. But I fail to see how it could be said that there was negligence on the part of the guardian in that suit. For one thing, he was an officer of the Court. He had no interest in the matter. There have been suggestions of collusion and negligence; but it seems to me, so far as the record of the earlier suit is concerned, there is no evidence of it, and I think the learned Judge was right in declining to frame an issue in this suit as to whether there had been negligence on the part of the guardian. I think as the learned judge points out in his judgment, that the plaintiff in the earlier suit in effect represented the interest of the 2nd defendant in that suit. It seems to me that the interest of the plaintiff in that suit and the interest of the 2nd defendant was really the same, because the plaintiff, in the view of the deed of sale being good, was interested in showing that there was a fund in the hands of the 2nd defendant available for the satisfaction of his (the Judgment-creditor's) judgment debt. It was the interest of the 2nd defendant to make out that he possessed a fund out of which his

1. (1907) I. L. R. 30 M. 447. 2. (1843) 67 Eng. Rep. 530.

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(the Judgment-debtor's) judgment debt could be discharged. At any rate in any view the 2nd defendant in the earlier suit cannot be heard to say that it was not his interest to have it established that he had proprietary rights in the house in question and I do not feel called upon to speculate as to whether the family were or were not agreed that so long as the judgment creditor was ousted the other question was comparatively unimportant. I think the guardian of the 2nd defendant in the earlier suit took the right course. If the negligence on the part of a guardian can be established, I see no reason why, on the principle of the decision in *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*[1] the negligence could not be relied upon as an answer to a plea of res judicata.

Another point which was taken was there was no right of appeal from the adjudication as between the two defendants and it was argued that, if there is no right to appeal, the plea of res judicata cannot be relied on. I am not sure this is so. It has at any rate been held that the fact that the defendant in the previous suit had no right of appealing against the decision because the suit was dismissed will not affect the operation of the bar, when such defendant having the right to be joined as a plaintiff chose to contest the suit as a co-defendant". See *Yousif Sahib* v. *Durgi*[2]. But I do not think it necessary to discuss this question, because it seems to me that here the present plaintiff had a right of appeal from the adjudication as between him and his co-defendant in the suit of 1902. I think the test is, was he aggrieved by that adjudication? It seems to me impossible to contend that he was not aggrieved, his case being that he had a share in a certain house, the adjudication being that he had not. His grievance was that by reason of the finding that he had no share in the suit house the judgment debt could not be discharged out of the share of the house which he said was his house. The question was considered in a case which is reported in *Kristna Chandra Goldar* v. *Mahesh Chandra Saha*[3]. I find this observation of Mr. Justice Woodroffe "In some cases a suit may be dismissed as against the defendant and yet the latter may have a right of appeal. It is not, because the suit is formally dismissed as against the defendant that no appeal lies, but because such dismissal is ordinarily not merely no grievance but an actual benefit to the defendant. There is in such cases nothing to complain of. If there is, then notwithstanding that the suit is dismissed against him he may appeal."

1. (1894) I. L. R. 22 C. 8. 2. (1907) I. L. R. 30 M. 427.
3. (1905) 9. C. W. N. 584.

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It was pointed out that the decree makes no mention of the adjudication and the appeal being in form, against the decree, the plaintiff was precluded from appealing. It seems to me with all respect to the learned vakil, that there is very little in that argument. I have already dealt with the form of decree. For the purpose of determining whether or not the adjudication is appealable, I think it is open to the parties to be behind the decree and see what really the adjudication was. This point is dealt with in the Judgment of *Woodroffe* J. in the case of *Kristna Chandra Golder* v. *Mohesh Chandra Saha*[1]. The learned judge observed. "If the decree although apparently and so far as it goes is favourable to the defendants but when read by the light of the record, is really unfavourable and may prove injurious to them, then the defendants being aggrieved by it and having every interest to appeal may appeal". The test appears to be whether the appellant defendant is aggrieved by the decree. If so, he may appeal notwithstanding the suit has been dismissed against him.

Then the only point remaining is the question in connection with section 11 of the Code, whether the City Civil Court would have been competent to try this suit. It was suggested that the value of the present suit was Rs. 5000 and that being so, the adjudication by the City Civil Court in that earlier suit does not operate as res judicata. In the plaint in the present suit the relief sought is valued at Rs. 5000 but in the preseut suit the plaintiff claims to recover possession, not of part of the house which was the subject matter of the earlier suit but the whole house so far as the half of the house (which was the subject matter of the earlier suit) is concerned, the value of the relief sought, taking the plaintift's own figures is half of Rs. 5000 or 2500 and that amount is within the pecuniary limits of the Jurisdiction of the City Civil Court. There are authorities on the point to which our attention has been called, and it seems to me that there are two principles recognised in these authorities. One is the plaintiff cannot add causes of action to what I may call the original cause of action for the purpose of swelling the amount of the valuation and then say " the original Court is incompetent to try this question". That seems to be the principle on which the case of *Bhugwan Bhutti Chowdrani* v. *Forbes*[2] is decided. The other principle is shown in *Pathuma* v. *Salliam*[3], *David* v. *Girish Chander Guha* , *Sheoraj Roy* v. *Kasinath*[5] and

1. (1905) 9 C. W. N. 584 at 588.
3. (1900) I. L. R. 28 C. 78.
3. (1884) I. L. R. 8 M. 83.
4. (1882) I. L. R. 9 C. 183.
5. (1884) I. L. R. 7 A. 247.

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the principle there stated, as I understand it, is that for the purpose of dealing with this question of res judicata it is open to the Court to split up so to speak, the causes of action in the subsequent suit and if it be found that one of these causes of action is the same as the cause of action relied upon in the earlier suit, then although, taking all the causes of action together, the second suit may be said to be outside the jurisdiction of the original Court, still if the specific question be within the jurisdiction of the original Court and was determined by the original Court it is no answer to say that the whole suit is beyond its jurisdiction. I think the objection based on the ground that the original Court would be incompetent to try this suit fails. It may be observed that although we are told this point was taken before Mr. Justice Bakewell the learned Judge does not deal with it in his Judgment. One may infer either that the point was not pressed seriously before Mr. Justice Bakewell or that the learned Judge did not consider it worthy of serious consideration, and it seems to me that the learned judge was right and that this appeal should be dismissed with costs.

Oldfield J.—I concur.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court at Madras.]

Present:—Lords Atkinson and Parker of Waddington Sir Samuel Griffith, Sir John Edge and Mr. Ameer Ali.

Sri Raja Venkata Narsimha Appa Row Bahadur Zemindar, since deceased, (now represented by Meka Venkataramayya Appa Row Bahadur and another.)	*Appellants*. 2nd Defendant.*
v.	
Sri Raja Parthasarathy Appa Row Savi Aswa Row Bahadur, Zemindar and another.	*Respondents Plaintiff and 1st Defendant.*

Raja Venkata Narasimha Appa Row *v.* Raja Partha-sarathi Appa Row

Hindu Law—Impartible Estate-Regulation XXV. of Madras Regulations of 1802—Sanad confers descendible estate-Impartibility of estate from its nature or family custom is a question of fact—Concurrent findings of fact—Practice.

Where a Zemindari was subject of a Sanad in common form under Regulation XXV of the Madras Regulations of 1802 and was not proved to be impartible and descendible to a single heir either by special family custom or from its very nature, but was on the other hand, concurrently found by the Courts in India, not to be a Raj:

Held, that it was partible and descendible according to the ordinary rule of inheritance of the Hindu Law, for the Regulation XXV of 1802 did not affect the title to any land, nor could a sanad alter the ordinary rule of succession which it would under ordinary circumstances only only confirm. The Judicial Committee refused to disturb the concurrent finding of fact of the courts below as to the nature of the estate before the grant of the Sanadas it was not shown to be not justified by the evidence.

Collector of Trichinopoli v. *Lekkamani*[1], *Kachi Kaligana* v. *Kachiyava*[2], *Raja Venkata Narasimha Appa Row* v. *Raja Narayya Appa Row*[3], *Baboo Ganesh Dutt Singh* v. *Maharaja Moheshur Singh*[4], *Srimantu Raja Yarlagadda Mallikarjuna* v. *Srimantu Raja Yarlagadda Durga*[5], *Allen* v. *Quebec Warehouse Co.*[6], referred to and approved.

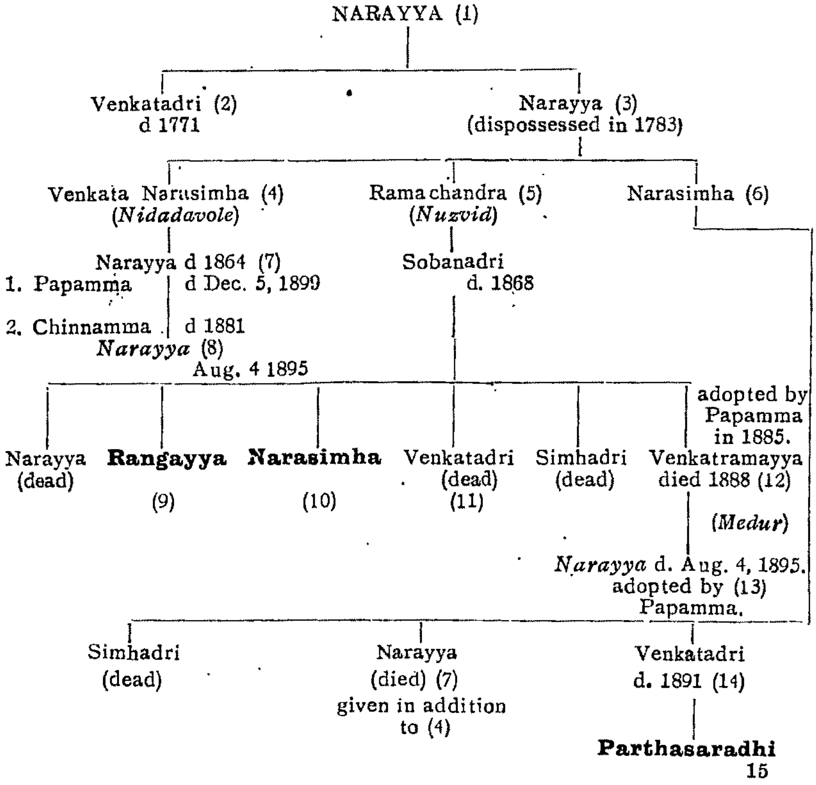
Consolidated appeals from a judgment and decrees of the High Court, dated November 20, 1905 which affirmed a decree of the Subordinate Judge of Kistna, dated December 2, 1899 and varied a decree of the Court of the District Judge of Godaveri, dated December 12, 1903.

* 24th July 1913.

1. (1874) L. R. 1 I. A. 306.
2. (1905) L. R. 32 I. A. 261.
3. (1879) L. R. 7 I. A. 38.
4. (1855) 6 M. I. A. 164, 187.
5. (1890) L. R. 17 I. A. 134.
6. (1886) 12 A. C. 101, 104.

The subject matter of the present litigation was the Zamindari States of Nidadavole and Medur. The principal questions for determination were—(1) whether the estate of Nidadavole was partible or impartible and (2) whether the adoption made on the 28th December, 1890 of Narayya Appa Row by a lady called Papamma Row was valid or invalid.

In the present Judgment of the Board only the first point has been decided, while the second point is reserved for argument during the next sittings. For proper appreciation of the facts of the case the following pedigree table of the litigants as proved from 1756, in which " Appa Row, has in all cases been omitted, will be useful:



Owing to the treaty between the Nizam and the British the overlordship in the Nuzvid Estate passed to the British in 1766 A. D. This Zemindari was held by two brothers, Venkatadri and Narayya, Nos. (2) and (3) who paid their dues first to Hussain Ali Khan, the lessee of the East India Co., and in 1769 and 1770 each obtained from the Collector lease for one half. In 1771 Venkatadri (2) died and the officials recognized that the half of the Zemindari that was

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under him devolved to his brother Narayya (3) as he died childless. In 1783 Narayya (3) rebelled against the Government who forfeited the Zemindari.

In 1784 the Government "constituted, his eldest son, Venkata Narasimha (4) to the Zemindari of Nuzvid." His step-mother raised a claim on behalf of her son, Ramachandra (5) and by an agreement made on July 17, 1795 the two half brothers divided the estate between them "according to the Code of the Hindu Law."

And in 1802 at the Permanent Settlement Sanads were issued under Reg. XXV of 1802 granting part of the old Zemindari to the elder brother Venkata Narasimha (4) as the Zemindari of Nidadavole and the rest to the younger brother, Ramachandra (5) as the Zemindari of Nuzvid. A third son of Narayya (3) Narasimha (6) who was the full brother of the new Zemindar of Nuzvid (5) received no grant and in 1816 he brought a Suit for a third of the whole property. The suit failed, but an arrangement was made by which the two Zemindars settled an annual sum, which was later on commuted into a grant of land, on Narasimha (6) the unsuccessful litigant. The new Zemindari of Nuzvid thus constituted at the Permanent Settlement was the subject of a partition Suit in 1871 between the grandsons of Ramachandra (5). In that suit a plea that it was an impartible Zemindari was raised and on appeal over-ruled (L. R. 7. I. A. 38) and in pursuance of the decree which was then passed. Venkataramayya (12) the youngest of the said grand-sons obtained a one-sixth share. The lands allotted to him for this share were the Zemindari of Medur which was the second of the estates in question on the appeals.

The first Zemindar of Nidadavole (4) died in 1827 and was succeeded by his son Narayya (7) who died in 1864 without issue leaving Papamma and Chinnamma his widows who were authorised by a will to adopt. On the death of Chinnamma which look place in 1883, Papamma became entitled to and remained in possession of the estate of Nidadavole. In 1885 she adopted under her husband's will Venkatramayya (12) who had become owner of the Medur estate. In January 1888 Venkatramayya (12) died leaving Venkayamma as his widow and Narayya (13) as his son, on whose behalf the Court of Wards took possession of the Medur estate. In a suit brought by a natural brother of Narayya (7) Venkatadri for a declaration that the adoption (14) of Venkatramayya by Papamma was invalid on the ground that he was given in adoption by his step-mother, the will was held to be

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genuine, but the adoption was declared to be invalid. In 1890 Papamma adopted a second time under her husband's will Narayya (13) the son of Venkatramayya (12) deceased. The effect of this adoption by Papamma was that on the death of Narayya (13) in August 1895, unmarried, both the estates of Nidadavole and of Medur which were vested in him, devolved on Papamma his adoptive mother as his sole heir. In October, 1895, Venkayamma, natural mother of the deceased Narayya (13) brought a suit against Papamma and the Court of Wards (then in possession of the Medur estate) to recover possession of the Medur estate on the ground that the adoption of her son by Papamma was invalid and if it was valid the effect of the adoption was to divest the Medur estate from Narayya. On her death Rangayya (9) and Narasimha (10), the heirs of her husband (12), continued the suit. The Subordinate Judge decided that the adoption in question was valid. Papamma having died in 1899 Parthasarathy (15) was made a respondent as legal representative of Papamma. Parthasarathy (15) on the other hand, brought a suit in the District Court of Godaveri against Rangayya (9) and Narasimha (10) claiming one-third share of the estates of Nidadavole and of Medur in the capacity of one of the reversionary heirs of Narayya (13). Rangayya and Narasimha contended that the will of Narayya (7) was a forgery and therefore Narayya's (13) adoption by Papamma was invalid and even if valid, it operated to divest Narayya (13) of the Medur estate and therefore one-third share could not be claimed by Parthasarathy (15). Rangayya (9) further contended that he alone as the eldest reversioner was entitled to both estates, to Nidadavole which was subject to the rule of primogeniture, and to Medur because it was impressed with the character of impartibility by it being brought into the Nidadavole family. Narasimha (10) also raised a fresh point. He stated that the adoption of Narayya was invalid and if not he was divested of his estate in Medur. He and Rangayya (9) alone as the nearest reversioners af Venkatramayya (12) were entitled to the Medur estate in equal moieties. In respect of Nidadavole he contended that it was not impartible in its nature and therefore he was entitled to a share. On December 12, 1903 the district Judge delivered his judgment holding that Parthasaradhi (15) had no claim to the Medur estate but gave him ⅓ share of the Nidadavole estate. All the parties then appealed to the High Court.

On Nov. 20, 1905 the High Court delivered its Judgment and held that the impartibility of the Nidadavole estate was not proved and that the will of Narayya (7) was genuine by which Papamma

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had full power to adopt Narayya who was not divested of his rights in the Medur estate. Therefore Rangayya and Narasimha preferred appeals to the Privy Council which were consolidated (an Order in Council dated March 7, 1913.)

The Appeals were argued on June 23, 24 and 25, 1913 and on preliminary objection being taken by Sir *Robert Finlay* K. C. in his address as to the effect of concurrent findings of the Courts in India on the question of partibility of the Nidadavole estate, further argument was deemed unnecessary and the following Judgment on that point was delivered by the Board. The other point might have been argued in August, 1913 during the extraordinary sittings of the Board to decide Indian Appeals, but was postponed till the next sitting in November on an application made by Sir Edward Clarke to the effect that counsel who had come to assist in the case had already left for India under the impression that the appeal would not be argued any further during the then sittings and that it was difficult to get him over to England at such a short notice.

Their Lordships who are always desirous of doing all they can to assist the parties in all matters calculated to meet the ends of justice, granted the application.

De Gruyther K. C. and *Dunne* for Raja Rangayya and his legal representative Raja Venkatadri contended that the Zemindari of Nidadavole was in its very nature impartible. It was a Raj and a Zemindari much larger than many. The question was set at rest by 7 I. A. 38 the Nuzvid case. Since 1802 the evidence was clear as to the senior succeeding, there was no question of co-parcenery during that time. There was thus succession by a single heir. Regulation XXV of 1802 neither corrected, nor did it take away any rights. The Zemindari was never sequestered; if it was, restoration placed one in the same position as before. Grant of Sanad to a title already in existence did not alter it. When the grant was made the Government recognised our title as existed before. Whether an estate was governed by the rules of the Hindu Law of inheritance or by primogeniture was a matter of evidence and in this case it was in favour of the appellants. The presumption was that the estate was impartible; it was for the Plaintiff to prove that it was governed by the Hindu Law. The Government was chiefly concerned with the revenue and not with the title. The matter was set at rest early in 1793 by the Government. In 1769 and 1776 the view put forward was that the Zemindars were Chiefs. What Grant in his Political Survey discussed was the nature of Deshmukh

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in Orissa under the Mohammedan rule. [*Lord Parker*: In 1802 whatever title there was, it was not in the nature of a Raj.]

Reference was made to *Baboo Ganesh Dutt Singh v. Maharaja Mohesher Singh and others*[1], *Hunsapore Case*[2], *Srimantu Raja Yarlagada Durga Mallikarjuna* v. *Srimantu Raja Yarlagada Durga*[3], *Kachi Kaliyana Rangappa Kalakka Kola* v. *Kachi yava Renjappa Kelakka Kola*[4], *Nuzvid Case*[5], *Bettia Raj Case*[6]. Harrington's Analysis of Bengal Regulations. Grant's Political Survey. Fifth Report of the Select Committee on the affairs of the East.

Sir *Robert Finlay* K. C. with him *Brown* and *S. Swaminadhan* for Raja Narasimha, contended that attempt was made in the High Court that they were Velmas; but all Velmas were not the same. There were Velmas of hills and of plains. The Zemindari did not go in regular course but by grant. [*Lord Parker*: Is there any presumption of impartibility on account of its remaining intact for a long time?] In 1756– 1770 both brothers were Zemindars, each held his half separately. The document of 1766 was signed by both brothers. In all official documents he was called a Zemindar. There were concurrent findings of the Courts in India that the estate was not a Raj but partible subject to ordinary Hindu Law of inheritance and the practice of the Board was not to interfere with such findings of fact. He quoted the following cases.

Allen v. *Quebec Warehouse Co*[7], *Owners of P.* and *O. v. G. S. Co.*[8], *Parbati Kunwar v. C. Pal Kunwar*[9], *Sajjad Hossain* v. *Wazir Ali Khan*[10], *Karuppan Servi v. S. Chetti*[11], *Kachi Kala yana* v. *Kachi yava*[4].

At this point *De Gruyther* was asked to argue the point of concurrent finding. Sir *Robert Finlay* offered to go on with the merits of the case if this objection was not upheld.

Sir Erle Richards K. C. with him *Ross K. C.* and *Madhavan Nair* for *Raja Parthasarathy Appa Rao.*

The Judgment of their Lordships was delivered by

Lord Parker of Waddington:—The principles to be applied in determining the question which now arises for decision do not, in their Lordships' opinion, admit of any controversy. These principles may be stated as follows:—*First*, in the absence of a sanad under Regulation XXV. of the Madras Regulations of 1802, those

1. (1855) 6 M. I. A. 187.
2. (1867) 12 M. I. A. 1
3. (1890) L. R. 17 I. A. 134.
4. (1905) L. R. 32 I. A. 261.
5. (1879) L. R. 7 I. A. 38.
6. (1902) L. R. 29 I. A. 178.
7. (1886) 12 A. C. 101, 104
8. (1893) A. C. 207.
9. (1909) L. R. 36 I. A. 134.
10. (1912) L. R. 39 I. A. 162.
11. (1901) L. R. 29 I. A. 38.

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regulations do not affect the title to any land. *Collector of Trichinopoli* v. *Lekkamani*[1]. *Secondly*, the acceptance of a sanad in common form under Regulation XXV. does not of itself, and apart from other circumstances, avail to alter the succession to an hereditary estate. *Kachi Kaliyana* v. *Kachi Yava*[2]. *Thirdly*, unless there be an existing estate with other incidents which a sanad in common form under Regulation XXV. can operate to confirm, such sanad will confer on or confirm in the grantee an estate descendible according to the ordinary rules of inheritance of the Hindoo law. *Raja Venkata Narasimha Appa Row* v. *Raja Narayya Appa Row*[3]. *Fourthly* in order to establish that any estate is descendible otherwise than in accordance with the ordinary rules of inheritance of the Hindoo law, it must be proved either that it is from its nature impartible and descendible to a single heir, or that it is so impartible and descendible by virtue of a special family custom. *Baboo Ganesh Dutt Singh* v. *Maharaja Moheshur Singh*[4]. *Lastly* the nature of the estate and the existence or otherwise of a special family custom are questions of fact to be determined on the evidence available in each case. *Srimantu Raja Yarlagadda Mallikarjuna* v. *Srimantu Raja Yarlagadda Durga*[5].

The question now arising for decision is whether the Zemindari of Nidadavole is impartible and descendible to a single heir or partible and descendible according to the ordinary rules of inheritance of the Hindoo law. The Zemindari of Nidadavole was the subject of a sanad in common form under Regulation XXV., and on the principles above stated it must be held to be partible and descendible according to the ordinary rules of inheritance of the Hindoo law, unless the sanad could operate as the confirmation of a previously existing estate which from its nature or by virtue of some special family custom was impartible and descendible to a single heir. The Appellant contends that the grantee under this sanad had at and prior to the date thereof an estate which was of the nature of a Raj or Principality and therefore impartible. He does not rely on any special family custom. At and prior to the sanad the grantee thereunder had no doubt some estate, but whether or not it was an estate in the nature of a Raj is a question of fact to be determined on the evidence. Both Courts below have found that the estate was not in the nature of a Raj, and having regard to the ordinary practice of this Board it would be wrong to advise His Majesty to disturb this finding unless their Lordships are satisfied

1. I Ind. App. at p. 306.
2. 32 Ind. App. at p. 261.
3. 7 Ind. App. at p. 31.
4. 6 Moore's Ind. App. at p. 178.
5. 17 Ind. App. at p. 134.

that it was not justified by the evidence. (*See Allen* v. *Quebec Warehouse Company*[1]). So far from being so satisfied, their Lordships after considering the evidence are not prepared to say that they should not themselves have come to the same conclusion. Some stress was laid on the contrary findings of the Courts in the litigation which culminated in the proceedings before the Board reported[2], but their Lordships observe that in the present case there was evidence of a very material nature which was not available in the earlier litigation.

In their Lordships' opinion, therefore, the Judgments of the Courts below cannot on this point be disturbed, and they will humbly advise His Majesty to that effect. They will consider the question of costs when the other points arising on these Appeals have been dealt with.

Solicitors for *Sri Raja Ranjayya* and his legal representative to *Sri Raja Venkatadari*: *Douglas Grant.*

Solicitors for *Sri Raja Narasimha* and his representative, *the Court of Wards*: *T. L. Wilson & Co.*

Solicitors for *Sri Raja Parthasarathy*: *Chapman, Walker* and *Shephard.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Sadasiva Iyer.

In A. S. No. 185 of 1908.

Muthusami Iyer (died) and others (5th defendant and his legal representatives) ... *Appellants.**

v

Sree Sreemethanithi Swamiyar Avergal and others—Plaintiff and defendants Nos. 1 to 4 and 6 to 13. *Respondents.*

In A. S. No. 186 of 1908.

Annasami Iyer (4th defendant) ... *Appellant.*

v.

Sree Sreemathi Swamiyar Avergal and another—Plaintiff and 1st defendant *Respondents.*

Mutt—Permanent lease by the holder—Not operating to the detriment of the up-keep of the mutt—Not void, but good for the life time of the grantor—Voidable by successor—Ratification good for life of ratifier—Prescription against—Matadhipathi—Position and powers of—Corporation sole—Revenue sale—Notice absence of—Sale only irregular and not without jurisdiction—Limitation—Revenue Recovery Act (Act II of 1864) S 59—Limitation Act (Act XI of 1877) art. 12.

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*A. S. Nos. 185 and 186 of 1908. 5th March 1913.

1. 12 A. C. 101 at p. 104. 2. 7 I. A. 38.

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There is no justification for the view that each Matadhipathi has an independent life estate and as such is not bound by any prescription by which his predecessor might have lost title to the property.

A permanent lease by a Matadhipathi which does not operate to the detriment of the upkeep of the Mutt is after the manner of widow's alienations good for the life time of the grantor and may be ratified by his successor so as to validate it for his life.

Where, therefore, a Matadhipathi granted a permanent lease in 1872 leaving enough for the up-keep of the mutt and on his death in 1890, his successor elected to ratify the lease by accepting rent

Held that a suit brought by a succeeding trustee within 12 years of the latter's death was not barred.

Abhiram Goswami v. *Shyamacharan Nandi*[1] and *Narsaya Upada* v. *Venkataramana Bhatta*[2] followed,

Quaere: Whether the suit would not have been barred if the lease operated to the detriment of the upkeep of the mutt.

Nature of the Matadhipathi's interest in Mutt properties and his powers discussed. *Vidyapurna Tirtha Swami* v. *Vidhyanidhi Tirtha Swami*[3] referred to.

Per Sadasiva Aiyar J:—Comparison of the Matadhipathi's position to of a corporation sole is misleading.

Where the lessees in occupation having failed to pay the local cesses payable by the Mutt the property was sold by the Government without issuing notice to the Mutt.

Held that the sale was only irregular and not one made without jurisdiction and as the time prescribed for setting aside the sale (whether under S. 59 of Act II of 1864 or under Art. 12 of the second schedule to the Limitation Act) had elapsed, the purchasers' title was complete and a suit for possession of the land is not maintainable at the instance of the mutt (though brought within 12 years of the sale).

Appeals from the decree of the Court of the Subordinate Judge of Madura in O. S. No. 16 of 1908.

R. Kuppusami Iyer and *C. V. Ananthakrishna Iyer* for Appellants in A. 185 of 1908.

S. Srinivasa Iyengar and *K. V. Krishnasami Iyer* for Appellant in A. 186 of 1908.

K. Srinivasa Iyengar for Respondents in both.

The Court delivered the following

Judgments:—*Miller J.*—In 1872 the Matadhipathi Sukgnana Nidhi Swamiar made an alienation of the inam in dispute by way of a lease in perpetuity to a Brahmin, Mudgala Chariar, who enjoyed it till 1884 and then sub-leased or assigned his interests to the first and second defendants and to predecessors of the 12th and 13th defendants.

1. (1909) I. L. R. 36 C. 1003.
2. (1912) 23 M. L. J. 261.
3. (1904) I. L. R. 27 M. 435.

The lessor died in 1890 and was succeeded by Sri Suthi Nidhi Swamiar, a person who had been managing the affairs of the Mutt on behalf of his predecessor during the later years of his life. In 1889, before his predecessor's death, he, on behalf of the Matadhipathi, leased the inam to the 6th defendant, cancelling the lease of 1872. The 6th defendant was however never able to obtain possession and from 1893 onwards at any rate, the Swamiar was collecting the rent reserved by the old lease of 1872, from the persons then occupying as transferees of the lessee and in 1903 litigation about the 6th defendant's lease having come to an end, he treated the occupants under the old lease as the tenants and recovered rent from them apportioned according to the shares held by them in the inam.

In 1906 Sri Sudhi Nidhi Swamiar died and was succeeded by the plaintiff who sues to set aside the lease and recover possession of the inam.

The principal question, a question which arises in both the appeals, is whether the suit is barred by limitation. It is conceded for the Appellants that the lease is in excess of the powers of the Matadhipathi, and their contention is that the suit is barred because limitation must run from the date of the alienation in 1872, the lease being void, or at the latest from the death of Sukgnana Nidhi Swamiar in 1890.

The respondents do not contend for the view taken by the Subordinate Judge, that each Matadhipathi has what I may call an independent life estate in the Mutt, and is in no way bound by any prescription by which his predecessor may have lost his title.

As this view is not now supported, it is sufficient to say that it is not justified by the Judgment of *Bashyam Iyengar*, J. in *Vidyapurna Tirtha Swami* v. *Vidhyanidhi Tirtha Swami*[1] on which the Subordinate Judge seems to lease it.

The Subordinate Judge however also holds that at any rate the lease was good for the life time of Sukgnana Nidhi Swamiar, and was adopted by his successor and allowed to run on, and this view is that which is now pressed upon us.

We are bound by the decision of the Full Bench in *Kailasam Pillai* v. *Nataraja Thambiran*[2], the effect of which is, as I understand it to accept generally the view of a Matadhipathi's position taken by the learned judges in *Vidyapurna Tirtha Swami* v. *Vidhyanidhi Tirtha Swami*[1].

1. (1904) I. L. R. 27 M. 435. 2. (1909) I. L. R. 33 M. 265.

Muthusami Iyer v. Sreemethanithi Swamiyar

Miller J.

In that case *Bashyam Iyengar* J. held that the *corpus* of the Mutt property is inalienable except in special circumstances but that the produce, subject to the upkeep of the Mutt, is at the absolute disposal of the Matadhipathi and he recognises what is further emphasized by the Full Bench that there may be properties vested in the Matadhipathi as a bare trustee.

I may therefore here state my opinion on the evidence that the inam in question now is not so vested in the plaintiff; the inam registers shew that it was granted for the support of the Mutt. and oral evidence is not inconsistent with that. The register shews further that at the time of the inam settlement the produce was used for certain purposes and was not of itself sufficient for the upkeep of the Mutt but that is not sufficient to warrant us in holding that the grant was for those specific purposes. The statement as to the purposes to which the income was then being applied was obviously made as showing that the inam might properly be confirmed for the support of the Mutt. I take it therefore that the inam is one in which the Matadhipathi has, subject to the upkeep of the Mutt, that which is called in *Vidyapurna Tirtha Swami* v. *Vidhyanidhi Tirtha Swami*[1] an absolute right to dispose of the income. It may still be open to us in this Court to hold that even this right is not altogether an absolute right, but that is a question which it is not necessary to decide this case.

There is nothing in this case to suggest that the lease in question operated to the detriment of the up-keep of the Mutt. If it did so operate, if it reduced the income below what is necessary for the up-keep of the Mutt, it is possible that it might be held to be absolutely void *ab-initio*; that may be a difficult question, but fortunately it does not arise. Before us no one has suggested that as a fact the Mutt was not adequately maintained by Sukgnana Nidhi Swamiar or by his successor.

Now if the Matadhipathi has the management of the land and an absolute right to dispose of the income thereof, it seems difficult to withhold from him the right to make for his own life or rather for the period during which he occupies the position of Head of the Mutt, a lease of the portion of a property for any rent however small which he may deem sufficient; he may subject to the reservation of a sufficient fund for the up-keep of the Mutt, make gifts of the rents received to any one whom he chooses to favour.

It is unnecessary to decide whether there exists any means of preventing him from so dealing with the surplus income as to create

1. (1904) I. L. R. 27 M. 435.

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scandal and bring the Mutt into disrepute; here all that has been done is to give land on a favourable rent to one who, we may presume, was a sufficiently pious Brahmin.

It is suggested that to allow transfers by way of lease to be made by successive Matadhipathis, each for the period of his Headship of the Mutt, would be destructive of the institutions of which they are the Heads: all the property, it is argued, even the Mutt buildings, might be alienated to a Christian, a Muhammadan or an outcaste. It is probable however that in as much as the up-keep of the Mutt is the consideration and the Matadhapathi's interest is subject to that consideration, the law, if any one is entitled to put it in motion would be able to prevent the transfer of the Mutt buildings to any person incapable of continuing or unwilling to continue, to maintain the institution in accordance with the objects and views of its founder and the conditions laid down by him or imposed by usage. And it seems quite immaterial whether the lands are cultivated by a Christian or Muhammadan farmer, provided he is a good husbandman and pays his rent with regularity.

In *Abhiram Goswami* v. *Shyama Charan Nandi*[1] the Privy Council, as I understand the case, adopted what their Lordships call the ' most favourable construction' (of the powers of the alienor I presume) and were of opinion that the alienation was good for the life of the alienor; and his immediate successor being insane, prescription would not run against him; and Article 134 being inapplicable, the plaintiff was not barred.

Their Lordships do not, it is true, expressly state the case in this way but I find it impossible to accept the contention on behalf of the appellants that they have confined their attention to Article 134 of the 2nd Schedule of the Limitation Act (Act XV of 1877), and have overlooked the possibility of the extinction of the plaintiff's title by reason of Article of 144. The report of the argument both in *Shama Charan Nandi* v. *Abhiram Goswami*[2] and *Abhiram Goswawi* v. *Shyama Charan Nandi*[1] indicates that that is very unlikely, and I agree with the learned judges who in *Narsaya Upada* v. *Venkataramana Bhatta*[3] expressed the opinion that their Lordships proceeded on the view that the alienation was good for the life time of the alienor. *Abhiram Goswami* v. *Shyama Charan Nandi*[1] is therefore an authority that an alienation by the Head of a religious foundation is not necessarily utterly void and of no effect. In reliance upon this authority and on *Vidyapurna Tirtha Swami*

1. (1910) I. L. R. 36 C. 1003. 2. (1906) I. L. R. 33 C. 511.
3. (1912) 23 M. L. J. 260.

Muthusami Iyer v. Sreemethanithi Swamiyar.

Miller J.

v. *Vidhyanidhi Tirtha Swami*[1] I am prepared to hold in the present case that the lease of 1872, though beyond the powers of the lessor, was a lease which he could not have avoided during his own lifetime.

And I think we may deduce from *Vidyapurna Tirtha Swami* v. *Vidhyanidhi Tirtha Swami*[1] the further rule that the lease is voidable by the lessor's successors, in very much the same way that an alienation by a Hindu widow is in excess of her powers is voidable by her successors. Both the learned judges in *Vidyapurna Tirtha Swami* v. *Vidhyanidhi Tirtha Swami*[1] held that a Matadhipathi has an estate very closely resembling that of certain eccleciastical corporations sole in England. *Bashyam Iyengar* J. at page 457 holds that he is "as much a corporation sole as a Bishop admittedly is" and at page 456 cites the decision of Lord Hardwicke in *Knight* v. *Mosley*[2] and of Sir *George Jessel* in *Mulliner* v. *Midland Railway Company*[3] as showing that the nature of the estate vested in certain corporations sole is "the fee simple qualified and under restrictions in right of the church."

Subramania Aiyar J. too takes the same view; the Swamiar for the time being is "a real owner and not a mere trustee. He is, as he would be described in England, a corporation sole" (Page 442).

Consequently it seems to me that when the learned judges speak of 'an estate for life in the corpus,' and of the individuals composing the line of succession as being in the possession of tenants for life,' they do not mean that the estate is in fact that of a tenant for life (*Sankaran Nair J.* in *Kailasam Pillai* v. *Nataraja Thambiran*[4] expressly says it is not), but rather what Sir *George Jessel* pointed out in the case to which *Bashyam Iyengar* J. refers "though in a certain sense owners in fee simple yet in many respects they (certain corporations sole) had only the powers of tenants for life."

Being "owners of an inheritance" Matadhipathis could, but for 'restrictions and qualifications in right of their Mutts, make leases so as to bind their successors; in this country we have no statute which declares alienation by the Head of a Mutt to be 'utterly void and of no effect' and we are not bound to hold that the restrictions and qualifications which attach to the estate are, as regards their effect, different from those which prevent a Hindu widow from binding her successors by unjustifiable alienations by way of lease. There are no doubt differences in respect of the purposes which will

1. (1904) I. L. R. 27 M. 435.
2. (1753) Ambler 175. s.c. 28 E. R. 118.
3. (1879) 11 Ch. D. 611.
4. (1909) I. L. R. 33 M. 265.

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justify an alienation, but there seems to be no reason to hold that the differences extend also to the duration of the lease as a valid transfer. Of course, the successor of a Matadhipathi will be unable to validate it for all time. In that respect he will be like a female succeeding to a widow, say a daughter succeeding her mother as her father's heir; he will be able to validate the transfer only for the period during which he holds the office and will be able to avoid the lease altogether or affirm it for this period, and it will not be absolutely nullified by the death of the alienor.

This being my view of the position, I have to consider the question whether the plaintiff's immediate predecessor, Sri Sudhi Nidhi Swamiar, adopted the lease and ratified it so far as he could ratify it. In 1889, before he came Matadhipathi, and purporting to act for his predecessor, he gave, as I have already stated, another lease to the 6th defendant he is not however shown to have done anything to support the 6th defendant's fruitless efforts to obtain possession, and from 1893, if not before that he accepted rent from the transferees of the original lessee. I cannot find that after he became Matadhipathi he did anything to indicate an intention to avoid the lease, and on the other hand by accepting rent he did make clear his attention of adopting it. I am therefore able to accept the finding of the Subordinate Judge on this point.

The question of forfeiture does not in these circumstances require decision and the only one remaining which I find it necessary to decide is one which arises in Appeal No. 185, the 5th defendant's appeal, and not in No. 186.

It is that owing to the failure of the holders of a portion of the land to pay the local cesses payable by the inamdar, there was the sale by the Revenue authorities, and the 5th defendant became the purchaser. The question is whether he bought the right of the Mutt or only that of the lessee in occupation. I am not able to agree on this point with the Subordinate Judge that the interest of the Mutt was not sold.

The facts are that the Deputy Tahsildar gave no notice of the sale to the Mutt but issued his notice only to Ramachariar, who had been paying the taxes. Ramachariar told the Deputy Tahsildar that he had sold his interest in the land to Narayanachariar, and the sale proceeds, after payment out of them of the amount due to the Local Board, were paid over to Narayanachariar possession of the land was obtained by the 5th defendant but I do not find anything to show after the sale the Mutt continued to receive any rent for the land sold.

Muthusami Iyer v. Sreemethanithi Swamiyar.

Miller J.

I have had considerable doubt whether on their evidence I ought not to hold that the Deputy Tahsildar sold and the 5th defendant bought the interest of the lessees alone. If the 5th defendant had paid rent to the Mutt, that would have been clearer, but it is not shown that any rent was paid. On the whole I think the Deputy Tahsildar intended to sell the defaulter's interest *i.e.*, the interest of the owner, from whom the cesses were due, but thought that the person in occupation was the owner; the purchaser seems to have been a similar mistake and to have thought that the purchase entitled him to possession as well as ownership.

The result is that the Deputy Tahsildar sold the interest of the defaulter, the Mutt without giving notice to the Matadhipathi. The sale was irregular and liable to be set aside, but passed the title and at the date of this suit it was too late to set it aside whether Sec. 59 of the Act II of 1864 or Article 12 of the 2nd Schedule to the Limitation Act be the provision of law applicable to the case.

Appeal No. 185 will, on this ground, have to be allowed and the suit, so far as it is for possession of the land dismissed; the alternative prayer of the plaintiff for payment to him of the surplus sale proceeds received by the 3rd defendant may be allowed. and the decree may be modified accordingly and will be that which my learned brother sets out in the judgment which he will now deliver. Appeal No. 186 is dismissed with costs.

Sadasiva Aiyar J,—Appeal No. 186 is the principal appeal. It has been brought by the 4th defendant, who is in possession of three-fourth's share of the plaint village under deeds executed by the owners of the permanent lease right which permanant lease right was created by the deed of 1872, in favour of Mudgalachariar by the former Matadhipathi. I entirely agree for the reasons given by my learned brother in the judgment just now pronounced by him, that the plaintiff was entitled to repudiate the lease as soon as he became Matadhipathi in March 1906 and to bring his suit for possession within 12 years of his becoming Matadhipathi. The Privy Council in *Bijoy Gopal Mukerji* v *Krishna Mahishi Debi*[1] held that a reversioner, after the death of a Hindu widow, was entitled to bring his suit for possession within 12 years of her death, repudiating *in pais* the widow's alienation, that such repudiation may be indicated by the institution of the suit itself. The position of a Matadhipathi is, (as pointed out by my learned brother), neither that of an absolute owner, (as he cannot ordinarily alienate the corpus), nor that of a mere tenant for life,

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1. (1907) I. L. R. 34 C. 329.

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Sadasiva Aiyar J.

(as he represents fully the ownership of the Matam properties for certain purposes), and is, therefore, in many ways analogous to that of the estate of a Hindu female heir to a male's estate. A Matadhipathi has been compared to a corporation sole in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Thirtha Swami*[1], but (speaking for myself I do not like to dwell on that analogy, as (unless we are very careful) that analogy might not only mislead us to the complication and difficulties of considering and constructing the varied opinions given in English cases about corporations sole, but there is this fundamental distinction, namely, that whereas "the properties belonging to an English Bishop" (a corporation sole under the English Law) "including his saving from the revenues of the benefice, devolve upon his legal representatives or heirs." the savings of a Matadhipathi devolve upon the succeeding Matadhipathi. I am also not at all sure that as regards even the income of the Mutt properties, a Matadhipathi has an absolute and unqualified power of disposition as a Bishop over the income of his benefice that is, to squander it away in even immoral or extravagant ways. I should be very loathe to come to the conclusion that Sec. 92 (1) of the Civil Procedure Code (corresdonping to old Sec. 539) does not apply to Mutts, as was suggested during the course of the arguments in these cases, and that the public and the Advocate General and the Courts of Justice are powerless to stop the wholesale misuse of the income of a charitable and religious institution like a Matam. In a recent case, the right to protect the religious institution was allowed to a mere disciple in management of the Mutt by my learned brother and *Abdur Rahim* J. See *Kasi Chetty* v. *Srimathu Devasikamony Nataraja Dikshitar*[2]. I concurred with *Sundara Aiyar* J. in the judgment reported in *Narasayya Upada* v. *Venkataramana Bhatta*[3] and I adhere to the opinion expressed therein as to the effect of the three recent Privy Council decisions beginning with *Abhiram Goswami* v. *Shyama Charan Nandi*[4] discussed therein. In the result I agree with my learned brother that Appeal No. 186 should be dismissed with costs.

As regards Appeal No. 185, my conclusion is that it should be allowed. This appeal has been brought by the 5th defendant, who purchased the remaining one-fourth share in the village of a revenue sale held for recovery of road-cess due by the Matam. It is clear from S. 3 (10), S. 64 (2) and Ss. 66 and 75 of the Local Boards (Act (V of 1884) that it is the inamdar matam) that was liable for

1. (1904) I. L. R. 27 M. 435.
2. (1913) M. W. N. 181.
3. (1912) 23 M. L. J. 260.
4. (1908) I. L. R. 36 C. 1003.

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the road-cess and not any tenant of the Matam. The revenue sale was held according to the procedure laid down by the Revenue Recovery Act, such procedure having been incorporated into the Local Boards Act by S. 76 of the latter Act. By Exhibit J. 1 (b), Ramachariar, on whom notice was served as the defaulter (that is, I take it as the landlord inamdar), informed the Deputy Tahsildar in April 1902 that he had sold away his "¼ share in the village" to Narayanachariar and that the amount should be collected from Narayanachariar who was in possession of the one-fourth share in the village. Ramachariar did not inform the Deputy Tahsildar that he and Narayanachariar were not landlords but only lessees.

Exhibit J1 (C) shows that one-fourth share in the village itself was intended to be sold and not merely a lease right therein. I find it difficult to hold that what was sold was the right not of the defaulter, which lessee could not be made legally liable for the road-cess and whole lease rights also could not be made liable, as a sale held for road-cess under the Local Boards Act is not a sale free of encumbrances or under tenures, but only the rights of the land holder as they stood on the date of sale. Though the sale procedure was that prescribed by the Revenue Recovery Act, the substantive provisions of the Revenue Recovery Act (sections 32 and 42) that a sale for recovery of arrears of land revenue frees the land from all encumbrances and from all favourably rented leases, do not apply for a sale under the Local Boards Act. See *Ramachandra* v. *Pitcha kanni*[1] and *Chinnasami Mudali* v. *Tirumalai Pillai* and *the Right Honourable the Secretary of State for India*[2]. It seems to be better to hold (if it can be fairly so held) that a sale conducted by a Revenue Officer was conducted with jurisdiction, though irregularly, than to hold that it was conducted wholly without jurisdiction. Purchasers in sales held by Revenue Officers for realisation of public taxes would not have their title remaining in jeopardy for long, and public policy seems to me to require that, when such sales are attacked long afterwards on the ground of want of jurisdiction in the officer conducting the sale, such ground should be strictly established by cogent evidence, which seems to me to be wanting in this case. (That the plaintiff himself thought that the sale was intended to convey away the mutt's interest seems to be indicated by paragraphs Nos. 8 and 11 of the plaint. In paragraph No. 8 he calls the sale an "irregular revenue sale" and not a sale held without jurisdiction. In paragraph No. 11 he prays in the alternative for the balance of

1. (1883) I. L. R. 7 M. 434.
2. (1901) I. L. R. 25 M. 572.

Muthusami Iyer v. Sreemethanithi Swamiyar.

Sadasiva Aiyar J.

the revenue sale amount). Taking it then, that the sale was held with jurisdiction, the irregularities committed by the Revenue officer in having the notices served on Narayanachariar (the man in possession), treating him as the defaulter (the Matam), cannot be now made a basis for attacking the sale, as the time fixed by law for the setting aside of the sale on the ground of irregularities [See *Malkarjun* v. *Nara Hari*[1]] had expired long before the present suit was brought.

In the result this appeal must be allowed with appellant's costs payable by the plaintiff and the order of the lower Court directing the plaintiff and the 3rd defendant to pay sums of money to the appellant will be set aside. A money decree will be given in favour of the plaintiff against the third defendant for the sum of Rs. 382-8-0, balance of the revenue sale proceeds with interest thereon at 6 per cent. per annum from the date of suit and proportionate costs on that amount from the 3rd defendant in the lower Court. To this extent the lower Court's decree will be modified.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH]

Present:—Sir Charles Arnold White, *Chief Justice*, Mr. Justice Sankaran Nair, and Mr. Justice Tyabji.

Solai Gounden, and others. — *Petitioners*.*
(Accused (Nos. 1 to 5).

Solai Goundan *In re*

Criminal Procedure Code S. 106 cl. (3)—Appellate court—Power of—Not restricted to convictions by Courts specified in cl. (1).

The power conferred on the appellate court by S. 106 cl. (3) Cr. P. Code is not restricted to cases where the conviction is by one of the courts specified in Sub. Sec (1) and can be exercised even where the conviction is by a second or third class Magistrate.

Muthia Chetty v. *Emperor*[2] overruled.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sub-Divisional Magistrate of Salem in Criminal Appeal No. 113 of 1912 presented against the conviction and sentence of the Stationary 2nd Class Magistrate of Salem in C. C. No. 261 of 1912.

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*Cr.R.C. No. 637 of 1912 (Cr.R.P. No. 524 of 1912). 13th March 1913.

1. (1900) I. L. R. 25 B. 337. 1. (1906) I. L. R. 29 M. 190.

Solai Goundan *In re*

C. S. Venkatachariar for petitioner.

Public Prosecutor for Government.

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH.

The Chief question argued in this petition is whether an Appellate Court has jurisdiction under section 106 sub-section (3) Criminal Procedure Code to order the appellant to execute a bond to keep the peace when the appellant has been convicted of one of the offences specified in sub-section (1) of the section, not by one of the Courts specified in that sub-section, but by a 2nd or 3rd Class Magistrate.

The pleader for the petitioner relies on the cases reported in *Mahmudi Sheikh* v. *Aji Sheikh*[1], *Muthiah Chetti* v. *Emperor*,[2] *Paramasiva Pillai* v. *Emperor*,[3] and *Emperor* v. *Momin Malita*.[4] The three latter cases are direct authorities in support of his contention that the Appellate Court has no jurisdiction where the original conviction was by a 2nd or 3rd Class Magistrate.

But (as was pointed out by *Benson*, J. in Crl. R. C. No. 37 of 1904 unreported) the decision in *Mahmudi Sheikh* v. *Aji Sheikh*[1], was under the Criminal Procedure Code of 1872 in which there was no provision corresponding to the present sub-section (3), and was therefore inapplicable to the present Code. In that case *Benson*, J. held that the appellate Court had jurisdiction where the original conviction was by a 2nd or 3rd Class Magistrate. It does not appear that this decision was brought to the notice of the Bench which decided the case in *Muthiah Chetti* v. *Emperor*[2]. This latter case was followed without discussion in the case reported in *Paramasiva Pillai* v. *Emperor*[3], and in several other unreported cases in this Court, and it was also followed in the case reported in *Emperor* v. *Momin Malita*[4].

The correctness of the two Madras decisions was, however, doubted in the case reported in *Dorasami Naidu* v. *Emperor*[5], and was directly dissented from in the cases reported in *Emperor* v. *Bhausing*[6], and *Emperor* v. *Dharma Das*[7], where it was held that the Appellate Court had jurisdiction even when the Original Court was a 2nd or 3rd Class Magistrate.

1. (1894) I. L. R. 21 C. 622.
2. (1905) I. L. R. 29 M. 190.
3. (1906) I. L. R. 30 M. 48.
4. (1908) I. L. R. 35 C. 434.
5. (1906) I. L. R. 30 M. 182.
6. (1908) I. L. R. 33 B. 33.
7. (1910) I. L. R. 33 A. 48.

Solai Goundan *In re*

In this state of the authorities we think it desirable to refer the question, as stated at the beginning of this order, for the decision of the Full Bench, as we are inclined to doubt the correctness of the decision in *Muthiah Chetti* v. *Emperor*[1], and the cases which followed it, having regard to the reasons stated in *Dorasami Naidu* v. *Emperor*[2].

This Court expressed the following

Opinion:—We are of opinion that the jurisdiction of an Appellate Court to order a person who has been convicted of one of the offences mentioned in sub-section (1) of section 106 of the Code of Criminal Procedure is not restricted to cases where the conviction was by one of the courts specified in the sub-section. The words "an Appellate Court" are quite general and the word "also" indicates that the powers given by the section may be exercised by the courts mentioned in sub-section (1) and by any Appellate Court.

We think the words "under this section" in sub-section (3) have reference to the powers given by the section and not to the courts by which these powers are, in the first instance, exerciseable. We are unable to agree with the decision in *Muthiah Chetty* v. *Emperor*[1], and in the other cases referred to in the order of reference in which that decision was followed. We would answer the question which has been referred to us in the affirmative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Sir Charles Arnold White KT. *Chief Justice*, Mr. Justice Sankaran Nair and Mr. Justice Sadasiva Aiyar.

Doraisami Sirumadan and another ... *Appellants*.*

v.

Nondisami Saluvan and others ... *Respondents*.

Doraisami *v.* Nondisami Saluvan

Limitation Act (Act XV. of 1877) S. 8—Art. 44, Suits governed by, not exempt from the operation of—Hindu law—Manager—Sale by mother during minority of sons—Suit to set aside more than 3 years after the elder attaining majority—Limitation, bar of—No separate causes of action for minor arising at the date of alienation and after attaining majority.

Suits governed by art. 44, Limitation Act are not exempt from the operation of S. 8.

In a suit by two brothers to set aside a sale effected by their mother as guardian during their minority,

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* L. P. A. No. 114 of 1911. 18th December 1912.

1. (1905) I. L. R. 29 M. 190. 2. (1906) I. L. R. 30 M. 48.

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Doraisami v. Nondisami Saluvan

Held: the claim being a joint claim and the suit having been brought more than 3 years after the elder of the two brothers attained majority (who was as manager of the family "competent to give a discharge" within the meaning of Section 8) the claim was barred by limitation even in respect of the share of the younger who was not yet twenty one.

Sadsiva Aiyar J:—There are no two separate causes of action for a minor seeking to set aside an alienation by his guardian—one arising at the date of alienation and another on his attaining majority.

Appeal under S. 15 of the Letters Patent from the judgment and order of the High Court (*Abdur Rahim* & *Sundara Aiyar* JJ.) in Letters Patent Appeal No. 13 of 1911 presented under the said section against the judgment and order of the Honorable Mr. Justice *Krishnaswami Aiyar* in S.A.No. 1458 of 1910 presented against the decree of the Court of the Subordinate Judge of Mayavaram in A. S. No. 837 of 1909 (original Suit No. 1 of 1909 on the file of the Court of the District Munsif of Mannargudi.)

The Judgment of the Division Bench is reported in 21 M. L. J. 1041.

T. R. Venkatrama Sastri for Appellant.

K. Bashyam for *S. Srinivasa Aiyangar* for Respondent.

The court delivered the following

Judgments:—*The Chief Justice*:—I have read the judgment of *Sankaran Nair* J. and I agree. The Letters Patent Appeal is dismissed with costs.

Sankaran Nair J:—The properties in suit belonged to the plaintiff's father who died in 1895. The plaintiffs are his only heirs and during their minority their mother as their guardian sold the properties to the defendants. The plaintiffs now seek to recover possession of them. The instrument of sale was executed in November 1895. At the date of the institution of the suit the 1st plaintiff was 23 years old and the 2nd plaintiff 20. The plaintiff's case is that the suit is not barred by limitation as it was brought within 3 years of the 2nd plaintiff's attaining majority and as the 1st plaintiff could not give a valid discharge without the concurrence of the 2nd plaintiff. Both the lower courts dismissed the suit on the ground that it was barred by limitation following the decision in *Vigneswar* v. *Bapayya*[1]. The learned Judges of this court who heard the case differed in their opinion. Mr. Justice *Abdur Rahim* holding that the suit was barred and Mr. Justice *Sundara Aiyar* holding that the suit was barred so far as the 1st plaintiff was concerned and that it was not barred with reference

1. (1892) I. L. R. 16 M. 436

to the claim of the 2nd plaintiff. This is an appeal from the decision of Mr. Justice *Abdur Rahim* confirming the decrees of the courts below.

The question for decision is whether the plaintiff's suit is barred. The suit is governed by article 44 of the Limitation Act. Under that article, in the case of a suit by a ward who has attained majority to set aside a transfer of property by his guardian the period of limitation is 3 years and the time from which it begins to run is stated to be "when the ward attains majority." It is contended by Mr. Venkatrama Sastri that in this case as the word 'ward' includes the plural and applies to a suit by both the plaintiffs both the wards can be said to have attained majority only when the 2nd plaintiff became of age in 1907 and time began to run only from that date. The 1st plaintiff became a major long before that, i. e., in 1904. The time, so far as he is concerned, began to run against him from that date. I do not see therefore how it is possible to hold that the two plaintiffs can be said to have attained majority only in 1907. I have no hesitation in disallowing this contention.

The next question is whether the suit so far as the 2nd plaintiff alone is concerned is barred. The contention on behalf of the defendants is that his claim is barred under S. 8 of the Limitation Act. It is argued on behalf of the plaintiffs that S. 8 has no application to suits which are governed by article 44 of the Limitation Act because it is said that that section only applies to cases where the starting point of limitation is postponed by reason of a disability; whereas in this case under article 44 the starting point itself is the date the ward attained majority. I think the answer is contained in the section itself. S. 8. runs thus." When one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all: but when no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others." These words are quite clear. Where the plaintiffs are under a disability time begins to run against one of them when the other becomes capable of discharging the liability without the concurrence of the person who is under the disability. When the words of the section are quite clear and the conclusion itself is one which is not opposed to any principle of law we have to give effect to it. In this case it is admitted that the section governs all classes of cases where one of several claimants

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Sankaran Nair J.

who were under a disability attains majority and can give a discharge without the concurrence of the other, excepting the cases coming under article 44. In these circumstances I see no reason why the plain words of the section should not be given effect to. I am therefore of opinion that if the case falls within the scope of S. 8 of the Limitation Act, then we must give effect to it.

The question then remains for consideration is whether S. 8 is applicable to the case. If the 1st plaintiff on attaining majority was competent to give a discharge of the claim of the 2nd plaintiff then time began to run against the 2nd plaintiff also in 1904. It cannot be denied that on his attaining majority the 1st plaintiff became the managing member of the family to which the 2nd plaintiff belonged, that as such he represented the family. It was competent for him to deal with the interest of the 2nd plaintiff also in circumstances which would justify an alienation under the Hindu Law. On this ground I am of opinion that the claim is barred.

Sadasiva Aiyar J:—I must confess that, at first, I was inclined to the view that the second plaintiff's right of action was not barred, the view taken by *Sundara Aiyar* J. in this case when it was before the Division Bench. Article 44 of the Limitation Act seems to give each ward who attains majority a separate right to sue to set aside the transfer of his property made by his guardian and as the "time from which the period begins to run" is stated in the third column to be "when the ward attains majority," it looks at first blush, as if the cause of action itself arises *on the attainment of majority and not before.* This view is capable of being further supported by the fact that a minor as soon as he attains majority and *on the date of his attaining majority* has got the right to repudiate or to ratify a transaction effected by his guardian during his minority. In a recent case decided by *Sundara Aiyar* J. and myself, the question of the minor's right was considered, and we held that when the guardian of a minor made an alienation and afterwards died while the ward yet remained a minor, the succeeding guardian has no right to repudiate the said alienation on behalf of the minor and that it is the ward alone who has got the power to repudiate or ratify it on his attaining majority. (S. A. Nos. 892 to 912 of 1911 decided on 27th September 1912).

But there are cases binding on us (and it is so admitted in that same judgment), which show that even before the ward attains majority, a suit could be brought on behalf of the minor by a next friend to set aside the alienation made by the guardian, though, in such a case, the court has got large powers of interference, with the

course of the litigation. If such a suit is *bonafide* brought on behalf of the ward during his minority and decid ed against him, it is clear that the ward's powers of repudiating the transaction on attaining his majority is extinguished, and he cannot be allowed, within three years of his attaining majority to bring a second suit to set aside the same alienation. This seems to indicate that the cause of action to set aside the alienation arises at once, though the ward has three years to see after he attains his majority, *provided that a previous suit had not been bona fide instituted during his minority on that same cause of action on his behalf and bonafide conducted to its natural termination.*

After anxious consideration, I think that just as the minor would be barred from bringing a suit to set aside his guardian's alienation after he attains majority by reason of the decision in a previous suit brought and conducted *bonafide* by a next friend during his minority for the same relief, so he would be barred if the manager under the Hindu Law of the family property in which the minor had an interest and which interest was conveyed away by the minor's guardian during his minority, confirms the said alienation on behalf of the family on proper grounds before the minor attains majority and releases for the family benefit the minor's right to question the alienation. It seems difficult to hold that there are two separate causes of action given to the ward to set aside an alienation of the ward's property by the guardians;

(*a*) One cause of action which arises at once to be enforced by a suit brought by anybody acting as his next friend during the whole course of his minority and

(*b*) another distinct cause of action which arises as soon as he attains majority (and only on the date of his so attaining majority and not before) to be enforced by a suit brought by himself as a major.

If there is only one cause of action which arises on the date of alienation, it seems to follow (as Abdur Rahim J. has remarked) that, article 44 is only an illustration of the principle embodied in S. 7; and though a succeeding guardian (in the strict sense of the word) cannot ratify or repudiate the alienation of a prior guardian during the minority of the ward so as to bind the minor (according to the ruling already quoted in S. A. No. 892 of 1911 decided by Sundara Aiyar J. and myself), the adult managing member of the minor's undivided family can deal with the family property for proper purposes and he (the managing member) has a right as soon as he attains majority and becomes such managing

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member to bring a suit *as such manager* for recovery of not only his share of the alienated property but of the whole of the alienated family property including his minor brother's share treating the whole as *family property* improperly alienated during the minority of himself and his younger brother. If such a suit became barred through his (the managing member's) not bringing it within three years of his attaining majority and of thus attaining the position of managing member, his younger brother cannot (see *Ahimsa Bibi* v. *Abdul Kader Sahib*[1]) be allowed to contend that he had a separate cause of action to recover his share alone, apart from the cause of action of the adult managing member to recover the whole. For the above reasons and after some hesitation I agree that this Letters Patent Appeal ought to be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Justice Sundara Aiyar.

Kocherla Seetamma ... ... *Appellant** *(1st Deft.)*

v

Pillala Venkatramayya and others... *Respondents.* *(Plaintiff.)*

Assignment—Claim for past mesne profits—Transfer of Property Act S. 6 (e)—Not transferable.

Seetamma v. Venkataramayya

A claim for past mesne profits is not assignable having regard to S. 6 (e) of the Transfer of Property Act.

Shyam chund Koondoo v. *The Land Mortgage Bank of India*[2], *Pragilal* v *Fateh chand*[3], *Varahaswami* v. *Ramachandra Raju*[4] followed.

Appeal from the decree of the District Court of Ganjam in O. S. No. 1907 and the Memorandum of objections filed by the Respondents coming on for hearing.

H. Sitaramaswami for Appellant.

P Narayanamurthi for Respondent.

The court delivered the following

Judgment:—We entirely agree with the findings of the learned District Judge and the reasons he has given for them. The appellant's case as to the date of Ankamma's death is entirely unsupported by any credible evidence. We dismiss the appeal with costs.

The question argued in the Memorandum of objections is whether a claim for past mesne profits could be validly transferred

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*A. No. 211 of 1912. 17th April 1913.

1. (1901) I. L. R. 25 M. 26.
2. (1883) I. L. R. 9 C. 695.
3. (1882) I. L. R. 5 A. 207.
4. (1913) 24 M. L. J. 298.

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having regard to clause (*e*) of S. 6 of the Transfer of Property Act. We are of opinion that the Lower Court is right in holding that it cannot be; *Shyam Chand Kundoo* v. *The Land Mortgage Bank of India*[1] and *Pragi Lal* v. *Fatechand*[2] support this view. The recent decision of this court in *Varahaswami* v. *Ramachandra Raju*[3] after the amendment of clause (*e*) of S. 6 of the Transfer of Property Act is to the same effect. See also *Abu Mahomed* v. *S. C. Chunder*[4]. The respondents refer to *King* v. *Victoria Insurance Company*[5]. But the case is not in point, as the right of an insurer under the contract of insurance to be subrogated to the rights and remedies of the assured cannot be regarded as arising merely from the transfer of a right of action. We are not prepared to agree that the view laid down in Warren's "Choses in Action" p. 161, that a right to recover damages for an assault is assignable correctly expresses the law applicable in this country assuming that it does the law applicable in England. The plaintiffs are entitled to interest on the profits of each year at 6 p. c. per annum. With this slight modification we dismiss the Memorandum of objections with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White KT. Chief Justice and Justice Tyabji.

The Secretary of State for India in Council represented by the Collector of South Canara. } *Plaintiff. Appellant*.*

v.

Santaraja Shetty alias Bojapparasa Binnani... *Defendant. (Respondent.)*

Secretary of State for India v. Santaraja Shetty

Aliyasantana Law—Adoption of sole male—Not belonging to the bali of adopter—Validity of—Customs—Proof of—Bhutalapandia's Kattukattale—Court if bound to take judicial notice of—Evidence Act, S. 57—Inconsistency with necessary consequence of another custom—Not ground for rejecting custom.

According to Aliyasantana Law and custom, a male may be adopted solely and the adopted need not also belong to the same *bali* or tribe as the adopter.

Bhutalapandia's Kattukattale is not a book, the binding force of which the court is bound to take judicial notice.

Books purporting to contain the laws and customs of any particular community may acquire by being repeatedly proved in Court such a status as to make

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* A. No. 155 of 1910. 31st March 1913.

1. (1883) I. L. R. 9 C. 695.
2. (1882) I. L. R. 5 A. 207.
3. (1913) 24 M. L. J. 298.
4. (1908) I. L. R. 36 C. 345.
5. (1896) A. C. 250.

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it unnecessary in any subsequent case for persons of that community to prove anew the authority or the binding force of the books in question. Unless such a state of circumstances is brought about, books of this nature stand on the same footing as any other evidence tending to prove the existence of a body of customs.

Custom must be proved in each particular case and even proof in one or two cases will not dispense with the necessity of its being proved in a subsequent case.

S. 57 Evidence Act does not cast upon the Court the duty to direct of its own accord investigation into the customs set up by the parties.

Assuming that the rules of Aliyasantana law are "rules having the force of law" within the meaning of S. 57, Evidence Act, and the Court is bound to take judicial notice of the binding force of any alleged rule of that law, the Court is not bound to take judicial notice of the further fact that the alleged rule of conduct has been uniformly followed by the parties concerned or by the community to which the parties belong so as to be still binding on them.

The Court cannot decline to accept a custom as valid because it appears to be contrary to what might seem to be the necessary consequence of some other rule of custom by which the parties are bound: *Herbal* v. *Sarbal*[1] referred to.

In the case of persons governed by Aliyasantana Law, adoption is but slightly different from the nomination of successor.

Appeal from the decree of the Court of the Temporary Subordinate Judge of South Canara in O. S. No. 74 of 1909 (O. S. No. 21 of 1909 on the file of the District Court of South Canara.)

The Hon'ble the Advocate General and *R. N. Aiyangar* for Appellant.

Hon'ble T. V. Seshagiri Aiyar, K. P. Madhava Rao, B. Sitarama Rao and *K. P. Lakshman Rao* for Respondent.

The Hon'ble the Advocate-General:—Male adoption is contrary to Aliyasantana Law and usage. It is equally contrary to principle inasmuch as adoption is for perpetuation of the family the male is not a stock of descent in this system. The main authority for this system is Bhutala Pandia's Kattukattale. Strictures of Burnell on this work are hypercritical. (Burnell's Introductien to Varadaraja p. xii). The arguments directed against the reality of Bhutala Pandya and the great antiquity of the work miss the point; notwithstanding that the work is not of 1st century A. D., it may still correctly record the laws of the people and have been taken by them as guides to their conduct. It has been looked upon as authoritative

1. (1841) Perry's Oriental Cases 110, 111, 123 s. c. Morley's Digest Vol. II p. 43.

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in *Mundachetti* v. *Timmaju Hensu*[1], *Subbu Hegade* v. *Tongu*[2] though reference is made to the doubts thrown on it by Dr. Burnell the book is still referred to as authority and so taken by the people. *Koraga* v *Queen*[3], *Antamma* v. *Kaveri*[4], *Devu* v. *Deyi*[5] Instance—Translations made in 1873 and later, the petition in 1868 by the people of Canara attached to the letter of Ramayya Punja to the Malabar Commission, the opinion of Mr. Mundappa Bangera. The book was known long before 1843. See Krishna Rao's Aliyasantana Law p. 13 *et seq.* If the book is taken as laying down the law, it is for the defendant to show that the usage is different and the evidence in the case is insufficient for the purpose. Bhutala-Pandya expressly prohibits adoption of male. The evidence of custom given for the Crown shows that there is not the usage of adopting a male alone, though a male and a female are usually adopted. In the kindred system of Malabar also it is the practice to adopt females *Raman Menon* v. *Raman Menon*[6]; males if at all, are adopted with females. Strange's Manual S. 403. *Velayudha Eswaran* v. *Vythilinga Iyer*[7]. Under the Aliyasantana Law, it is also the rule that a girl of the same *bali* alone can be adopted. Bali means "people descended from the same female ancestor", though not of the same tarward.

Election by the Magne people also could be only of a male and female. See *Bhutala Pandia's Kattukattale.*

T V. Seshagiri Aiyar contended (i) that Bhutala Pandia's book was no authority; (ii) Even if viewed as a record of custom it was only a piece of evidence to be weighed with others; (iii) both on evidence in the case as on the analogies of the kindred system of Malabar, adoption of male was good; (iv) custom of adopting males has been made out; (v) assuming that adoption is bad, defendant takes it as *persona designata* under the adoption deed of his father; (vi) If the adoption deed is not sufficient for the purpose, the revocation of the previous will being conditional on the validity of the adoption the invalidity of the adoption revives the will and the Crown is excluded. As to Bhutala Pandya—he submitted that the criticism of Dr. Burnell was not textual merely but based on personal investigation as to the source of the manuscripts from which the book was prepared. The High Court has since (*Devu* v. *Deyi*[5]) not been attaching any great importance to this book. Dr. Burnell had to consider the value of the book on three occasions, in his introduction to Varadaraja, in his

1. (1863) 1 M. H. C. 380.
2. (1869) 4 M. H. C. 196.
3. (1883) I. L. R. 6 M. 374.
4. (1884) I. L. R. 7 M. 676.
5. (1885) I. L. R. 8 M. 353.
6. (1900) I. L. R. 24 M. 73.
7. (1890) 7 Tr. L. R. 66.

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letter to the High Court and in his introduction to Manu; see Nelson's Hindu Law and Usage p. 251-252. After all, Bhutala Pandya's book can only be taken as a record of customs. It is not a binding authority which is to be displaced by proof of ancient usage. On the admitted facts in this case the custom does not accord with what is noted in the book; for instance Bhutala Pandya prohibits male adoption while the admitted practice is to adopt males and females. Bhutala Pandia directs a male and female to be installed by the Magne. Here we have a case of adoption of males. As to Bali, one of the instances of adoption given by witnesses for the Crown is the adoption of a son and daughter. Moore's Malabar Law p. 81, and glossary where he accepts Burnell's view of the book. In the kindred system of Malabar the adoption of a male is good. *Subrahmanyan* v. *Paramasivan*[1]; Moore's Malabar Law p. 31. 7 Travancore Law Reports p. 76—Justice Sitaramier's opinion. On principle too, there is nothing against male's adoption. Males no doubt do not form a stock of descent. But they continue the family till their natural life. They can also adopt. Their existence is a bar to adoption. The theory that females alone are owners is no longer accepted. *Devu* v. *Deyi*[2]. There are besides well-attested instances of single male adoption in this case. Admittedly the last man was the absolute owner of his property. He was the last member of his Tarwad and therefore could dispose of the property both *inter vivos* and by will, *Alami* v. *Konu*[3]. Malabar Wills Act S. 4. The deed of adoption operates as a will in favour of the *persona designata*. The kinds of cases treated by decisions on this head may be thus classified—cases where the legatee is to take the property, the character given to him being only description. *Nidhoomani Debya* v. *Saroda Pershad Mukerjea*[4], *Fanindra Deb* v. *Rajeswar Das*[5], *Subbaraya* v. *Subbammal*[6], *Sri Raja Venkata Surya Mahipati Ramakrishna Rao* v. *The Court of Wards*[7]. *Lalta Prasad* v. *Saligram*[8], *Murarai Lal* v. *Kundan Lal*[9]. Cases where the adoption is the fact recited and the words about taking the property are only statements of the consequence of adoption. *Vireswar Mukerjea* v. *Ardha Chunder Dey*[10], *Fanindra Deb* v. *Rajeswar Das*[11], *Lali* v. *Murlidhar*[12]. A third class of cases is where the adoption is the condition precedent to the taking of

1. (1887) I. L. R. 11 M. 116
2. (1885) I. L. R. 8 M. 353.
3. (1888) I. L. R. 12 M. 126.
4. (1876) L. R. 3 I. A. 253.
5. (1889) L. R. 12 I. A. 72.
6. (1900) I.L.R. 24 M. 214. (P. C.)
7. (1898) I. L. R. 22 M. 389 (P. C)
8. (1908) I. L. R. 31 A. 5.
9. (1909) I. L. R. 31 A. 339.
10. (1892) I. L. R. 19 C. 513.
11. (1884) I. L. R. 11 C. 463 (P. C.)
12. (1906) I. L. R. 28 A. 488 (P.C.)

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property. See *Abbu* v. *Kuppammal*[1]. The present case falls within the first class of cases. The intention of the adopter was that the adoptee should take it by all means, preferably as an adopted son. Next even assuming that it does not operate as a will the earlier will revives, its cancellation being dependent on the validity of adoption. Williams on Executors p. 111. Jarman on Wills pp. 148, 162, 158. *Jijamba Bai Sahib* v. *Jathai Row Sahib*[2]. Another aspect of the case is adoption by the Magane people. That itself gives a right. It is at least valuable as an index of the popular consciousness as to the validity of male adoption. And yet another aspect of the case is if male adoption is bad, the right of crown accrued 70 years ago and is barred. The late Binnani never lost his conection with the natural family and his heirs in the natural family will take the estate. The crown is bound to show that there are no natural heirs of the deceased and this it has failed to do. On the question of burden of proof he cited *The Collector of Madura* v. *Veera Camoo Ammal*[3], *Girdhari Lal Roy* v. *The Bengal Government*[4], *Ranga Balaji* v. *Mudiappa*[5].

The Advocate-General in reply submitted that even if the deed of adoption be construed as a will, the case fell within the 2nd and 3rd class of cases and if the legatee was not validly adopted he could not take.

The Court delivered the following

Judgment:—This is an appeal arising out of the claim of the Secretary of State for India in Council that a decree may be passed ordering the defendant to make over to him the properties mentioned in the Schedules A and B annexed to the plaint and for payments of mesne profits of the immoveable properties mentioned therein from 1900 to the 31st March 1909. The claim was made on the footing that the last owner of these properties, one Chandranna alias Pandyapparasa Binnani (to whom we shall refer hereafter as 'the deceased') died without leaving any heirs and that, according to the law and custom applicable to his estate, the whole of it escheated to the Government.

The learned Subordinate Judge who tried the case came to the conclusion that the defendant had established that the deceased did not die without leaving any heirs, and that the defendant was his heir and was entitled to succeed to his property. The decision of this point depends upon the determination of two questions viz.,

1. (1892) I. L. R. 16 M. 355.
2. (1911) 22 M. L. J. 45.
3. (1863) 9 M. I. A. 450.
4. (1868) 12 M. I. A. 448.
5. (1898) I. L. R. 23 B. 296.

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first, whether or not the defendant had validly been adopted by the deceased into his tarwad and secondly, if not, whether the defendant is entitled to succeed to the deceased as legatee under a document which is Exhibit II on the record.

The validity of the adoption of the deceased is attacked by the plaintiff, who is the appellant, on the ground, first, that it is against the *Aliyasantana* law, and custom which have the force of law in the community to which the deceased belonged, to adopt solely a male, i. e., to take into adoption a male without also simultaneously taking a female into adoption, and secondly, that, in any case the defendant could not have been adopted by the deceased because the defendant was the son of the deceased by natural descent, and according to *Aliyasantana* law and custom, it is necessary that the person adopted should belong to the same *bali* as the person adopting, whereas a father and son must necessarily belong to different *balis*. The learned Advocate-General, who argued the case on behalf of the appellant, relied, in the first instance, on what had been referred to before us as 'Bhutala Pandya's Aliyasantana Kattukattilagalu' which he said, was a code promulgated by Bhutala Pandya, a former ruler of Canara and which was well recognised as an authoritative source of *Aliyasantana* Law. On behalf of the respondent it was contended that this so called code is a spurious treatise of a date much more recent than it purports to be and is neither recognised as laying down correctly the *Aliyasantana* Law as it prevails at the present time nor does it, as a matter of fact, so lay it down. No evidence either oral or documentary, was given in the Lower Court on this point, but the learned Advocate-General relied on the fact that this treatise had frequently been referred to by the Courts, and his argument, in effect, was that, without any proof being given of this treatise being a book of authority, binding on the parties and recognised as such by the community we could take judicial notice of its contents and binding force. It is true that books purporting to contain the laws and customs of any particular community may acquire by being repeatedly proved in the court, such a status as to make it unnecessary in any subsequent case for persons of that community to prove anew the authority or the binding force of the books in question. But it seems to us that unless such a state of circumstances is brought about, books of this nature stand on the same footing as any other evidence tending to prove the existence of a body of customs. Hence to admit this book into evidence without specific proof in the proceedings before us would be to take judicial notice

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both of its binding force and of all the customs referred to therein. Now custom must be proved in each particular case, and even proof in one or two cases will not dispense with the necessity of its being proved in a subsequent case. See *Re Parker Exparte Turquand*[1] *Southwell* v. *Bowditch*[2], *Moult* v. *Halliday*[3]. But, when we turn to the judgments of this Court in which Buthala Pandia's code has been referred to, we find that during recent years, that is, at least after the criticism of Dr. Burnell questioning its genuineness, the Courts have always expressed doubts as to whether it is a reliable document or not. The learned pleader for the respondent contended that the criticisms contained against this document in *Koragu* v. *The Queen*[4], *Antamma* v. *Kaveri*[5] and *Devu* v. *Deyi*[6] are such as to establish that this book is not a book of authority. It seems to us that it is unnecessary for us to express an opinion on the broad point whether this book is authoritative or not. It is enough to say that there is no material before us on which we can hold either that this book has been proved for the purpose of the proceedings between these parties, or that this book has so often been proved before to be genuine and authoritative that we may take judicial notice of its contents and binding force.

Since the hearing of this appeal an application was made to us by the Advocate-General that we should admit in evidence a certain cadjan manuscript alleged to be dated 1820 and purporting to be a copy of Bhutala Pandya's alleged code; that in the alternative we should use it for taking judicial notice of the *Aliyasantana* law, or in the further alternative that the question of its authenticity may be determined either by this Court or by an issue sent down for determination by the Lower Court.

The learned Advocate-General pressed upon us at the hearing and his learned junior in the course of the special application above referred to, that it is incumbent upon the court to take into consideration the contents of Bhutala Pandya's Code, or at any rate, to come to a definite conclusion upon the question whether the rules contained in Bhutala Pandya's Code are or are not binding upon the estate of the deceased, in as much as it is a duty cast upon the court to take judicial notice of the law by which the parties before it are governed. He relied upon the provisions of S. 57 of the Evidence Act, which states that "the court *shall* take judicial notice of the following facts: (1) All laws or rules having the force of law now or heretofore in force or hereafter to be in force in any

1. (1884) 14 Q. B. D. 636 at 645
2. (1876) 1 C. P. D. 374.
3. (1898) 1 Q. B. 125.
4. (1883) I. L. R. 6 M. 374 at 379.
5. (1884) I. L. R. 7 M. 575 at 577.
6. (1885) I. L. R. 8 M. 353 at 386

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part of British India." This argument of the learned Advocate General must, it seems to us, be based on the assumption that S. 57 of the Evidence Act refers also to those customs which have their binding force, so far as the Courts are concerned, by reason of the provisions contained in such Acts as the Madras Civil Courts Act III of 1873. S. 16 of the latter Act provides that "where in any suit or proceeding, it is necessary for a civil court to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution (b) any *custom* (if such there be) having the force of law and governing the parties or properties concerned *shall form the rule of decision*, unless such law or custom has by, legislative enactment, been altered or abolished." Assuming that the alleged rule of *Aliyasantana* law on which the appellant relies is a rule having the force of law" (within the terms of the clause of Evidence Act S. 57 above referred to) there is one essential feature in the operation of custom which necessarily differentiates them from the operation of Acts of the Legislature. In regard to Acts of the Legislature, we have to take judicial notice not merely of the rules themselves contained therein, but also of the fact that they have been enacted and that they have the force of law and govern the parties or properties concerned. The Evidence Act S. 57, clause 4, expressly requires the courts to take judicial notice of "The course of proceedings of Parliament and of the Councils for the purposes of making laws and Regulations established under the Indian Councils Act or any other law for the time being in force." Hence, in the cases of laws enacted by the Legislature, we have to take judicial notice, not only of the effect of the rules but also of those facts which are necessary for showing that they have the force of law and that they govern the parties or properties concerned, such facts consisting of the proceedings of Parliament or of the Legislative Council. On the other hand, in the case of customs, the facts showing that they have the force of law and that they govern the parties or properties concerned include the fact that the alleged rules of conduct have been uniformly followed by the parties concerned or by the community to which the parties concerned belong. This fact is not one of which we are required to take judicial notice nor have we any power to take judicial notice of it, unless it has been so often proved in the courts as to make further proof unnecessary as already stated. Reference might in this connection be made to the last clause of S. 57 of the Evidence Act.

Without, however, saying that there can be no case in which the court might consider it necessary or desirable to move of its

own accord in order to discover the effect and the nature of the customs having the force of law and governing the parties in any proceedings before it, it is enough to say that in the present case it would be futile to embark on any such inquiry. For we have before us direct evidence adduced by both sides in order to prove and to disprove the existence of the custom relied upon by the respondent, and it is not necessary for us to come to any conclusion on the point, whether or not Bhutala Pandya's code was promulgated when it is alleged to have been promulgated, and whether or not it contains the rules of law which were binding on the subjects of Bhutala Pandya when he lived. Assuming that it was so, it does not follow that the customary rules by which the estate of the deceased was bound are the same that presented at the time when the code is alleged to have been promulgated.

Hence, it seems to us that the questions of law and custom involved in this case must be determined by a reference to the evidence adduced before the Subordinate Judge, and we have to decide whether or not it has been established that according to the *Aliya-santana* law and custom, the deceased could have adopted the defendant solely to be his successor after his death. It has been pointed out to us that, in the evidence, seven instances have been either proved or referred to of a male having been adopted solely. Two instances are referred to in Exhibit H p. 33, lines 19 to 24, four other instances are referred to in Exhibit IX p. 129, and a seventh instance is referred to at p. 114, line 15 of the printed documents. These include the instances of the defendant himself). There is much force in the argument of the learned pleader for the respondent that more instances can hardly be expected to be forthcoming, considering the restricted nature of the custom; for an adoption of a sole male can, according to the alleged custom, take place only where a family consists of a single individual. It must be remembered also that the deceased was a person who, for 70 years, had been at the head of his family, and it is not unreasonable to assume that he would know the customs prevailing in his community. He also evidently believed that he had the power of making a valid disposition of his property by a will, (and it was not contended that he had no such power) and yet, he deliberately preferred to revoke his will in favour of the defendant and other descendants and purported to adopt the defendant. This action was, moreover, pointedly brought to the notice of the 'magane' people who, at a meeting, of which notice had been given and at which three-fourths of them were present, ratified it, or at any rate, took no exception to the

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adoption being made. The 'magane' people it was explained to us consists of all the leading people of the community. Then again, we have the fact that, for 10 years, no objection was taken on behalf of the Government to the defendant putting himself forward as the successor of the deceased on the strength of this adoption and, apparently, he received payments from the Government which would not have been made to him, except on the basis that they recognised his title to succeed to the deceased by virtue of his adoption. With reference to the point that the 'magane' people accepted the adoption of the defendant, the learned Advocate-General referred us to the judgment in O. S. No. 1 of 1903 where the adoption was contested, but that suit was instituted by the members of the Chowter family who claimed that they had the right to nominate a successor and that the adoption was in contravention of their right so to do. There was an appeal in that suit to the High Court, and the judges who decided that appeal expressly refrained from pronouncing on the validity or otherwise of the adoption. Much reliance was placed by the learned Advocate-General on the fact that, in a number of cases, it was proved that a male and female had been adopted conjointly. It seems to us that that fact does not necessarily affect the force of the evidence adduced on behalf of the respondent for it is admitted by both sides that a male and female may be adopted conjointly, and the only question is whether a male can solely be adopted.

There was one other point of attack by the Advocate-General on the proof of the custom in question. He contended that the adoption of the sole male was opposed to the theory of *Aliyasantana* law, for the object of adoption must be to perpetuate the line and that for this purpose, it is necessary to adopt also a female. Now, it seems to us that, in determining whether the validity of a custom has been proved we ought not to take into consideration the question whether the custom that is alleged would appear to be contrary to what might seem to be the necessary consequence of other rules of custom by which the parties are bound. It was pointed out by Sir Erskine Perry, the Chief Justice of Bombay, in the case of *Horbal* v. *Sorabal*[1] known as the Khoja's and Memon's case that in such cases, it is not for the Court to determine what particular rules of conduct ought to be observed by the community, but rather what as a matter of fact are the customs actually adopted by the community. It may, therefore, be that the

1. (1841) Perry's Oriental Cases 110, 111 & 123, s.c. Morley's. Digest Vol. II p. 43,

learned Advocate-General is right in saying that the establishment of a custom to adopt a male solely may be contrary to the general principles and that might be supposed to underlie the *Aliyasantana* law and to the theory by which all devolution of property proceeds through the female line. But, still if a custom is actually proved which shows that, as a matter of fact, males may be solely adopted, such a custom will be given effect to, provided that it is valid in other respects.

For these reasons, it is unnecessary for us to decide whether there is a conflict between the general principles by which the devolution of property is regulated according to the *Aliyasantana* law and the custom alleged in this case or whether, as was contended on behalf of the respondent the custom alleged in this case is reconciliable with the general principles of *Aliyasantana* law. We are also of opinion for reasons similar to those which have been indicated above and which need not be repeated that the adoption of the defendant was not invalid by reason of his not being of the same *bali* as the deceased, who purported to adopt him.

Our concurrence in the view that the learned Subordinate Judge has taken as to the sufficiency of the evidence proving the existence of the custom in question makes it also unnecessary to decide the question whether, apart from the adoption, there was such an election of the defendant by the 'Magane' people as would entitle him to succeed, irrespective of any adoption. This question was not dealt with as distinct from the question of adoption, in the Lower Court, and we think it unnecessary to determine whether assuming that the questions of adoption and election can be considered apart from each other, there has been an election of the defendant, in this case, by the 'Magane' people.

The second head of argument on behalf of the respondent was that the deed which has been spoken of as the adoption deed in this case may be construed as a will by which the deceased left all his property to the defendant. Had we not come to the conclusion that the defendant had proved his title to the property of the deceased by adoption. We should have been inclined to hold that, in the circumstances of this case, Exhibit II was a sufficient "declaration of the intention of the deceased with respect to his property which he desired to be carried into effect after his death" to be given effect to as a will; for it must be remembered that Exhibit II was preceded by a will in which the defendant was left a good portion of the properties concerned in this suit and was appointed to be the successor of the deceased as *pattam* holder. Again, the

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wording of Exhibit II seems to us to indicate with sufficient clearness that the main object of the deceased was to nominate the defendant as the successor to the property and dignities of the deceased, and that the adoption was merely a means for enabling the defendant to be such successor. Now, adoption in the case of persons governed by the *Aliyasantana* law is very different from adoption in the case of persons governed by the Hindu Law. In the former, the main, if not the only object of adoption is to nominate a person to succeed to the property. There is an absence of religious motive which must accompany a valid adoption governed by the Hindu Law. Hence, it seems to us that in the case of persons governed by the *Aliyasantana* law adoption is but slightly different from the nomination of a successor.

For these reasons, it seems to us that the defendant has succeeded in proving that he is entitled by the law governing the estate of the deceased to continue to be in possession of that estate, and consequently the suit of the Secretary of State must fail and the appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Sivasubramania Mudaliar and others ... *Appellants.** (*Defendants*).

v.

A. R. A. R. S. M. Somasundaram Chettiar .. *Respondent.* (*Plaintiff*).

Limitation—Agreement to pay costs of litigation—Construction—Time to run from the termination of the litigation.

Sivasubramania Mudaliar v. Somasundaram Chettiar

Where defendant had agreed to pay plaintiff all costs of a litigation conducted on his behalf by plaintiff *Held*: on a construction of the agreement that limitation began to run only from the termination of the litigation when plaintiff was able to ascertain the total amount of the costs.

Second appeal from the decree of the District Court of Tinnevelly in A. S. No. 548 of 1909 preferred against the decree of the Court of the Subordinate Judge Tinnevelly in O. S. No. 36 of 1908.

V. Ramesam for *T. R. Venkatarama Sastry* for Appellants.

C. V. Ananthakrishna Aiyar for Respondent.

The following is the full text of the agreement referred to in the judgment *infra*.

* S. A. No. 1231 of 1911. 26th March 1913.

Agreement entered into on 3rd October 1900 between A. P. R Arunachellam Chettiar Avergal son of Nattukottai Periakaruppan Chettiar Avergal who has come to Tinnevelly kusba and Sivasubramania Mudaliar Avergal son of Vellanayagam Mudaliar residing at Papankulam, Ambasamudram Taluk is as follows:—

While the President of the Sarangapani Sugar Mill Company Ltd., Tinnevelly and A. P. R. Arunachellam Chettiar Avergal of us having entered into an agreement on 28th August 1899 in respect of the aforesaid Mill were transacting business, the said transaction ceased for some reasons and the President of the said company and Sivasubramania Mudaliar Avergal of us entered into another agreement on 26th March 1900 and were transacting business. Such being the case, as A. P. R. Arunachellam Chettiar Avergal of us has been giving out that the agreement executed to him and the power of attorney executed for collecting the amount relating to that have not been cancelled, the agreements come to between us in respect of the cancelment of the aforesaid agreement and the power of attorney executed in connection therewith are as follow:—On complete settlement of the account of dealings carried on by A. P. R. Arunachellam Chettiar and in respect of the above matter under the terms mentioned in paragraph 19 of the agreement relating to the cancellation thereof, the account found due to A. P. R. Arunachellam Chettiar Avergal from the Sarangapani Sugar Mill Company Limited is Rs. 5200. In respect of this sum of five thousand and two hundred Rupees; it has been arranged that A. P. R. Arunachellam Chettiar Avergal should obtain Rs. 2500 due from Messrs. Parry and Co., in respect of the occasion on which the said Chettiar Avergal transacted business under the agreement that is to say prior to the 26th March 1900 the date of Sivasubramanya Mudaliar Avergal's agreement, that as Sivasubramanya Mudaliar aforesaid has agreed to pay the balance of Rs. 2700 on behalf of the said Company and executed and given a promissory note this day, the said sum should be paid to the said Arunachellam Chettiar Avergal on demand that in so far as it relates to matters other than the fact of the said Arunachellam Chettiar Avergal should obtain Rs. 2500 from Messrs. Parry and Co., as stated above the agreement executed to the said Arunachellam Chettiar Avergal should be cancelled hereby, that immediately on the receipt of the said sum of Rs. 2500 from Messrs. Parry and Co., the power of attorney executed to the said Arunachellam Chettiar should be cancelled, that until the recovery of Rs. 2500 due as stated above to the said Arunachellam Chettiar Avergal from Messrs Parry and Co., the said Sivasubramania Mudaliar Avergal should be liable to pay for the said amount from

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this date to the date of realisatio nwith interest at one per cent. per mensem with compound interest, the interest for each year being added once a year and *costs of suit if any that may have to be filed together with interest thereon also at the said rate and should pay the said sums to A. P. R. Arunachellam Chettiar Avergal,* that Sivasubramania Mudaliar Avergal of us should obtain the sum due in respect of works done subsequent to 26th March 1900 that A. P. R. Arunachellam Chettiar should have nothing whatever to do therewith and that both of us should write to Messrs. Parry and Co., showing these particulars. As both of us have accepted these terms, as Sivasubramanya Mudaliar Avergal and his son have executed a pro-note for Rs. 2700 to A. P. R. Arunachellam Chettiar Avergal accordingly and as both of us have written letter to Messrs. Parry and Co., mentioning these particulars the agreements executed to the name of Arunachellam Chettiar of us is hereby cancelled. Further until A. P. R. Arunachellam Chettiar recover Rs. 2700 as above stated from Messrs. Parry and Co., the power of attorney executed to the name of the said Arunachella Chettiar should remain in force so far as that sum is concerned and should be cancelled after the recovery of the said amount.

The claim against Parry & Co., was attached by one Mahadeva Aiyar. Parry & Co., paying the amount into Court, the amount was drawn out by Mahadeva Aiyar. As a result, plaintiffs had to sue Mahadeva Aiyar. The present suit was for costs incurred in that suit.

The court delivered the following

Judgment:—We agree with the learned District Judge in holding that under the agreement between Arunachellam Chettiar and the 1st defendant the plaintiff is entitled to recover the costs of the litigation against Mahadeva Aiyar. We are unable to accept Mr. Ramesam's argument that the plaintiff had no right to sue the defendants for the interest due on the amount of Rs. 2,500 in the hands of Messrs. Parry and Co., which was transferred to Arunachellam before recovering the principal amount from Messrs. Parry and Co., or Mahadeva Aiyar. The claim for interest due for the 3 years prior to the institution of the suit is clearly not barred by limitation. The second appeal must therefore be dismissed with costs. The claim in the plaintiff's memorandum of objections to interest prior to the period for which it was allowed by the Lower Court cannot be sustained as it is barred by limitation. But with respect to the costs of the litigation against Mahadeva Aiyar, we think that the learned judge is wrong in holding that the right to

recover all costs incurred more than three years before the suit is barred by limitation. It could not have been the intention of the parties to Exhibit A that the Chettiar should be entitled to recover each item of costs as soon as it was incurred. We are of opinion that limitation began to run only from the termination of the litigation when the plaintiff would be able to ascertain the total amount of the costs. The plaintiff no doubt is entitled to recover the costs from the defendant, although Mahadeva Aiyar also became liable to pay the costs decreed against him by the courts. The defendants however must be held to be entitled to a transfer of the plaintiff's claim under the decree in S. A. No. 998 of 1903 to costs against Mahadeva Aiyar. The decree to be passed in the plaintiff's favor must be conditional on his assigning to the defendants the decree he has obtained for costs against Mahadeva Aiyar within three months from this date. The plaintiff will have a decree on this account for Rs. 300 in addition to the amount awarded by the District Court. He will be entitled to interest on the amount decreed to him for costs from the 27th November 1905. Both parties will have proportionate costs throughout in the memo of objections.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH]

Present:—Sir Charles Arnold White KT., Chief Justice, Mr. Justice Ayling and Mr. Justice Oldfield.

R. P. Koneti Naicker, and two others. } *Appellants** *(Appellants in S. A. No. 103 of 11.)*

v.

Jatu Gopala Aiyar and another ... } *Respondents. (Respondents in do.)*

Negotiable Instruments Act S. 28—Agent—Signing the note in his own name—English Law and Indian Law—No difference—Promissory note—Construction—Practice—Plaint seeking to make party liable as agent—Additional issue as to liability as maker—Competent for the trial judge to raise.

A pro-note was in these terms :—Promissory note executed to you both (1) Gopalaiyar and (2) Nagasamier * * *......by R. P. Koneti Naidu Garu * * * agent holding power of attorney from the Zemindar Dorai Rajah * * * and residing in Vellikurichi Village. * * *

Amount due to you * * * up to date upon settlement of accounts of dealings which was standing against the name of Rani Chakkani Ammal on cloths &c., having been purchased ere this for the Vellikurichi palace is Rs. .... On demand, I promise to pay.......(Signed) R. P. Koneti Nayudu"

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*L. P. A. No. 167 of 1912. 19th August 1913.

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Held, on the construction of the note, that there was nothing thereon to indicate that the executant signed as agent or that he did not intend to incur personal responsibility that therefore he was personally liable.

Per Chief Justice and Oldfield J.—The law as to the liability of the agent signing his name to a pro-note is the same in England and in India. The Legislature intended in both enactments (English Bills of Exchange Act S. 26. and Indian Negotiable Instruments Act S. 28) to reproduce the Common law though the language used for the purpose of carrying out the intention is different.

In this case, the plaint sought to make the appellant liable only in the alternative i. e. if it was found that his representation as to agency was erroneous. At the hearing, on the application of the plaintiff the Munsif raised an additional issue as to the liability of the appellant as a maker of the note and gave a decree on that footing.

Held that under the circumstances, it was competent for the Munsif to raise the additional issue.

Appeal under S. 15 of the Letters Patent from the Judgment of the Honourable Mr. Justice Sundara Aiyar, and the Honourable Mr. Justice Sadasiva Aiyar, dated 13th August 1912, in S. A. No. 103 of 1911, against the decree of the District Court of Madura in A. S. No. 105 of 1910 preferred against the decree of the Court of the Principal District Munsif of Madura in O. S. No. 457 of 1908. For the differing Judgments see 23 M. L. J. 417.

S. Varadachari for *Gopalaswami Iyengar* for Appellant.

B. Sitarama Rao for Respondent.

S. Varadachari.—On the pleadings, the question of the agent's personal liability was not open. The suit was based on the footing that the note was by the appellant as agent, and he was sought to be made liable only if it was found that he had no authority to act. Under the circumstances, the Court ought not to have allowed a change of case at the hearing. *Raliegh* v. *Goschen*[1] was a case in point. A case which is inconsistent with the case in the plaint ought not to be allowed by way of amendment. Here there was no amendment of the plaint, even, at any time.

On the construction of the note, there was in the case sufficient indication on the note that the agent signed as such. Unlike S. 26 of the English Bills of Exchange Act, the Indian Act required only clear indication on the note *i.e.* the whole note that the agent signed as such. The language of the Indian Act is like that of the New York Act. See also Daniel S. 299. The law in England as it stood before the Act was the same as under the Indian Act. See *Lindus* v. *Melrose*[2], *Aggs* v. *Nichoslon*[3], *Alexander* v. *Sizer*[4]. In *Dutton* v. *Marsh*[5] their Lordships had not to consider this question. The recent case of

1. (1898) 1 Ch. 73 (81).
2. (1857) 27 L. J. Ex. 326.
3. (1856) 25 L. J. Ex. 348.
4. (1869) L. R. 4 Ex. 302.
5. (1871) L. R. 6 Q. B. 361.

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Chapman v. *Smethurst*[1] seems to show that in spite of the Act, it is possible to hold that an agent not adding words to his signature may yet be exonerated. In Chalmer's Bills of Exchange, cases that come under several categories are cited. First you have cases of trustees, secondly you have cases of directors of companies which cannot be made liable ; thirdly cases of acceptance. In addition you have cases of ship-masters &c. Each of these cases has a peculiar feature of its own and cannot be used as authority on the agent's liability. If a bill is drawn on a person in his personal capacity, and he accepted describing himself as agent, the presumption is that he accepted it in his personal capacity and not otherwise. The presumption is in favour of the validity of the instrument. But this presumption will not avail where the contrary construction is clear; *Aggs* v *Nicholson*[2] Mr. Justice Krishnasamy Aiyar's judgment is obiter. *Aiyathorai* v. *Dharmasivayah*[3]. *Mungumal Jessa Singh* v. *A. L. V. R. C. T. Firm*[4], shows that regard must be had to the customs and habits of the people of this country. Similarly the case in *Veerian Chettiar* v. *Ponnusawmi Chettiar*[5] shows that the proper presumption to make when a person is described as agent, is he takes the document as agent. *Subba Narayana Vathiar* v. *Ramaswami Aiyar*[6] is not an authority on this question. Prima facie in this case there is no consideration, the debt for which the note is given is the debt of a third party. *Croft* v. *Beale*[7] and no time is given. Hence also, the Court ought to presume that the document was given by the person as agent.

B. Sitarama Rao. Assuming that the law in India is different from that in England, still on the face of the particular note there is no indication that the agent signed as such. The law requires an indication that the agent *signs* as such and not merely that he is an agent. The description as agent, is not inconsistent with the agent contracting personally. When there is room for another construction it could not be said that there is indication that the agent signed as such. The law as laid down in S. 26 of the English Act is not peculiar to the law of Negotiable instruments. See Bowstead on Agency p. 400. Mere description as agent either in the body of the note or in the signature is insufficient to exclude personal liability of the agent. See *Parker* v. *Winlow*[8], *Hutcheson* v. *Eaton*[9], *Lennard* v. *Robinson*[10]. *Dutton* v. *Marsh*[11] is clearly an authority

1. (1909) 1 K. B. 927.
2. (1856) 25 L. J. Ex. 348.
3. (1911) 1 M. W. N. 143.
4. (1908) 4 M. L. T. 309.
5. (1911) 10 M. L. T. 328.
6. (1905) I. L. R. 30 M. 88.
7. (1851) 11 C. B. 172 s. c. 20 L. J. C. P. 186.
8. (1857) 7 El. & Bl. 942—119 E.R. 904.
9. (1884) 13 Q. B. D. 861.
10. (1855) 24 L. J. Q. B. 275.
11. (1871) L. R. 6 Q. B. 361.

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at least for this. Description of the purpose for which the borrowing is made is not sufficient; nor the knowledge that the defendant is agent *Leadbitter* v. *Farrow*[1], *The Elmville*[2]. The presumption is that the agent incurred personal liability *Lindus* v. *Melrose*[3]. That the debt is another's—and this appears on the note—is immaterial. See *Parker* v. *Winlow*[4]. It may have been for the purpose of ear-marking the transaction *Dutton* v. *Marsh*[5] *The Elmville*[2]. *Gray* v. *Raper*[6] *Okell* v. *Charles*[7] are both cases of negotiable instruments and before the Act. The former is a case where the agent stated in the body that he was acting for another and yet he was held liable. *Aggs* v. *Nichoslon*[8] is a case of conditional delivery. See *Price* v. *Taylore and another*[9]. The cases establish at least this that the agent must distinctly say on the face of the document that he is executing the document *as agent* and *for the principal.* Nothing short of it will do. *Gray* v. *Raper*[6] goes further and says that even this will not do in the case of negotiable instruments and this was the law as laid down authoritatively in England when the Negotiable Instruments Act was enacted. S. 28 of the Indian Act is not inconsistent with S. 26 of English Act. The difference is difference in drafting. Taking S. 28 which requires the agent to indicate that he *signs as agent*, with S. 27 which requires the agent to act in the principal's name and taking both with the general rule of construction adopted in England as to agent's contracts, the same result is reached as S. 26 of the Bills of Exchange Act. He referred to *Subba Narayana Vathiar* v. *Ramaswami Aiyar*[10], *Somasundram* v. *Krishnamurthi*[11], *Kutte Ammu* v. *Purushottam Doss*[12]. On the question of consideration he submitted antecedent debt by whomsoever incurred is good consideration for a pro-note, S. 27 of the Bill of Exchange Act. The theory is that a pro-note is a payment. It is dealt with on the same footing as currency. See *Currie* v. *Misa*[13]. *Croft* v. *Beale*[14] is not case of negotiable instrument at all. A person accepting performance from a stranger can't enforce it again; See S. 41 of Contract Act. The burden of proving want of consideration was on the defendant and he has not chosen to prove it. The case in *Mungumal Jessa Singh* v. *A. L. V. R. C. T. Firm*[15] is a case consistent with the English rule. There the signature was not that of the agent at all. The case in *Veerian Chettiar* v. *Ponnusami Chettiar*[16]

1. (1816) 5 M. & S. 345—105 E. R. 1077.
2. (1904) P. 319
3. (1857) 27 L. J. Ex. 326.
4. (1857) 7 El & Bl 942—110 E. R. 1497.
5. (1871) L. R. 6 Q. B. 361.
6. (1866) L. R. 1 C. P. 694.
7. (1876) 34 L. T. N. S 822
8. (1856) 25 L. J. Ex. 348.
9. (1860) 29 L. J. Ex. 331
10. (1906) I. L. R. 30 M. 88.
11. (1906) 17 M. L. J. 126.
12. (1910) 21 M. L. J. 526.
13. (1875) L. R. 10 Ex. 153, 162.
14. (1851) 20 L. J. C. P. 186.
15. (1908) 4 M. L. T. 309
16. (1911) 10 M. L. T. 328.

not a case of liability of agent. The object of the law is as said by Daniel in S. 301, that a negotiable instrument should wear no mask.

S. Varadachariar replied.

Cur ad vult.

The Court delivered the following

Judgments:—*The Chief Justice.*—The main question we have to determine is whether the party who signed the promissory note in question as maker is personally liable thereon. The following is a translation of the note :—

"12th August 1907 corresponding to 28th Audi Plevanga—
"Promissory note executed to you both (1) Gopalaiyar and
"(2) Nagasamier, sons of Soothi Seshaiyar, residing in No. 1 Police
"Station lane, Madura town, by R. P. Koneti Nayudu Garu, son of
"Nanjundappa Nayudu Garu, agent holding power of Attorney from
"the Zemindar Dorai Rajah Avergal and residing in Vellikurichi
"Village, Mana Madura Taluk, Madura District.

"Amount due to you including principal and interest up to date
"upon settlement of account of dealings which was standing against
"the name of Ranichekkani ammal on cloths &c., having been pur-
"chased ere this for the Vellikurichi palace, is Rs. 694—6—0. On
"demand, I promise to pay this sum of Rupees six hundred and
"ninety four and annas six with interest at Re. $\frac{5}{8}$ per cent. per
"mensem from this date either to you or order and shall take this
"back with the endorsement of payment thereon.

(Signed) R. P. KONETTI NAYUDU"
(in Telugu.)

The contention for the Appellant was that the Zemindar was liable on the note and not the party who signed it.

S. 28 of the Indian Act (Negotiable Instruments Act, 1881) makes the party who signs liable unless, there is, on the note, an indication that he signs as agent, or that he does not intend to incur personal responsibility.

The words in the instrument before us which are relied on as affording the required indication are the words in the body of the note "agent holding power of attorney from the Zemindar." If I had to decide the question entirely on the words of the instrument, leaving out of consideration the English decisions, I should be prepared to hold, as a matter of construction, that there is no indication on the note that the maker signed as agent or that he did not intend

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to incur personal responsibility. He is described as holding a power of attorney from the Zemindar. It is not stated that the power of attorney included a power to sign promissory notes, or that the note was signed in pursuance of the power. There are no words added to the signature indicating that the maker signed in the capacity of agent.

It was suggested that the law as laid down in the English cases before the English and the Indian Acts was not the same as the law under the Acts and that the English cases which supported the respondent's contention that the maker was personally liable could not be relied on. I do not agree.

The Indian Negotiable Instruments Act was passed in 1881 one year before the English Bills of Exchange Act, 1882. The latter enactment was drafted by Sir M. D. Chalmers and was based on his Digest of the law of Bills of Exchange published by him in 1878. In the preface to the 3rd edition of his book on the Act he states that for the most part the propositions of the Act were taken word for word from the propositions of the Digest. He goes on to observe that since the Act the cases decided before the Act are only law in so far as they can be shown to be correct and logical deductions from the general propositions of the Act. This statement is consistent with the observations on the same subject, made by Lord Herschell in *Vagliano* v. *The Bank of England*[1] and seems to me to be equally applicable to the Indian Act.

Sir M. D. Chalmers states in his introduction to his first edition of the Indian Act that it reproduces in a statutory form the English common law of negotiable instruments with scarcely any modifications. Elsewhere he observes that as the Indian Act, in so far as it deals with any subject, adopts and enforces English law almost in its entirety, it is conceived that in matters relating to negotiable instruments which are introduced by the Act (and which do not come within the scope of the Indian Contract or Evidence Act) English law would be looked to and followed as a guide.

The question of the liability of the maker of a note who disclaims personal responsibility on the ground that he signed as agent is, as it seems to me, not a matter untouched by the Act." It is specifically dealt with in S. 28.

The language of the section of the English Act (section 26) no doubt differs from that of the corresponding section of the Indian Act (section 28). It declares that a person who signs and adds

1. (1891) A. C. 107 at p. 144.

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words to his signature indicating that he signs for and on behalf of a principal, or in a representative character, is not personally liable, while section 28 of the Indian Act declares that an agent who signs is personally liable unless he indicates on the instrument that he signs as agent or that he does not intend to incur personal liability. It might be said that in view of this difference of language the onus on the party who seeks to avoid personal responsibility on the ground he signed as agent is heavier under the Indian than under the English enactment. I do not, however, attach importance to this variation of language because, I think the legislature intended in both enactments to reproduce the English common law, though the language for the purpose of carrying out their intention is different.

In dealing with this question we are, in my opinion, warranted in considering the decisions before the Indian Act, bearing in mind that they are only law " in so far as they can be shown to be correct and logical deductions from the general propositions" in the Indian Act, in the same way as an English Court would be warranted in considering the English decisions in an English case.

Perhaps the strongest case in the appellant's favour is one since the Act, the decision of the Court of Appeal, overruling, *Channel* J, in *Chapman* v. *Smethurst*[1]. The court held that the man who signed was not personally liable, but in that case the facts were very different from those in the present case. There, at the foot of the note was the rubber stamp of the company and under those words the defendant wrote the words J. H. Smethurst, managing Director. There, it was admitted the defendant had the company's authority to sign the note. The note was made in the name of the company by a person acting under the authority of the company, as allowed by section 47 of the Companies Act, 1872. In *Alexander* v. *Sizer*[2] where it was held that the man who signed the note was not personally liable, it was signed " For (certain parties) John Sizer, Secretary". *Lindus* v. *Melrose*[3] was again, a very different case from this. There the note was signed by certain persons who described themselves as directors, and it was held that the note was binding on the company and that the directors were not personally liable. In *Aggs* v. *Nicholson*[4], the two directors who signed the note, without additional words, described themselves in the body of the note as directors of the Society. They were held not personally liable. The case of *Dutton* v. *Marsh*[5] was held to

1. (1909) 1 K. B. 927.
2. (1869) L. R. 4 Ex. 102.
3. (1858) 27 L. J. Ex, 326.
4. (1856) 25 L. J. Ex. 348.
5. (1871) L. R. 6 Q. B. 102.

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be on the other side of the line, and the parties who signed were held personally liable. In that case though they described themselves as Directors in the body of the note, they did not promise to pay *on behalf of the company* and they signed the note without any addition to their signatures, though the company's seal was affixed at the corner of the note with "witnessed by L. L."

I do not propose to discuss further the numerous authorities cited in the able arguments which were addressed to us. So far as the English cases go, the weight of authority seems to me clearly on the side of the respondent. The question came before the late Mr. Justice *Krishnaswami Aiyar* in a case *Aiyathurai Aiyar* v. *Dharmasiva Aiyar*[1]. The learned judge held that the man who signed the note was personally liable. In that case the indications on the note that the man who signed it did not intend to make himself personally liable would seem to have been stronger than the indications in the case before us.

It seems to me that, reading the note in question as a whole, on the construction of the instrument, and on authority, the maker is personally liable.

As to the minor point that the Munsif was wrong in framing an additional issue which raised the question of the liability of the 3rd defendant as maker of the note, I agree with *Sadasiva Aiyar Justice*, that it was open to the Munsif to do this.

A further point was taken that there was no consideration for the note as between the maker and the payee and that the only consideration for the transaction was the debt due to the payee by a third party. In the course which the case took before the Munsif this point did not arise and was not considered. I do not think we are called upon to consider it now.

I think the appeal should be dismissed with costs.

Ayling J :—I agree. The point is not free from doubt, but on a careful consideration of the terms of the pro-note I am of opinion that there is no indication therein that the maker signed as an agent or did not intend to incur personal liability.

Oldfield J :—I concur in the statement of the law contained in the judgment of the learned Chief Justice. With reference to the wording of the note it is material not only that the maker describes himself in a manner which does not imply any intention to incur personal responsibility, but also that his promise to pay is unqualified by any reference to his alleged principal. The appeal must be dismissed with costs.

1 (1911) M. W. N. vol. I. p. 143.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

Sri Sri Sri Gajapathi Kistna Chendra Deo Garu, Proprietor of Nandigam Estate being minor under the Court of Wards by his next friend the Collector of Ganjam ... ... *Appellant.**

v.

P. Srinivasa Charlu (died) L. R. of the late Dewan Bahadur P. Anantha Charlu ... ... *Respondent.*

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Deed—Construction—Gift—Agreement to pay peishcush after sub division—Duty of donee to afford facilities for sub-division—Indian Contract Act S. 70—Scope of—" Implied Contract "—" Option to refuse benefit ", unnecessary.

Plaintiff's father made a gift to the defendant, a condition of which was "we (i.e. plaintiff's father) should get the village sub-divided in your (donee's) name, you should pay to the Government the peishcush fixed thereupon according to the said sub-division".

Held: upon the construction of the document that the liability of the donee to pay his portion of the peishcush arose only upon sub-division.

but that he was bound to afford facilities for separate registration by concurring in the application made by the Zamindar for the purpose.

Held: accordingly,

When on the plaintiff's application the Collector fixed the proportion of the peishcush due from the defendant but as the defendant did not intimate his consent thereto, the application was dismissed

that the defendant was liable to pay the proportionate amount due from the land in his possession from the date on which the Collector fixed the proportion.

and that payments made by the plaintiff in that behalf could be recovered from the defendant under S. 70 I. C. A.

There is nothing in S. 70 I. C. A. which requires the court to deal with the cases coming under it as cases of implied contract.

Yogambal Bai Ammani Ammal v. *Naina Pillai*[1], puts too narrow a construction on the Section and cannot be followed in so far as it lays down that the defendant must have an option before the benefit is conferred, of accepting or declining it.

The scope and applicability of S. 70. I. C. A. discussed.

Appeal from the decree of the District Court of Ganjam in Original Suit No. 13 of 1907.

S. Swaminadhan for Appellant.

A. Kristnaswamy Aiyar for *C. P. Ramaswamy Aiyar* for Respondent.

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* A. S. No. 25 of 1909. 12th March 1913.

1. (1909) I. L. R. 33 M. 15. s. c. 19 M. L. J. 489.

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The Court delivered the following

Judgments.—*Miller J* :—The District Judge decided the case on the 2nd issue only and has construed Exhibit A as meaning that the plaintiff's father made a gift of the village free of land tax to the donee until the donor obtained separate registration of the village by the Collector and apportionment of the peishcush. The condition in the gift is " we should get the village sub-divided in your name (we being the Zemindar), you should pay to the Government the peishcush fixed thereupon according to the said sub-division." The Zemindar made the gift in 1890 and died in 1898 and during all that time the donee remained in possession of the village and paid no portion of the land tax. The conduct of the Zemindar, which may be looked to aid in construing the document, supports the construction which the District Judge has put upon it, and that is that so long as the village remained an unseparated part of the zemindar, the zemindar was to pay the land-tax. But he had the option of obtaining from the Collector separate register and that may well imply an obligation on the donee to concur in his application to the Collector for that purpose. Then in 1901, the Manager of the estate under the Court of Wards, on behalf of the plaintiff applied for separate registration. Notices were published in accordance with the provisions of the Madras Act I of 1876 in the District Gazette and on the 19th of September 1903 the Collector fixed the appropriate peishcush at Rs. 206-5-3 and on that date notice thereof was sent to the donee calling upon him to state if he was willing to agree to the apportionment. The donee made no answer to several letters calling upon him to reply, and in 1904, the Collector for want of his concurrence refused to order the separate registry. Subsequently in September 1904, the donee consented to separate registry and it was made finally in 1905. Now construing the document as the District Judge has done, that the donee was under no obligation to pay the land tax before the sub-division of the village, the 19th September 1903 is the first date so far as I can see on which any obligation can be laid upon the defendant. There is nothing in the evidence to show that the peishcush could have been fixed earlier by the Collector unless he had been applied earlier by the Court of Wards. There is nothing to suggest that the delay was due in any way, to any action of the defendant or to any contention of his, that peishcush ought not to be apportioned. Consequently on the terms of the gift the 19th of September 1903 is the earliest date from which the inability to pay peishcush could commence. On that date or a day or two later, the donee received a notice from the Collector that the peishcush had been fixed and that the sub-

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division has been concluded subject to his consent. It may be, therefore, that from that date the sub-division contemplated by the deed of gift was complete and that the donee was bound to pay the amount fixed in which case all subsequent payments made by the plaintiff may be recoverable under S. 69 of the Indian Contract Act. But it is not necessary for us to decide the case on that Section. It may be safer to rely, as the plaintiff also relies in his plaint upon S. 70. From the date on which the peishcush was fixed it seems clear that the peishcush paid by the plaintiff to the amount of Rs. 206–5–3 was made for the donee. No doubt, it is possible that if the plaintiff had not paid it, his own interest might have suffered though it is probable that the Collector in as much as the Court of Wards was the payer, might have come down upon the given village for any arrears which the Court of Wards might assent to be due in respect of that village. That, however, which I need not go into, it is undoubtedly possible that the plaintiff's interest might have suffered but that I think will not, in the circumstances make the payment less a payment for the defendant.

The amount of the peishcush which had been fixed may be payable by the defendant and it was paid as such and as being due upon that property. Therefore though it might have been in the interest of the plaintiff to pay it, it does not seem to me that there is any reason to say that it was not on that ground a payment made for the defendant. It is perfectly clear, of course that once the sub-division was effected, the amount paid by the plaintiff could not have been intended to be left unrecovered, that the payment was not intended to be made gratuitously.

Then the only other point, that has to be considered in deciding whether the section is applicable in its language seems to me 'did the defendant enjoy the benefit thereof'? He undoubtedly did enjoy the benefit thereof; he never objected to accepting the benefit; he remained in possession of the village until the permanent registration was effected; and he never showed that he did not wish the payment to be made. On the contrary, he finally accepted the sub-division and the apportionment. It is true, no doubt, that, in his written statement, he suggests that the amount was excessive but so far as the evidence shows he does not seem to have said so to the Collector or to the plaintiff or to any one before the suit was filed. Consequently, I think, that he clearly accepted the benefit; he enjoyed the land and let the plaintiff pay the land tax which he must have known was being paid for him. It does not seem to me that anything further is required in order to make the amount re-

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coverable under the Section. We have been referred to some cases as shewing that this section does not materially depart from the English law with regard to voluntary payments. I do not know that I need discuss them. We of course proceed on the language of the section as it stands, unless we are bound by some decision to put a particular interpretation on it. What is necessary under the section ? It is necessary no doubt that the plaintiff should prove first, that he is doing something lawful when he is making the payment. That provision had been interpreted in various cases, but here there is no question about the lawfulness of the payment. Then he will have to show that he did not intend to pay gratuitously. That is also clear here. He will have then to show that what he did was done for the defendant, and it clearly may be very difficult for him to show that in some cases especially in cases where his own interest is manifestly predominant. If he pay in his own interest, he will not ordinarily be held to have made the payment for the defendant, but whether he did so or not it seems to me is a question of fact in each case. Then finally the plaintiff will have to show that what he did, did actually confer a benefit upon the defendant and that the defendant enjoyed the benefit. It would seem to be a sufficient answer to the plaintiff's claim if the defendant declined the benefit which it was proposed to thrust upon him. He may be taken to be the best judge of what is beneficial to himself in ordinary cases and could not in such cases be said to have enjoyed a benefit which was no benefit. On this ground or on the ground that in such cases the payment is not really made for the defendant may be rested the cases which decide that, unless the defendant is willing to accept the benefit, the payment will not be recoverable under the section. No case has, I think, been cited during the arguments. There is a case *Narayanaswami Nayudu* v. *Sri Raja Vellanki Srinivasa Jagannadha Row*[1], in which it is pointed out that, at any rate, the law of S. 70 of the Indian Contract Act is certainly not narrower than the English Law, and though in that case we held that we could imply a request to pay, I do not know that there is anything in S. 70 which requires us to deal with the matters as one of an implied contract; but there, I think that from the condition of the gift accepted by the defendant we might well imply an undertaking that anything that might be paid on his behalf after his sub-division (which he is bound to facilitate) would be repaid by him.

1. (1909) I. L. R. 33 M. 189.

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I do not think that what I have laid down is opposed to any of the cases though perhaps I go somewhat farther than *Yogambal Bai Ammani Ammal* v. *Naina Pillay Marakayar*[1]. I do not think it can be held under S. 70 of the Indian Contract Act that the defendant must have an option of declining the benefit if that means that before the benefit is conferred, he must be given the choice of accepting or declining it. Here as I have said the defendants adopted the benefit. It seems to me that we are clearly in this case within S. 70 of the Indian Contract Act and therefore I hold that, from the date on which the sub-division was settled by the Collector i. e., from the 19th of September 1903, though the registration could not be made then, the payments were made by the plaintiff for the defendant and that in respect of them the latter is bound to reimburse the former, the amount of the payment up to the 18th April 1904 (the last payment) with interest at 6% per annum from the date of the suit till payment. Proportionate costs are to be paid and received in both the Courts.

Sadasiva Aiyar, J.—On the construction of the gift deed I agree that the defendant would under its terms become liable to pay the proportionate kist in a village gifted to him only from the date when the Collector divided off the village as a separate estate and fixed the separate revenue due upon that village. But there was clearly an implied obligation imposed under the gift deed on the defendant to give facilities for such separate registry whenever the donor takes steps to have such separate registry and separate apportionment of peishcush made by the Collector. All payments made before the date (about the 20th September 1903) when the Collector fixed the separate revenue payable in respect of the village and sent notice to the defendant cannot therefore be recovered by plaintiff from defendant, having regard to the provisions of gift deed. As regards the payment of peishcush made after September 1903, the circumstances clearly indicate that the payment of the whole peishcush including the portion chargeable upon the defendant's Village (according to the Collector's estimate) was made by the plaintiff not only on his (plaintiff's) own behalf, but also on behalf of the defendant. Much reliance was placed by the respondent upon the case decided in *Yogambal Bai Ammani Ammal* v. *Naina Pillay Marakayar*[1], by Mr. Justice *Munro* and Mr. Justice *Sankaran Nair*. A portion of the head-note runs thus:—"Where the person paying is interested in making the payment, he cannot be presumed, in the absence of evidence to shew that he intended to act for the other party also, to have acted for such other party." I fully accept the

2. (1909) I. L. R. 33 M. 15. s. c. 19 M. L. J. 489.

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statement of the law so laid down. In that case, there seems to have been such absence of evidence to include 'surrounding circumstances' to show that the plaintiff in that case intended to act for the other party also. The case of *Abdul Walid Khan* v. *Shaluka Bibi*[1], was, again, decided on the particular facts of that Case i. e., the circumstances in that case similarly indicated that the payment of the plaintiff in that case was not also on behalf of the other party sought by the plaintiff to be made liable to pay contribution. I do not think that these cases intended to lay down generally that where a person is interested in making a payment, it cannot be held under any circumstances that he intended to act for the other party also. On the contrary, the observations at page 21 in *Yogambal Bai Ammani Ammal* v. *Naina Pillay Marakayar*[2], clearly shews that from the circumstances it might be inferred that the plaintiff intended "also to act for the defendant." I think the facts and the circumstances of the present case clearly show that all payments made after September 1903 were intended by the plaintiff to be both on behalf of the plaintiff and of the defendant. Therefore, of course, other observations in *Yojambal Bai Ammani Ammal* v. *Naina Pillay Marakayar*[2], to the effect that S. 70 of the Indian Contract Act merely reproduces the English law laid down in *Lampleigh* v. *BraithWaite*[3], with all the restrictions imposed by other English decisions following it and that a person sought to be made liable must not only have benefited by the payment but also have had an opportunity of accepting the payment. I respectfully dissent from such observations and I am inclined to agree more with the judgment in *Jagnarain* v. *Badri Das*[4], in which the too narrow interpretation put upon S. 70 of the Indian Contract Act in the above case (*Yogambal Bai Ammani Ammal* v. *Naina Pillay Marakayar*[2]), is dissented from. The words of S. 70 of the Indian Contract Act do not oblige us to place the restrictions imposed by the English decisions upon the equitable right of a person who honestly does something for another without an intent to do so gratuitously to recover compensation from that other for the benefit so conferred upon and enjoyed by that other person. The case in *Damodara Mudaliar* v. *The Secretary of State for India*[5], did not favour the imposition of such restrictions. It is stated in *Yogambal Bai Ammani Ammal* v. *Naina Pillay Marakayar*[2], that the decision in *Damodara Mudaliar* v. *Secretary of State*[5] is opposed to the decision of the Privy Council in *Abdul Walid Khan* v. *Shaluka*

1. (1893) I. L. R. 21 C. 496. 2. (1909) I.L.R. 33 M. 15 s.c. 19 M.L.J. 489
3. (1616) 1 Smith's Leading Cases 163. 4. (1911) 16 C. L. J. 156.
5. (1899) L. R. 18 M. 188.

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Bibi[1], and rested on the particular facts of that case. As regards the observations of the Privy Council in *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*[2] not only was the payment in that case made in 1868 (before the Indian Contract Act became law) but it was found in that case that the payment was a voluntary payment " against the will of the party benefiting and made in the course of a speculative transaction in which the interest of the appellant was directly opposed to that of respondents. Of course a few restrictions ought to be placed on the words of S. 70 of the Indian Contract Act, if they are so wide that it could not have been possibly intended by the legislature that the words should be given such a wide scope. For instance if the benefit is conferred notwithstanding notice of protest of the man benefited that he did not want the benefit proposed to be conferred on him, the act could not be said to have been done on his behalf. That seems to have been laid down in *Damodara Mudaliar* v. *The Secretary of State for India*[3] and also in the Privy Council case in *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*[2]. Also if the benefit conferred is so inseparably accompanied by onerous obligation that a reasonable man might reasonably (and not in a wholly capricious way) have refused to accept the benefit burdened with these obligations, there also S. 70 may not apply. But subject to these and other similar restrictions (it is impossible to predict and lay down exhaustively all the restrictions which it is advisable to lay down. I think that Courts in India ought to be guided more by justice, equity, and good concience than by the English precedent and should not cut down the beneficent provisions of S. 70 of the Indian Contract Act which are intended to apply to all cases of benefit *bonafide* conferred by one person upon another and which benefit is enjoyed by the other person. It has been held in *Raja of Vizianajaram* v. *Raja Satrucherla Somasekararaj*[4] that, so far, as a charge claimed by one co-sharer when both sharers are benefited by a payment (made by the first co-sharer such a charge can be imposed by law notwithstanding certain English decisions which refuse to give such a charge to the co-sharer. In this connection I wish to quote the following passage from the judgment of Justice Sir. *Subramania Aiyar* in that case " this case convinces me that there is far less likelihood of any unsound rule being laid down in this country in consequence of the supposed deceptive character of the phrase " Justice, equity and good conscience" than there is of Judges refusing to accept a sound rule from, I say with all deference, what is little short of a prejudice

1. (1863) I. L. R. 21 C. 406.
2. (1875) L. R. 2 I. A. 131.
3. (1899) I. L. R. 18 M. 188.
4. (1902) I. L. R. 26 M. 686.

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to that time-honoured phrase introduced of old by wise legislators and universally accepted as words compendiously denoting those ultimate principles of what is right and proper, fair and reasonable, and good and expedient,—principles which Judges here as elsewhere, cannot help resorting to in dealing with the difficult questions, not directly governed by existing precedents, which often arise in the course of the administration of justice."

"It is quite true that for the enunciation of such principles, we mainly and generally look to English decisions and text books of repute. But I fail to see why we are precluded from, when necessary, considering and following rules laid down in the sister is land of Ireland, where the same system of Common Law and Equity is administered by a judiciary neither less able nor less learned than that in England, if such rules appear to us to be the best suited to the conditions and requirements of this country. In order to shew that the view adopted in *Seshagiri* v. *Pitchu*[1], and since then more than once followed in this Court, is not a *pseudo*—equitable doctrine peculiar to Ireland, but true equity accepted and enforced as such without any reference to any analogy that may or may not be furnished by the principle of maritime salvage lien, in jurisdictions remote from Ireland, but administering the same common law and equity, I may also draw attention to what is alluded to in the passage cited by *Bashyam Iyengar* J. from Freeman on Co-Tenancy, and quote a fuller statement by another writer of the law on this point in those parts of the United States where it has arisen". If a charge on property could be created because it is in consonance with justice, equity and conscience, I do not see why an obligation, though it will be personal, cannot also be created if consonant with justice especially when S. 70 of the Indian Contract Act interpreting its terms in their ordinary meaning, also favours the plaintiff's right to obtain contribution from the defendant. The case in *Raja of Vizianagaram* v. *Raja Satrucherla Somasekararaz*[2], was decided without any reference to any analogy that may or may not be furnished by the principle of maritime salvage lien. Let us take a not infrequent case of two neighbouring agriculturists. One of them is absent in a distant town on private business. His land requires well water irrigation for one day emergently in order to produce a fair 12 annas crop, though even without the irrigation it may yield a four annas crop and will not totally fail. His neighbouring land-owner, while spending Rs. 5 for irrigating his own neighbouring land does the neighbourly service of spending Rs. 5 for irrigatiag his neighbour's land also on that day

1. (1887) I. L. R, 11 M. 452. 2. (1902) I. L. R. 26 M. 686.

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believing that, as a reasonable man, his neighbour, when he returns from the distant place where he is unavoidably detained, would repay him the Rs. 5 as he is bound to do in justice, equity and good conscience. It is to be said that S. 70 does not apply to such a case because though defendant enjoyed the benefit of the 12 annas crops (say benefited to the extent of Rs. 50, he had, had no option to accept or reject the benefit. I think not. The Roman Law is admittedly wider than the English Law in this matter, and S. 70 was suggested rather "by the notes to *Lampleigh* v. *Braithewaite* and perhaps, indirectly by the Roman Law" than by the strict rules laid down in English cases, (as Mr. Stokes has remarked). No doubt the introduction of considerations as to what a "reasonable man, a man of ordinary prudence" would do for another or would accept as properly done for himself when done by a third person introduces an uncertain element and gives some discretion to Courts of Justice; but the Contract Act in several sections introduces such expressions as "ordinary prudence" "reasonable diligence" "similar skill as generally possessed" "considerations" (See Ss. 151, 189 and 212 of the Indian Contract Act), and Courts could not shirk the duty of dealing out justice because difficulties in determining what ordinary prudence or reasonable diligence, &c., would dictate under particular circumstances would have to be encountered in deciding some cases. I may add that Mr. Shephard in his Contract Act says (page 425) that not only does section 70 of the Contract Act "make a departure from the principle" (of the English decisions) "that a man cannot be charged for services rendered to him by another unasked and without authority "but that S. 189 also makes a similar departure in favour of an agent who acts in an emergency without authority. In the result I agree in the decree passed by my learned brother.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Aiyar,

Krishna Hande ... ... *Appellant**

v.

Padmanabha Hande and others ... ... *Respondents.*

Krishna Hande *v.* Padmanabha Hande

Joint family—Decree for partition—Death of decree holder—Eldest son after him proper person to execute—Civil Procedure Code Or. 21 r. 16—Security not necessary—O. 21 r. 2—Payment in Kind—Applicability.

Where in a suit for partition the decree-holder dies leaving several sons, the eldest son as the managing member of his branch of the family is prima facie the person entitled to take out execution and not the junior members.

Ordinarily no security need be taken from the managing member where execution is allowed in his favour on behalf of himself and his brothers.

A payment to the managing member of a family towards the amount due under the decree is valid.

Dorasami Sastriar v. *Venkatrama Iyer*[1] *followed.*

Or. XXI r. 2 C. P. C. requiring the certifying of payment applies only to monies payable under a decree and not to payments in kind.

Appeals from the orders of the District Court of South Canara in A. S. Nos. 418 and 437 of 09 respectively preferred against the order of the Court of the Temporary Subordinate Judge of South Canara in E. P. Nos. 11 and 32 of 09.

C. V. Ananta Krishna Aiyar for Appellant }
K. Ramnath Shenoi & *K.Y. Adiga* for Respondent } in C. M. S. A. 29 of 1912.

K. Y. Adiga for Appellant ... ... }
B. Sitarama Rao for Respondent ... } in C. M. S. A. 30 of 1912.

The Court delivered the following

Judgment :—These appeals are against orders passed on applications made to execute a decree for partition. The plaintiff who obtained the decree died after it was passed. He left 5 sons. The eldest of them was the 27th defendant in the suit. His minor brother was the 32nd defendant. The other sons were the defendants Nos. 28 to 31. Two applications were put in for execution owing to dissensions between the sons,—one by the 27th defendant on behalf of himself and his brother, and the other by the defendants Nos. 28 to 31. The Subordinate Judge allowed execution to issue in favour of the defendants Nos. 28 to 31 on behalf of themselves and the defendants Nos. 27 and 32, whose application was rejected ; but directed that the money realized in execution

*C. M. S. A. 29 and 30 of 1912. 4th April 1913.

1. (1911) 21 M. L. J. 1088.

Krishna Hande v. Padmanabha Hande

should be paid to all the sons of the plaintiff in shares if they could not agree to act together. The 1st defendant who was directed by the decree to pay until partition and delivery of possession, a certain quantity of paddy every year on account of the proportionate share of the income due to the plaintiff on the family lands, set up that he had made certain payments to the 27th defendant. The defendants Nos. 28 to 31, in their application for execution, admitted some of these payments as having been made to them, but denied the other payments pleaded by the 1st defendant. The 27th defendant denied any payment to himself and contended that payments made to the defendants Nos. 28 to 31, even if true were not valid as against him and that he was entitled to execute the whole decree. The Subordinate Judge did not record evidence with respect to the payments pleaded on appeal. The Subordinate Judge's order was, in the main upheld by the District Court, but it was of opinion that the payments even if true, were invalid. There was also a question raised as to the proper price of the rice which the 1st defendant was bound to deliver. No evidence was taken on the point, but the prices notified in the Government Gazette were awarded by the Lower Courts.

The first question argued is whether the Lower Courts were right in granting execution to the defendants Nos. 28 to 31 instead of to the 27th defendant. We are of the opinion that the 27th defendant as the manager of the decree-holder's branch of the family is *prima facie* the proper person entitled to take out execution. The reason given for preferring the defendants Nos. 28 to 31 *viz.*, that they formed the majority of the sons of the deceased plaintiff, cannot be accepted as valid. We shall therefore direct that execution should issue in pursuance of the 27th defendant's petition on behalf of himself and the other members of the family, *viz.*, the defendants Nos. 28 to 32.

It was contended in the Lower Court by the defendants Nos. 28 to 31 that the 27th defendant was in collusion with the 1st defendant. No inquiry was made about this plea. If there are reasonable grounds to support it, it would be proper to take security from the 27th defendant for the protection of the interests of the defendants Nos. 28 to 31, although ordinarily, no security need be taken where execution is allowed in favour of the managing member of a family on behalf of himself and the other members thereof.

The next question relates to the payments pleaded by the 1st defendant. It is clear that the 1st defendant had no right to make any payment to the defendants Nos. 28 to 31 who are junior mem-

Krishna Hande v. Padmanabha Hande

bers of the family. A payment to the 27th defendant out of Court would be valid according to the decision of this Court in *Duraisami* v. *Venkatarama Aiyer*[1]. We see no reason for departing from the view taken in that case. Mr. Anantakrishna Aiyar states that one of the cases relied on there *viz.,Ganesh Row* v. *Tuljaram Row*[2] has been subsequently reversed by the Privy Council. But the question in that case was whether the managing member of a family can compromise a suit on behalf of himself and the other members parties to the suit—who are minors, without the consent of the court. There is clearly a distinction between such a case and the present one. The conduct of every guardian *ad litem* of a minor litigant is subject to the control of the Court and there is good reason for holding that he is not entitled to enter into a compromise so as to affect any minor party, without the sanction of the Court. We do not think that the reversal of that decision by the Privy Council would affect the correctness of the judgment in *Doraisami* v. *Venkatarama Aiyar*.[1] We are of opinion that any payment made by the 1st defendant towards the amount due under the decree must be taken to be valid. But it is contended that as the payments were not certified to the Court, they cannot be recognized in execution proceedings. Mr. Anantakrishna Aiyar urges in answer to this argument that O. XXI R. 2 requiring the certifying of payments applies only to monies payable under a decree and is not applicable when the decree is for the delivery of rice and rice is delivered accordingly. We must accept this contention. Order XXI Rule 2 restricts the right of a person obeying a decree to prove his performance of the directions contained therein. There is no reason for not construing the words of the Rule strictly. No authority justifying a broad construction has been cited. There must be an inquiry into the question whether any payments were made to the 27th defendant.

We must also uphold the 1st defendant's contention that he was entitled to adduce evidence regarding the price of rice. The Subordinate Judge was not right in accepting the rates mentioned in the Government Gazette as correct without giving an opportunity to the 1st defendant to give evidence on the point.

The first defendant also contends that after the decree was passed, the assessment payable on the plaintiff's share of the lands which had been fixed at Rs. 200 in the decree was enhanced, and that he is entitled to a deduction of the additional amount paid by him. But according to the terms of the decree, he cannot claim to deduct more than Rs. 200 on account of the payments made by him

1. (1911) 21 M. L. J. 1088. 2. (1908) 19 M. L. J. 4.

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on behalf of the plaintiff and any further claim which he may have must be conferred by a fresh suit.

In the result, the 28th to 31st defendants application for execution must be dismissed and the 27th and 32nd defendants' application must be remanded for fresh disposal according to law with reference to the observations made above. The defendants Nos. 28 to 31 must pay the costs of the 27th and 32nd defendants in both the cases throughout. We make no order about costs in this Court as between the 1st defendant and the 27th and 32nd defendants in this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar.

Kamakshamma ... { *Accused in Sessions Case No. 51 of 1913 on the file of the Court of the Additional Sessions Judge of Bellary.

v.

Emperor. ... ...

Criminal Procedure Code—S.438—Sessions Trial—Loss of material records — Conviction —whether void and passed without jurisdiction—Replacing Judgment by memory—Failure to pronounce written judgment before convicting--S. 537 A—Irregularity.

Kamakshamma v. Emperor

There is no provision of law which empowers the High Court to quash the conviction and sentence by a Sessions Judge and order a new trial simply because some of the material records of the Sessions trial have been lost.

If the convicted prisoner is satisfied that justice has been meted out there is no ground for interference by the High Court.

Semble ;—The court has an inherent power in the case of loss or destruction of a judicial record to restore such record and where what is lost is the judgment it is open to the judge to re-write the judgment from memory and from the materials before him and place it on the record.

Sec. 537—A. Cr. Pr. Code cures the omission to pronounce the whole of the written judgment before convicting and sentencing the accused though it might be different if no judgment had been written.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code by the Additional Sessions Judge of Bellary in his letter dated 18th August 1913.

The Public Prosecutor for Government.

The Court made the following

ORDER.—There seems to be no provision of law which empowers the High Court to quash the conviction and sentence by a

* R. C. No. 76 of 1913. 10th September 1913.

Kamakshamma v Emperor

Sessions Judge and order a new trial because some of the material records of the Sessions trial have been lost. If the convicted prisoner appeals, then, it will be time enough to interfere if necessary. There is no provision of law (so far as I know) which enacts that, unless all the records of a case are in the court house, at the time of convicting and sentencing, the conviction and sentence are void, and should be quashed or that the Sessions Judge's trial has been held without jurisdiction or the sentence passed without jurisdiction. If the convicted prisoner is satisfied that justice has been meted out to her, there is no ground for interference of this court. S. 366 of the Code of Criminal Procedure only imposes the condition that the judgment should be pronounced in open Court and imposes a few other conditions, but such conditions do not include the condition that the record should not have been lost or that, if only a portion of the judgment (that relating to the conviction and sentence alone) is pronounced the conviction is illegal. In *Venkatramayya and another*[1] it was held that the omission to read a portion of the judgment was a mere irregularity covered by S. 537. In *Queen Empress* v. *Chendu Kalya* and *others*[2] the learned judges refused to interfere on the District Magistrate's reference where a Magistrate had not written any judgment at all, but had convicted and sentenced 5 accused persons who had not themselves chosen to appeal. That High Court afterwards interfered on the application of one of the five accused persons (See *Queen Empress* v. *Kamodhi Sridhana*[3]). I think the more appropriate course for the learned Additional Sessions Judge is to re-write the judgment from memory and from the materials before him and place it on the record.

S. 537-A cures all omissions in proceedings and the omission to pronounce the judgment before convicting and sentencing is also cured under the new Code, though it might be different if no judgment had been written. In *Narasingh Narain Singh* v. *Harkhu Singh*[4] it was held that where a judgment has been lost, it was open to the judge to re-write from memory the substance of it. In *Raja Gir Sahaya* v. *Iswardhari Singh*[5] authorities are quoted for the proposition that a Court has inherent power in the case of loss or destruction of a judicial record to restore such record" and it was held in that execution might issue even before the reconstruction of the record. According to Black on judgments (Vol. I S. 125). "The

1. (1898) 2 Weirs Crl. rulings 711 at 712. 2. (1898) 1 Bom.L.R. 117 at p. 118.
3. (1898) 1 Bom. L. R. 160. 4. (1907) 8 C. L. J. 521.
5. (1907) 11 C. L. J. 243 at 248.

power of supplying a new record where the original has been lost or destroyed is one which pertains to Courts of General Jurisdiction independent of legislation." Kamakshamma v Emperor

Even if I am wrong in my opinion that the learned Additional Sessions Judge is entitled to replace the lost judgment by a new judgment and that the conviction and sentence passed by him without pronouncing the whole of the written judgment do not make them void, I think (as I said already) that it is more advisable to wait till an appeal is preferred against the conviction and the sentence by the accused in the case before the High Court takes any action. Let the records be returned.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH]

Present :—Sir Charles Arnold White, Chief Justice, Miller and Justice Oldfield.

Kotagiri Venkataramarayanim and others... *Appellants.**

v.

Partibanda Basavayya ... ... *Respondent (Plaintiff.)*

Limitation Act Art. 39—Illegal attachment of land with crops—Trespass—Suit for value of crop—Applicability of—Trespass under colour of legal process—Effect of.

Defendants illegally procured attachment of plaintiff's land with crops thereon. The attachment on land was subsequently removed but not that on the crop. While under attachment, part of the crop was lost by theft, part owing to negligence and failure to harvest in proper time and the rest was sold by court and the proceeds were paid to the defendants. Under the law prevailing at the time of attachment, standing crops were immoveable property. In a suit to recover the estimated value of the crop, Venkataramarayanim v. Basavayya

Held that the illegal attachment of the land with crops thereon amounted to trespass on immoveable property and the suit being in substance one for damages consequent on such trespass, art. 39 of the Limitation Act applied to the case, the starting point being the date of attachment.

Art. 39 does not become inapplicable because the trespass is effected under colour of legal process. *Jadunath Dandupat* v. *Harikar*[1] followed.

Appeal under clause 15 of the Letters Patent from the order of *Sundara Aiyar* and *Sadasiva Aiyar* JJ. in C. M. A. No. 54 of 1912. See 23 M. L. J. p, 620 for the differing judgments.

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* L. P. A. No. 171 of 1912, 29th April 1913.

1. (1908) I. L. R. 36 C, 141.

Venkata-rama-rayanim v. Basavayya

White C. J.

V. Ramdoss for Appellant.

T. Prakasam for Respondent.

The Court delivered the following

Judgments:—*Chief Justice.*—I have had the advantage of reading the judgment which Miller J. is about to deliver and I agree with his conclusion.

Both the learned judges by whom this appeal was first heard seem to have concurred in the view that the property attached was, according to the law in force when the attachment took place, immoveable property. On the argument of the appeal before us, it was not seriously contended that they were wrong as to this.

In this case both land and crops were attached in the first instance, though the attachment of the land was afterwards raised. It seems to me that the plaintiff's cause of action was trespass to land within the meaning of article 39. If this is so, the period of limitation is 3 years and the suit is in time. The alleged trespass took place on December 13th 1906, and the present suit was instituted on November 18th, 1909.

In *Narasimha Rao* v. *Gangaraju*[1] a majority of the court were of opinion that as regards the question of limitation raised in that case article 29 applied. That case was dealt with rightly or wrongly, on the footing that the property attached was moveable property.

The case is distinguishable on this ground.

In *Madras and Southren Mahratta Railway Company Ltd.,* v. *Bhimappa*[2] the property attached was unquestionably moveable property. That case is therefore also distinguishable on the same ground.

I think the appeal should be dismissed with costs.

Miller J :—The allegations in the plaint are briefly put the following :—

The defendants illegally procured the attachment of the plaintiff's land with the crop standing on it. The attachment of the land was removed but not that of the crop, and while under attachment, part of the crop was lost by theft, and part owing to negligence and failure to harvest it at the proper time. The remainder was sold by the court and proceeds were received by the defendants. The prayer is for a decree for a sum equal to the full esti-

1. (1908) I. L. R. 31 M. 431. 2. (1912) 23 M. L. J. 511.

Venkatarama-rayanim v. Basavayya

Miller J.

mated value of the crop. The present suit was instituted on November 18th 1909.

The cause of action is dated by the plaintiff of the attachment (the 15th December 1906) or alternatively as of the date on which he obtained a decree declaring his title to the land (the 22nd September 1909): If the latter date can be admitted as that of the origin of the cause of action, the suit is certainly in good time, and this is the view taken by *Sundara Aiyar* J. in the C. M. A. If the earlier date is that which must be adopted, then, as the suit was instituted more than two and less than three years after that date, it will be barred by limitation if the period applicable is two years under Art. 36 of Schedule I of the Limitation Act of 1908 or any shorter period, but it will not be barred if the period is 3 years. *Sadasiva Aiyar* J. held, I think, that the article applicable was either 36 or 29, and that the starting point of limitation was the date of the attachment and so was for dismissing the suit.

It will be seen that the attachment is alleged to be the cause of the loss of the crop, and the suit is for damages consequent on the attachment and is not framed as a suit for the recovery by the plaintiff of anything illegally gained by the defendants and held by them for him. It may be that as to part of the crop it might have been so framed but it is not.

I do not think it necessary to decide the question whether the starting point of limitation is the date of the decree, because I am able to accept the view pressed upon us on behalf of the respondent that the suit is governed by the specific article 39 and consequently the general article 36 is not applicable.

As *Sundara Aiyar* J. has pointed out, standing crop was at the time of the attachment in the present case, generally held in India to be immoveable property, and it seems therefore that the illegal attachment of the land with the crop thereon is a trespass on immoveable property. The suit is simply a suit to make good the loss *i. e.* for compensation for the damage, consequent on the attachment. I am unable to see why article 39 should not be applied to a trespass under color of legal process; the language is wide enough to cover the case, and in *Jadunath Danduput* v. *Harikar*[1] this article was applied by *Doss* J. to a case of a distraint under process obtained from the court by a person not entitled to distrain. *Rampini* J. differed but only on the ground that the acts complained of were

1. (1908) I. L. R. 36 C. 141.

Venkata-rama-rayanim v. Basavayya

Miller J.

trespass and something else and not a mere trespass, and no one seems to have suggested that the fact that the trespass was under color of legal process ought to remove the case from the article.

In *Haricharan Fadikur* v. *Harikar*[1] it was held that article 36 was the article applicable to the case; I find it somewhat difficult to reconcile the judgment of *Maclean* C. J. in that case with his judgment in *Mangun Jha* v. *Dolhin Golab Koer*[2] where he was for applying article 39 or article 49 to a similar case; but the opening sentence of the later judgment suggests that possibly the contest was only between articles 29 and 36, and it may be that in as much as the period of two years was enough to save the plaintiff the possibility of a longer period was not very carefully considered. It was not necessary to search for an article specifically covering, the case, because, even if no such article was to be found, the general article 36 was applicable and was sufficient for the plaintiff's purpose, and therefore, though the learned Chief Justice observes that there is no specific article applicable, it may be that all that he had considered minutely was whether there was a specific article prescribing a shorter period than two years.

I respectfully agree with the reasoning which led *Doss* J. to apply article 39 in *Jadunath Dandupat* v. *Harikar*[3] and I think that reasoning warrants the application of that article to the present case.

I would therefore dismiss this appeal with costs.

Old field J.—I concur and have nothing to add to the judgment of Mr. Justice *Miller*.

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1. (1905) I. L. R. 32 C. 459.
2. (1898) I. L. R. 25 C. 692.
3. (1908) I. L. R. 36 C. 141.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

Gopisetti Narayanasami Naidu Garu, Receiver of Madur Estate. } *Appellant.**

v.

Namburi Bhadri Raza ... ... *Respondent.*

C. P. C Or. 9 r. 5—Or. 41 r. 14—Appeal—Failure to take out fresh summons—Dismissal for—Not competent for one year after return of non-service.

Narayanaswamy Naidu Garu *v.* Namburi Bhadri Raza

Order 41 r. 14 C.P. C. makes Order 9 applicable to proceedings in appeal and as such an appeal cannot be dismissed for failure to take out fresh summons to the respondent before the expiry of one year from the date of the return of non-service as provided by r. 5 of that order.

Second appeal from the decree of the District Court of Krishna in A. S. No. 410 of 1910 preferred against the decree of the Court of the Head Assistant Collector of Narasapur Division in S. S. No. 67 of 1909.

P. Nagabhuhanam for Appellant.

Respondents was not represented.

The Court delivered the following

JUDGMENT :—There is nothing on the record to show that the address of the respondent given by the appellant was not the correct address.

Order 9 rule 5 gives the plaintiff one year's time to apply for the issue of fresh summons, the time to be calculated from the non-service return. This order is applicable to proceedings in appeals (See Order XLI R. 14). Ordinarily we would not interfere with the discretion of the judges of the Lower Courts in connection with orders passed with a view to the proper despatch of the business coming before those courts, but we do not see our way to get over O. 9 R. 5.

The appeal is allowed, and the Lower Appellate Court will receive a fresh application from the Appellant for issue of process to the Respondent and continue the proceedings before it in due course of law.

The costs of this Second Appeal will be costs in the cause.

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*S. A. No. 1365 of 1912. 31st July 1913.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sadasiva Aiyar.

Subramania Aiyar alias Pichu Aiyar ... *Appellant*.* *(Defendant)*

v.

(1). M. Subba Naidu (dead) 2. Anantha Krishna Naidu L. R. of the 1st Respondent } *Respondents. (Plaintiff and his L. R.*

Religious Endowment—Temple—Trustee—Costs of litigation—Unsuccessful—Right to be reimbursed—Conditions of—Unsuccessful action by person believing himself to be trustee—Right to be paid—Limitation Act—Ss. 20, 22—Parties—Suit by person not trustee—Substitution of trustee—Effect of—Validation of Suit from commencement—Suit against ceased trustee, validly appointed or not—Limitation, no bar of—Civil Procedure Code S. 588—Order substituting party—Confirmed on appeal—Finality of.

Subramania Aiyar v. Subba Naidu

Where a suit was brought on behalf of a Devasthanam by a person who was not or had ceased to be trustee but on objection the proper trustee was substituted in his place.

Held that the substitution cured all defects in the suit with effect from the date of the institution of the suit.

Held also that such substitution did not involve the addition of a new party within the meaning of S. 22 of the Limitation Act. *Peary Mohun Mukerjee* v. *Narendranath Mukerjee*[1], confirmed on appeal in *Peary Mohun Mukerjee* v. *Narendra Nath*[2] followed.

Having regard to S. 588 C. P. C. the correctness of an order directing the substitution of a party confirmed on appeal cannot be impeached in Second appeal.

Sec. 10, Limitation Act applies to suits on behalf of the Devasthanam against a ceased trustee whether his right to the office was legally valid or not, *Sethu* v. *Subbamma*[3] and *Moosabbai* v. *Yakotabhai*[4], followed.

A trustee is entitled to be reimbursed out of the trust estate moneys which he spends on litigation which he *bona fide* believes to be in the interests of the trust including suits to defend or establish his own right as trustee, provided he has not been guilty of gross negligence or misconduct in instituting or conducting the suit.

An action brought against a person in unlawful possession of the office of trustee after having been validly dismissed by the committee is an action in the interest of the Devasthanam and the trustee who incurs the expenses of the action is entitled to be reimbursed in respect of the same.

The fact that the suit (which was brought under legal advice and under the immediate superintendence of a member or the committee well versed in litigation) failed ultimately on account of some technical defect would not deprive the trustee of the costs incurred in the suit.

*S. A. No. 1590 of 1908. 2nd April 1912.

1. (1905) I. L. R. 32 C. 582.
2. (1909) I. L. R. 37 C. 229.
3. (1887) I. L. R. 11 M. 274.
4. (1904) I. L. R. 29 B. 280.

Subramania Aiyar v. Subba Naidu

There is no authority for the position that a person believing himself to be trustee of a Devasthanam while really not entitled to the office has a claim against the Devasthanam for expenses incurred in bringing an unsuccessful suit against the trustee when the court which decided the suit has not in its decree provided for his costs to come out of the trust funds.

Second appeal from the decree of the District Court of Madura in No. 393 of 06 ; presented against the decree of the Court of the Subordinate Judge of Madura West. in No. 8 of 1903.

T. V. Seshagiri Aiyar for Appellants.

T. Srinivasa Iyengar for Respondents.

The Court delivered the following

Judgment :—The suit out of which this 2nd appeal has arisen was brought by one Authappa Chetty as trustee of the Kallalagar temple (subject to the supervision of the Madura Vishnu Devasthanam Committee) to recover from the defendant (appellant in this Court) the sum of Rs. 3087-8-6. The plaint alleges that the plaintiff was the lawful trustee of the Devasthanam between March and May 1902 during which period the defendant unlawfully collected moneys due to the Devasthanam for the recovery of which (with interest) the present suit was brought on 28th March 1903.

The defendant filed his written statement on 8th May 1903. His contentions (shortly stated were :—

(*a*) that plaintiff's appointment in 1898 was legally invalid and hence he was not entitled as trustee to bring the present suit in 1903.

(*b*) that plaintiff had been rightly dismissed in April 1901 from his office as trustee and defendant was validly appointed in October 1901 by the temple committee and that defendant was therefore the legal trustee between March and May 1902 when he made the collections for recovery of which the present suit was brought, and

(*c*) that though defendant had ceased to be trustee in May 1903 when the written statement was filed, he had spent during the period of his trusteeship (*from 15th October 1901 till 30th March 1903*) sums on behalf of the Devasthanam over and above the collections he made between March and May 1902 and far from his owing anything to the Devasthanam, the Devasthanam would be found to owe him more than Rs. 1400 on the taking of accounts.

During the devious course of this suit, one Subba Naidu (appointed by the committee members as trustee in November 1903) was substituted by an order of 22nd November 1905 as plantiff in the place of original plaintiff Authappa Chetty. That order of

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substitution was confirmed on appeal by the District Court and became final under S. 591 of the Civil Procedure Code (New S. 105). The defendant has not raised the contention that Subba Naidu was not legally competent to *represent the Devasthanam interest* from November 1905, though he may not properly represent *Authappa Chetty's personal right* to claim the managership of the Devasthanam.

The lower Appellate Court held on the merits the defendant had obtained Rs. 2798-0-4 of the temple moneys into his hands, that he had properly spent only Rs. 676-5-8 out of it for temple purposes and that he owed on date of suit Rs. 2121-10-8. The defendant's other objections were overruled and decree was passed for Rs. 2121-10-8 and interest at 12 per cent. from date of suit to date of the first Court's decree (9th July 1906), the parties to give and receive proportionate costs. (Subba Naidu himself died after the filing of this second appeal and the present temple trustee Anantha Krishna Naidu is now the respondent in this second appeal.)

The gist of the contentions advanced by the Appellant's (defendant's) learned Vakil before us may be shortly stated as follows:—

(*a*) The lower Court should have given a decision on the validity of the original plaintiff's (Authappa Chetty's) appointment in 1898 and of his dismissal in April 1901.

(*b*) The substitution of the proper trustee of the temple in 1905 could not lawfully convert this suit brought *to enforce the personal right of Authappa Chetty to the management of the temple* into a suit brought in the interests of the Devasthanam for an account of the sums which came into the defendant's hands as *de jure* or *de facto* trustee. The suit ought to have been dismissed as having abated as soon as Authappa Chetty withdrew from the suit in 1905.

(*c*) The suit is barred by limitation under S. 22 of the Limitation Act as when the substitution took place in November 1905, more than 3 years had elapsed from the dates (in March and May 1902) when defendant made collections of Devasthanam funds on behalf of the Devasthanam.

(*d*) The substitution itself of Subba Naidu was illegal and unauthorised whether the suit is treated as one brought to enforce Authappa Chetty's personal right or the right of the Devasthanam.

(*e*) Such substitution of the proper trustee could not validate a suit brought by an unauthorised trustee even if the suit is treated as brought on behalf of the Devasthanam.

(*f*) On the merits, the defendant is entitled to credit not only for the sums of Rs. 676-5-8 allowed by the Lower Court but also for the following amounts:—

1. Rs. 1608—14-0 expenses incurred in O. S. 44 of 1901 which defendant brought under the committee's directions against Authappa Chetty (See Ex. IV.) and Rs. 853-4-0 paid by him for costs to Authappa Chetty as defendant lost that suit (See Ex. V.) Total Rs. 2642-2-0. (2) Rs. 776-10-6 on account of the Salary of defendant himself (at Rs. 50 a month) and the manager's establishment.

3. Rs. 24-14-3 for printing and contingent charges spent on behalf of the Devasthanam. If defendant is allowed credit for item 1 of Rs. 2462-2-0 in addition to the Rs. 676-5-8 which the lower court allowed, the plaintiff's claim is fully wiped out.

We think that there is no substance in the contentions (*b*) to (*e*) set out above. Having had the pleadings read and commented upon by both sides before us and having regard to the course of this litigation and the prayer for accounts in the plaint, we do not think that this is a suit brought merely on behalf of Authappa Chetty's personal right of management of the temple properties. The decisions in *Balwant Rao Bishwant Chandra Chor* v. *Purandakal Chambe*[1], and *Karimshah* v. *Nattan*[2], do not therefore apply. The suit was, in our opinion, brought on behalf of the Devasthanam to recover moneys from a person who was never a legal trustee though he professed to act as trustee (according to the plaintiff's case) or from a person who ceased to be a trustee 2 days after the suit was brought (according to the defendant's own case). The substitution of the right trustee in 1905 cured all defects in the suit even if the suit was originally brought in the name of a trustee who was not entitled to represent the idol. (See *Peary Mohan Mukerjee* v. *Narendra Nath Mukerjee*[3], and also the same case in *Peari Mohun Mukerjee* v. *Narendra Nath*[4], on appeal to the Privy Council, the *ratio decidendi* in the above case establishing that when the *cesti qui trust* is substantially on the record of a suit from the beginning, the rectification of the original improper representation by a proper representation cures all the original technical defects with effect from the date of institution of the suit and that the rectification cannot be treated as the addition of a new party so as to attract the penal provisions of S. 22 of the Limitation Act. Though the above case related to the proper representation of a defendant 2nd

1. (1883) 10 I. A. 90.
2. (1883) I. L. R. 7 M. 417.
3. (1905) I. L. R. 32 C. 582.
4. (1909) I. L. R. 37 C. 229.

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not of a plaintiff, the principle applies to the latter case also). As regards the question of limitation, the suit having been brought on behalf of the Devasthanam (which at the trial was represented by a proper legal trustee) against a former trustee, whether the former trustee's right to the office was legally valid or otherwise, the provisions of S.10 of the Limitation Act clearly apply and the defendant cannot rely on the bar of limitation (See *Sethu* v. *Subramanya*[1], also, *Mosabhai* v. *Yacoobhai*[2]). The validity of the substitution of Subba Nadar for Authappa Chetty to represent the idol cannot be questioned in second appeal as the order passed by the Sub Court for such substitution was appealed against to the District Court and was confirmed in appeal and became final.

Coming, then, to the merits, that is, the appellant's contention (*f*) in paragraph 5 above, we are of opinion after hearing the arguments on plaintiff's side, that *the defendant is entitled to credit for the sums spent by him in the litigation in O. S. 44 of 1901 if he had been valily appointed as a trustee in October 1901 by the temple committee.* A trustee is entitled to be reimbursed the moneys which he spends on litigation which he *bona fide* believes to be in the interests of the *cesti que trust* provided "he has not been guilty of serious *laches* or misconduct. (See the principle embodied in S. 32 of the Trusts Act. See also Lewin on Trusts, page 1267). He is also entitled to take out of the trust funds (or to be reimbursed from such funds if he had spent in the first instance from his own pocket) whatever he had been obliged to spend in order to defend or establish his right as trustee. "In the absence of misconduct, therefore, as distinguished from *negligence not of a gross character*, or *mistaken judgment*, trustees are, as a general rule, entitled to their costs of action." Godefroi on Trusts, pages 958 to 960). "The inclination of the court has been to recognise this right and not to abridge it when adjudicating upon the liability of trustees, lest a stricter rule should deter men from assuming the office." In *Turner* v. *Hancock*[3], "*Jessel* M. R. said that it was not the course of the court in modern times to discourage persons from becoming trustees by inflicting costs upon them if they have done their duty or even if they have committed an innocent breach of trust" (overruling *Re Hoskins*[4], on this point). If "they have acted from interested motives, or vexatiously or capriciously" or if "their negligence or misconduct *in the first instance has caused the suit*," they are not entitled to get their costs out of the trust funds. Trustees are seldom deprived of their right to take out of the trust

1. (1887) I. L. R. 11 M. 274.
2. (1904) I.L.R. 29 B. 267 at p. 280.
3. (1882) 20 Ch. D. 303.
4. (1887) 6 Ch. D. 281.

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estates all costs incurred by them as trustees except in cases "of gross negligence or misconduct" (page 962). "The courts have generally dealt leniently with trustees" in the matter of costs. "Trustees whose alleged breach of trust has arisen from a *bona fide* mistake are not made to pay costs."

If Authappa Chetty had not been validly appointed a trustee in 1898 or if he had been validly dismissed in April 1901 and if defendant's appointment in October 1901 consequently gave him a legal title to the manager's office, defendant is entitled to claim credit out of the trust funds for all sums spent by him in the institution and conduct of O. S. 44 of 1901 against Authappa Chetty including the costs he was obliged to pay to Authappa Chetty in that unsuccessful litigation *unless defendant was guilty of gross negligence or misconduct in instituting or conducting that suit.* We do not think that the fact that that suit (which was brought under legal advice and under the immediate supervision of a member of the committee well versed in litigation) failed ultimately on account of a technical legal defect, could deprive the defendant of his right to be reimbursed the costs incurred in that litigation from the trust funds, provided of course, that the defendant was a validly appointed trustee and legally held the office of trustee then. The contention of the respondent's vakil that defendant agreed to incur the costs of that litigation out of his own private funds is based upon the fact that defendant deposited Rs. 2,000 as security with a Vakil for defendant's instituting the suit against Authappa Chetty within a reasonable time. But we are satisfied from the documentary evidence in the case that it was not intended that defendant should make a gift of Rs. 2000 to the Devasthanam for the expenses of the suit against Authappa Chetty, but only to advance that money for the expenses of such suit, he being liable to forfeit the money to the Devasthanam only if he does not bring such suit within the time allotted to him by the committee. (See Ex. 13 where one of the influential committee members speaks to another person intended to be appointed as trustee defraying the expenses of the contemplated suit against Authappa Chetty from his own friends "if he gets no money belonging to the Devasthanam." See also Exs. S. B5. B6, H, J. and L. The Subordinate Judge disallowed the defendant's claim to indemnity for the costs of the litigation in O. S. 44 of 1901 on the ground (paragraph 14 of his Judgment) that that litigation was "undertaken by the defendant to contest his title with Authappa Chetty" and could not "be said to have been undertaken in the interests of the Devasthanam." We are unable to agree with that view as a suit intended to prevent the meddling of Authappa Chetty

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in the temple affairs is clearly a suit brought in the Devasthanam's interest provided of course, that Authappa Chetty was in unlawful possession of the manager's office when that suit was brought. The District Judge seems to have thought that defendant's appointment as trustee was "*opposed to public policy and should be discouraged.*" (Paragraph 4 of the Appellate Judgment). No reasons are given by the learned District Judge in support of his conclusion. He probably thought that the Rs. 2000 deposited by defendant was intended as the offering of a pecuniary consideration by defendant to the Devasthanam to get the manager's office. As we have said already the Rs. 2000 was intended as the advance required to bring the suit to prevent Authappa Chetty's interference with the management, the committee members who had dismissed Authappa Chetty from office having no temple funds at their disposal.

It was further argued by the defendant's (appellant's) Vakil that even if defendant's appointment as trustee was not legally valid, he is entitled to be reimbursed the costs incurred by him in O. S. 44 of 1901 if he *bona fide* believed himself to be the proper trustee and believed that Authappa Chetty was not the proper trustee. The learned Vakil was, however, not able to quote to us any clear authority to that effect, and we are not prepared to hold that a person believing himself to be the trustee of a Devasthanam while really not entitled to the office, can claim against the Devasthanam funds for moneys spent by him in bringing an unsuccessful suit against the real trustee when the court which decided the suit has not in its decree provided for his costs to come out of the trust funds.

Before, therefore, we can finally dispose of this second appeal it is necessary to determine the question of fact whether defendant's appointment to the office of trustee in October 1901 was a valid appointment.

We shall therefore direct the Lower Appellate Court to try the following issues (parties to be at liberty to adduce additional evidence on these issues) and return its findings and reasons therefor within 6 weeks of the reopening of the District Court after the midsummer recess.

(1) Was Authappa Chetty the lawful trustee of the plaint Devasthanam when O. S. 44 of 1901 was instituted? Was he never the validly appointed trustee of the temple? If he was at any time the lawful trustee, had he ceased to be such lawful trustee before that suit was instituted?

(2) Was defendant the lawful trustee of the Devasthanam from that date? Subramania Aiyar v. Subba Naidu

In compliance with the above order the District Judge Mr. J. G. Burn submitted findings to the following effect on the 2nd December 1912. That Authappa Chetti was the validly appointed trustee of the plaint Devasthanam when O. S. No. 44 of 1901 was instituted; that Authappa Chetti had ceased to be the lawful trustee before the suit was instituted; that Defendant was the lawful trustee of the Devasthanam on the date of the suit.

Upon the receipt of the above finding the case came on for hearing before their Lordships Mr. Justice Miller and Mr. Justice Sadasiva Aiyar on the 18th September 1913 who accepted the findings of the District Judge and dismissed the suit with costs with a direction that the costs incurred for the conduct of the suit should be paid out of the Devasthanam funds.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH]

Present:—Sir Charles Arnold White, KT. Chief Justice, Mr. Justice Sankaran Nair, and Mr. Justice Tyabji.

Mare Gowd ... ... *Petitioner.* * *(Accused)*.

Cr. Pr. Code S. 125—District Magistrate—Power under—Incorrectness of the order—Ground for setting aside.

Under S. 125 Cr. Pr. Code, the District Magistrate can set aside the order of the subordinate Magistrate as having been passed on insufficient grounds. *In re* Mare Gowd.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional 1st Class Magistrate of Bellary in Proceedings, dated the 2nd September 1912.

J. C. Adam for *Dr. Swaminathan.* for petitioner.

Public Prosecutor on behalf of the Government.

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH

Benson J.:—The question before us in this case is as to the powers of a district Magistrate under section 125, Criminal Procedure Code.

The facts briefly are as follows:—

The Deputy Magistrate acting under S. 107 and S. 118, Criminal Procedure Code, directed the petitioner to execute a

*Cr.R.C. No. 604 of 1912 and Cr.R.P. No. 496 of 1912. 20th March 1913.

In re Mare Gowd.

bond to keep the peace. The petitioner did so and then petitioned the District Magistrate to act under section 125, Criminal Procedure Code, and to set aside the order of the Deputy Magistrate and to cancel the bond. The ground alleged by the petitioners was that the Deputy Magistrate had no sufficient reasons for requiring him to execute the bond. The District Magistrate refused to entertain the petition, stating " I hold that I have no power to entertain this petition." We are now asked to revise this order of the District Magistrate.

I am of opinion that the view taken by the District Magistrate as to his powers under section 125 is incorrect. The section runs as follows :—"The Chief Presidency or District Magistrate may, at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by order of any Court in his District not superior to his Court."

It will be observed that the words of the section are very wide. The District Magistrate "may, at any time, for sufficient reason," cancel such a bond, *i. e.*, for reasons which appear to the District Magistrate, in the exercise of a sound judicial discretion, to be sufficient. If the District Magistrate, in the exercise of a sound judicial discretion, is of opinion that the bond ought never to have been *required*, is not that a sufficient reason for cancelling the bond? I can find nothing in the section to qualify or restrict the ordinary and natural meaning of the language used, or to indicate that " sufficient reasons" means reasons in connection with something which occurred after the execution of the bond.

The words of the section "at any time" (which are not found in the corresponding section 500 of the Code of 1872, but were introduced when the sections were recast in the Code of 1882) seem to point to the same conclusion. If the District Magistrate may, within a few minutes of a Subordinate Magistrate exacting the execution of a bond, cancel it, it could hardly be in consequence of anything that occurred after the execution of the bond. The view that I take was unanimously taken by a Full Bench of five Judges of the Calcutta High Court in the recent case of *Nabu Sardar* v. *Emperor*[1] overruling a contrary decision of a Bench of the same Court in the case of *Barka Chendra Dey* v. *Janmejoy Dutt.*[2] It is also the view taken by *Knox* J. in two cases reported in *Emperor* v. *Abdur Rahim*[3].

1. (1906) I. L. R. 34 C. 1. 2. (1905) I. L. R. 32 C. 948.
3. (1912) 2 Crl. L. J. 335.

In re Mare Gowd

There has been much discussion as to the nature of the jurisdiction vested in the District Magistrate under section 125, that is, whether it is an original, or an appellate or a revisional jurisdiction. I do not, however, think that the existence of the jurisdiction should be doubted or that its extent, according to the plain language of the section, should be curtailed, because of apparent difficulties in classifying the nature of the jurisdiction with reference to other sections of the Code. I say apparent difficulties, because I think that on examination they will not be found to be insuperable. It is, I think, clear from sections 404 and 406 Criminal Procedure Code that no *appeal* is allowed in regard to an order to execute a bond to keep the peace, and consequently the jurisdiction given under section 125 cannot be regarded as an appellate jurisdiction. This is what was expressly held in the case of *Chet Ram and others*[1] and by *Tudball* J. in the case reported in *Banarsi Das* v. *Partob Singh*[2], but the decisions did not go beyond that point, or state that the District Magistrate had not any revisional powers under section 125. The distinction is of importance, for if there is a right of appeal, the appeal cannot be dismissed without giving the appellant an opportunity of being heard (S. 421, Criminal Procedure Code), whereas there is no similar provision in regard to petitions for revision.

Whether the jurisdiction given by S. 125 is to be regarded as original or revisional, depends on the circumstances which evoke the exercise of the jurisdiction. If the petitioner alleges that in the events that have happened since the execution of the bond its continuance is no longer necessary and that it should, therefore, be cancelled, the jurisdiction invoked is clearly of an original, not a revisional character. But if the petitioner alleges that the order was made for insufficient reasons, and asks for the cancellation of the bond on this ground, the jurisdiction invoked is revisional in character. No doubt S. 125 does not, in terms provide for setting aside the order to execute the bond. It only provides for the cancellation of the bond, but I take it that if the bond is cancelled by the superior Court on the ground that it ought never to have been required, the petitioner would be content with having obtained the substance, and would not be too curious in seeking for the express cancellation of the order. The omission to provide expressly for the setting aside of the order was, perhaps, due to a desire for simplicity of language, and to the fact that the section covers both the classes of cases to which I have referred, in one of which the

1. (1905) I. L. R. 27 A. 623. 2. (1913) 11 A. L. J. 16.

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original order was rightly passed, though the continuance of the bond is no longer necessary, and in the other of which the cancellation of the bond may be regarded as, in effect, depriving of any further importance, the original order which was wrongly passed.

It may also be observed that under S. 124 the District Magistrate may order a person imprisoned for failure to give security to be discharged, but the section says nothing about cancelling the order of the Subordinate Magistrate requiring the bond to be given. It can hardly be contended that the absence of a provision in the section for cancelling the order, limits the power of the District Magistrate to discharge the prisoner to cases other than those in which the order of the subordinate Magistrate was illegal or unnecessary at the time when it was made. The interpretation which I have given to S. 125 seems to me to be in accordance not only with its plain language, but with obvious convenience. The District Magistrate is the Chief Magistrate responsible for the peace of the whole District; and it seems improbable that the Legislature would restrict his power of control over the orders of his Subordinate Magistrates when those orders are, in his more experienced judgment, unnecessary for the peace of the District. It is contended, however, that he could always report the case to the High Court under S. 438, but that would seem to involve a lengthy and cumbrous procedure without any corresponding advantage. It may be pointed out also that the Chief Presidency Magistrate has power to act under S. 125, but it is not clear that he has any power under S. 438 or otherwise to report a case to the High Court for revision. If, therefore, the restricted scope of S. 125 contended for by the Public Prosecutor is correct, a wrong or illegal order made by a Subordinate Presidency Magistrate under Ss. 107 and 118 could not be interfered with by the Chief Presidency Magistrate himself, nor could he report the case to the High Court. This could hardly have been the intention of the Legislature.

It is also suggested that if the Legislature intended to give the District Magistrate revisional powers, they would have been given in Chapter XXXII, as in the case of wrongful discharges, but the answer is that there was no need to make any provision in that Chapter as it had already been made in S. 125. I do not think that any argument can be drawn from the fact that no Sessions Court is a Court of reference for certain purposes under S. 123, for S. 125 is careful to exclude from its purview all such cases. In my opinion

then, the District Magistrate in the present case had power under S. 105 to entertain the petition to cancel the bond and it was open to him, in his discretion, to consider whether there were sufficient reasons for requiring the petitioner to excute the bond, and to cancel it if he found sufficient reason for so doing. The fact that there was a prayer to set aside the order in pursuance of which the bond was executed could not deprive the District Magistrate of the jurisdiction given by the section to cancel the bond.

I would set aside his order and direct him to restore the petition to his file, and to deal with it in accordance with law as above stated.

I do not think that this Court should go into the merits in a case of this kind where the District Magistrate has jurisdiction, but has dismissed the petition on the ground that he has no jurisdiction. In Criminal Revision Case No. 17 of 1907, I refused to entertain a petition similar to the present petition on the ground that the matter was one within the cognizance of the District Magistrate and no application had been made to him. It seems to me that he is in a better position than this Court to deal with this matter which relates to the peace of his District.

The same view was taken, and the same rule followed in two cases by *Knox* J. in *Emperor* v *Abdur Rahim*[1] already referred to.

As, however, my learned brother does not agree with me as to the interpretation of S. 125, and as the question of law involved is one of importance and likely often to arise in practice, I think it desirable to refer for the decision of the Full Bench the question whether, in the facts of this case as stated by me, the District Magistrate was right in holding that " he had no power to entertain the petition."

Sundara Aiyar J :—In this case an order was passed by the Sub-Divisional First Class Magistrate of Bellary directing the petitioner in this Court, Mare Gowd, under S, 107, Criminal Procedure Code, to execute a bond for keeping the peace. The petitioner moved the District Magistrate of Bellary under S. 125, Criminal Procedure Code, to set aside the order and to cancel the bond. It is admitted that the application was based entirely on the ground that it was passed by the Sub-Divisional Magistrate on insufficient grounds. The District Magistrate held that he had no power to revise the order of the Sub-Divisional Magistrate under

1. (1900).2 Crl. L. J. 335.

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S. 125 as he was asked to do. This Court is asked to hold in the exercise of its powers of revision that the District Magistrate was wrong in declining jurisdiction.

The question for decision is whether the District Magistrate was right in the view he took of his powers under S. 125. The contention of Mr. J.C. Adam, the learned counsel for the petitioner, is that S. 125 confers plenary powers of the District Magistrate to cancel the bond executed for keeping the peace or for good behaviour on any good ground, whether because the order was wrongly passed, or because there was no further necessity for keeping the bond alive in consequence of a change in the circumstances of the case, or because, on fresh facts not presented to the Magistrate who passed the order but brought to the notice of the District Magistrate the order directing security to be given appears to be unnecessary. It is admitted that before a bond has been actually executed a District Magistrate has no power under the section to set aside the order directing a person to execute a bond; Mr. Adam relies on a decision of the Full Bench of the Calcutta High Court, *Nabu Sardar* v. *Emperor*[1] in support of his contention. The learned Public Prosecutor contends, on the other hand, that the jurisdiction conferred by S. 125 on the District Magistrate cannot include the power to set aside the order of any inferior Magistrate as a Court of Appeal or Revision; and, therefore, also the power to cancel the bond executed, in pursuance of the order, on the ground that it was wrongly passed. This contention must I think, be sustained. The different kinds of jurisdiction possessed by a superior Court over the proceedings of an inferior Court are described in the Criminal Procedure Code as those of a Court of 'Appeal,' 'Confirmation,' 'Reference or Revision.' See S. 520. 'Appeals' are dealt with in Chapter XXXI. 'Reference and Revision' are dealt with in Chapter XXXII. 'Confirmation' is dealt with in special sections relating to the proceedings of an inferior Court requiring confirmation. S. 404 enacts that "No appeal shall lie from any judgment or order of a Criminal Court except as provided for by the Code or by any other law for the time being in force." No appeal is provided for either in chapter XXXI or in terms any where else in the Code against an order either under S. 106 or S. 107 directing security to be given to keep the peace, while an appeal is provided by S. 406 against an order, passed by a Magistrate other than a District Magistrate or a Presidency Magistrate, for security for good behaviour under section 118 of the Code. With respect to a District Magistrate's

1. (1906) I. L. R. 34 C. 1.

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powers of revision S. 435 entitles him to call for and examine the record of any proceeding before any inferior Criminal Court. S. 436 empowers him to pass final orders in revision in one class of cases; and S. 438 authorizes him to report to the High Court the result of his examination of the record in other cases for the orders of the High Court. There can be no doubt that both the Sessions Judge and the District Magistrate are empowered to report to the High Court an order directing security for keeping the peace under S. 438 after examining the record under S. 435. It is unlikely that, if the District Magistrate was intended to be a Court of Appeal or revision with respect to orders for security to keep the peace, provision would not have been made for it in chapter XXXI or chapter XXXII. There is no apparent reason for not doing so and for providing an appeal or revision in another portion of the Code. Besides, it is uulikely that the word "Appeal or Revision" would not have been employed in S. 125, if it was intended that the District Magistrate should be a Court of Appeal or Revision with respect to the order of an inferior Court for security to keep the peace. Again S. 125 refers to an order for security for good behaviour as well as to one for security to keep the peace. It is not likely that S. 125 also was intended to confer the powers of an Appellate Court in the former class of cases when S. 406 expressly provides an appeal in such cases. An examination of some other sections in chapter VII (C) dealing with "proceedings in all cases subsequent to order to furnish security" leads to the same conclusion. S. 123, clause (2) makes the Sessions Judge a Court of reference with respect to all orders for security passed by Magistrates for a period exceeding one year, and the High Court a Court of reference for similar orders passed by a Presidency Magistrate. Is it likely that the District Magistrate would be made a Court of appeal or revision in a case where the Sessions Judge is made a Court of reference? S. 124 gives the District Magistrate the power to release a person imprisoned for failing to give security ordered by any Magistrate of the District, including his own predecessor, where he is of opinion that the release may be made without hazard to the community or to any other person. He may, on the same ground, reduce the amount of security or curtail the time for which security has been required. This is a power of the nature of original jurisdiction not questioning the legality or validity of an order passed for giving security. Where the order for security has been passed by the Court of Sessions or the High Court, the District Magistrate or the Chief Presidency Magistrate, as the case may be, may make a

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reference to the Sessions Court and the High Court respectively, if he thinks that a person imprisoned for failing to give security may be discharged without any hazard. Such a reference also does not question the validity of the original order for security. It is unlikely that S. 125 immediately following the above sections and not expressly providing that the District Magistrate is to be a Court of appeal or revision intended to confer on him powers of an appellate or revisional character. Moreover, if this were the intention, there is no reason for not enabling the District Magistrate to set aside the order for security and for providing only that he may cancel the bond after it has been executed. It does not seem to be permissible to interpret the power to cancel the bond as including the power to set aside the order for security. A stronger reason for holding that the District Magistrate has no appellate powers under S. 125 is that he is empowered to exercise the power conferred by the section *at any time*. It is extremely improbable that Appellate Jurisdiction would be given to a court without limiting the time within which such power might be exercised. The Calcutta High Court in *Barka Chandra Dey* v. *Janmejoy Dutt*[1] held that "the jurisdiction conferred by S. 125 is not an appellate or revisional, but an original jurisdiction." This appears to be the only view consistent with the provisions of the Code already referred to. It is true that no bond had been actually executed in that case and the District Magistrate's order was therefore entirely wrong, and the opinion expressed by the learned Judges who decided the case may be regarded as only an *obiter dictum*. In *Naba Sardar* v. *Emperor*[2], a bond for keeping the peace had been *executed* by the person ordered to do so. He applied to the District Magistrate for the cancellation of the bond. It does not appear on what ground he requested him to do so. *Maclean* C. J. held that the District Magistrate may, under S. 125, cancel a bond for any reason which he thinks sufficient. He observed "If he thinks that the bond ought never to have been required, is not that a sufficient reason? I should say so. There is nothing in the section to qualify or restrict the natural meaning of the language used or to indicate that sufficient reasons means reasons in connection with something which has occurred after the execution of the bond." *Ghose* J. concurred in the observation. The questions referred to the Full Bench were (1) "has a District Magistrate power under S. 123 of the Code of Criminal Procedure to direct the cancellation of a bond to keep the peace executed on an order by a Subordinate Magistrate, on any other ground except that the bond is no longer necessary?

1. (1905) I. L. R. 32 C. 948. 2. (1907) I. L. R. 35 C. 1. (F. B.)

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(2) Has the case of *Barka Chandra Dey* v. *Janmejoy Dutt*[1] been correctly decided ?." It must be observed that in *Barka Chandra Dey* v. *Janmejoy Dutt*[1] it was observed that a bond could be cancelled under S. 125 only "if after a bond has been executed, it is made to appear that by reason of the circumstances as they existed at the date of the application, that is , the circumstances subsequent to the date of the execution of the bond, the continuance of the latter is no longer necessary, the District Magistrate may cancel it." The other learned Judges who took part in *Naba Sardar* v. *Emperor*[2] agreed in answering the first question in the affirmative and the second in the negative. That is, they held that the District Magistrate's power to cancel a bond was not confined to the case where the bond was no longer necessary and that *Barka Chandra Dey* v. *Janmejoy Dutt*[1] which held the contrary view was not correctly decided. It is not quite clear whether they intended to concur in the Chief Justice's observation that the cancellation might be based merely on the ground that the order for security was wrongly passed. S. 125 merely states that the District Magistrate may cancel the bond "for sufficient reason." What would constitute a 'sufficient reason' is not explained. S. 124 confines the power to discharge a person imprisoned for failing to give security to cases where there would be no hazard in releasing the accused. It is reasonable to infer that the 'sufficient reason' referred to in S. 125 was intended to be wider than the reason mentioned in S. 124. At the same time it would not be right to hold, for the reasons already mentioned, that the bond could be cancelled merely on the ground that the Magistrate who passed the order did so wrongly ; for, that would be to make the District Magistrate a Court of appeal or revision. The conclusion which this reasoning leads to is that the District Magistrate must have power to cancel the bond, not merely on the ground of something occurring after the execution of the bond which makes it right that it should be cancelled, but on the other grounds also which would not impeach the correctness of the order passed by the inferior Magistrate. For instance, it may appear, from facts not known at the time when the order was passed, or not put before the Magistrate who passed it, that it would not be desirable or expedient to keep the bond alive. The jurisdiction conferred by the section must be held to be of an original character and not one intended to enable the District Magistrate to exercise the powers of a Court of appeal or revision. Having regard to the object of the section, namely, to confer on the

1. (1905) I. L. R. 32 C. 948. 2. (1906) I. L. R. 34 C. 1 (F.B.)

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District Magistrate large powers in the matter of preserving the peace of the District, the section confers on him the power to hold a fresh investigation after a bond has been executed and to cancel it if he considers it proper to do so. The District Magistrate's power of interference is therefore wider than it was held to be in *Barka Chandra Dey* v. *Jammejoy Dutt*[1]. *Aikman* J. in *Chett Ram and others*[2] and *Tudball* J. in *Banarsi Das* v. *Partab Singh*[3] took the same view as the Calcutta High Court did in *Barka Chandra Dey* v. *Janmejoy Dutt*[1]. *Knox* J. on the other hand, held the view adopted in *Nabu Sardar* v. *Emperor*[4] in two cases, see *Emperor* v. *Abdur Rahim*[5]. The only case in this Court that has been cited is the judgment of *Benson* J. in Criminal Revision Case No. 17 of 1907, but it does not appear that the learned Judge intended to lay down any rule as to the scope of the District Magistrate's powers under S. 125. He merely held that the High Court would not ordinarily exercise its power of revision to cancel a bond for keeping the peace when no application had been made to the District Magistrate under S. 125. Though the District Magistrate has a wide power under S. 125, an order for security to keep the peace being the result of a conviction for an offence in cases where it is passed under S. 106, and of a comparatively simple and at the same time urgent character in cases where it is passed under S. 107, it was not considered necessary to provide an appeal against it. It was deemed to be sufficient, if either the District Magistrate or the Sessions Judge should consider it necessary to do so, to report such cases for the orders of the High Court in revision. In the present case, the District Magistrate was asked to cancel the bond merely on the ground that the Sub-Divisional Magistrate's order was wrongly passed. This, he had no power to do. As he could do so only by exercising the powers of a court of appeal or revision, the prayer that the order of the Sub-Divisional Magistrate should also be set aside was inadmissible. There is, therefore, in my opinion, no ground for interfering with the order of the District Magistrate in revision.

As my learned brother is of a different opinion, I agree to the order that the question whether the District Magistrate was right in holding that he had no jurisdiction to entertain the petition be referred to a Full Bench.

1. (1905) I. L. R. 32 C. 948.
2. (1905) I. L. R. 27 A. 623.
3. (1913) 11 A. L. J. 16.
4. (1906) I. L. R. 34 C. 1.
5. (1900) 2 Crl. L. J. 335.

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White C. J.

The Court expressed the following

Opinion :—*Chief Justice* :—I have had the advantage of reading the judgment which has been written by *Sankaran Nair* J., and I agree with the conclusion at which he has arrived.

I think the view taken by the Full Bench of the Calcutta High Court in *Nabu Sardar* v. *Emperor*[1], was right.

I am of opinion that the Magistrate was wrong in holding that "he had no power to entertain the petition," and I would answer the question which has been referred to us in the negative.

Sankaran Nair, J :—The question for consideration is whether a bond to keep the peace executed by a person in pursuance of an order of a First Class Magistrate under Ss. 107 and 118, Criminal Procedure Code, can be cancelled by the District Magistrate under S. 125, Criminal Procedure Code, on the sole ground that the evidence before the Magistrate did not justify him in passing such an order.

An order under Ss. 107 and 118 is passed to prevent any person from committing a breach of the peace or from disturbing public tranquillity. It is based upon evidence recorded as in summons cases. The amount of the bond must be fixed with due regard to the circumstances of the case and should not be excessive. The period for which security is required is to commence on the date of such order unless the Magistrate fixes a later date. Sureties also may be required by the Magistrate if he thinks it necessary; and in default of such security, the person against whom the order is passed may be committed to prison until he gives it or till the period of one year expires. Under S. 124, the District Magistrate may release any person who has not given such security, if he is of opinion that it may be done "without hazard to the community or to any other person." Then comes the important section—S. 125—which runs in these words: "The Chief Presidency or District Magistrate may, at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by order of any Court in his District not superior to his Court." Mr. Justice *Benson* held that, if the District Magistrate is of opinion that the order is not supported by the evidence on the record, it is open to him to cancel the bond. Mr. Justice *Sundara Aiyar*, on the other hand, held that such bond can be

1. (1907) I. L. R. 34 C. 1.

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cancelled only on the ground of something occurring after the execution of the bond which makes it right that it should be cancelled or on some other grounds which would not impeach the correctness of the order passed by the inferior Magistrate, but that a District Magistrate has no power to cancel the bond on the ground that the order for its execution was made on insufficient grouuds.

If we give the words "for sufficient reasons" in the above section their natural meaning, then it would seem that the District Magistrate may set aside the order if he thinks that the evidence did not support the conclusion arrived at by the Subordinate Magistrate. That the evidence adduced does not warrant the conclusion is surely a sufficient reason for interference. If anything had happened after the date of the passing of the order which made the continuance of the bond unnecessary, that also would be a sufficient reason. If, again, the District Magistrate considered from any other information which was not placed before the Deputy Magistrate that any bond was unnecessary, then also the section gives him the power to cancel the bond. Is there any reason, then, to restrict or qualify the ordinary meaning of the words used? It was argued that S. 125 refers to orders for security to keep the peace as well as to orders for security for good behaviour; that S. 406 gives a right of appeal against the latter class of orders; no such right of appeal is given in the former class of cases by any section of the Code, nor is any right of the District Magistrate to revise in terms recognised; it is therefore unlikely that S. 125 was intended to confer such powers. Now the power of interference with orders for security for good behaviour was given by the Criminal Procedure Code, S. 125, only recently. No inference can therefore be drawn from that provision and the right of appeal given by S. 406. The fact that no right of appeal is given does not show that the District Magistrate may not exercise the powers usually vested in an Appellate Court. In revision for instance such powers are often exercised, though the party has no right to be heard. Ss. 435 to 438 which refer to the revisional powers of the District Magistrate do not refer to the security cases, as they have been already dealt with under S. 125. Moreover it has to be noticed that S. 125 admittedly enables the District Magistrate to interfere on grounds other than those disclosed by the evidence before the Magistrate who passed the order. A Court in the exercise of its appellate or revisional powers is confined to the evidence recorded. The section therefore conferred far larger powers than those of an appellate or

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revisional Court. The object of S. 107 indicates probably why it was considered inexpedient to give a right of appeal to the party, while, as the Chief Magistrate responsible for the peace of the District, it may have been considered advisable to give him ample powers of interference. The order under Ss. 107 and 118 may result in simple imprisonment for one year. It is hardly likely that such an order would be intended to be final. The High Court's power of Revision when the evidence is recorded only as in summons cases will seldom be invoked with success, and as no right of appeal is given, it is probable that S. 125 was intended to give the District Magistrate the right to review the evidence. An argument was based on the fact that S. 125 enables the District Magistrate only to cancel the bond, not to set aside the order. The bond may be cancelled not only for the reason that the order is wrong, but, though the order is right on the evidence before the Subordinate Magistrate, for other reasons the District Magistrate considers its continuance unnecessary. The order in such cases cannot be set aside. Again the order under Ss. 107 and 118 is not to keep the peace, but to execute a bond to keep the peace. With the execution of the bond the order may be said to have spent itself. It is the bond then that remains to be cancelled.

S. 124 also supports this conclusion. It enables the District Magistrate to release any person imprisoned for failing to give security when he is satisfied that he might do so "without hazard to the community or to any other person," or, in other words, when there is no apprehension of any breach of peace or disturbance of public tranquillity as stated in S. 107. It is obvious that the District Magistrate may arrive at this conclusion on the evidence taken by his Subordinate Magistrate. If this power can be exercised only in the nature of original jurisdiction, it is probable it would have been conferred also if not solely on the Magistrate who originally passed the order. If he could do so under S. 124, he surely could do the same under S. 125.

It is also argued that the District Magistrate can interfere only after the bond has been executed or the party has been committed to prison. This is true. But it has to be pointed out that the period for which the security is required commences at the date of the order unless the Magistrate for sufficient reasons fixes a later date—S. 120. Therefore the party must execute his bond with or without surety at once, in which case the District Magistrate can deal with the matter under S. 125, or he is committed to prison in default, when the jurisdiction of the District Magistrate conferred on him

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by S. 124 may be invoked. The power to fix a later date was only given recently. I see no reason therefore to depart from the natural meaning of the words, and agreeing with *Benson* J. and the Full Bench of the Calcutta High Court answer the question in the negative, *i.e.*, that the District Magistrate is entitled to entertain a petition to set aside the order of the Deputy Magistrate as having been passed on insufficient grounds.

Tyabji J.:—The question we have to determine is whether the District Magistrate was right in declining to assume jurisdiction under S. 125 of the Criminal Procedure Code. The section is as follows:—"The Chief Presidency or District Magistrate may, at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by order of any Court in his District not superior to his Court."

According to the view of the section taken by the District Magistrate, in cases where it is contended that the bond should be cancelled and such contention is based on the same materials as those on which the order was originally made, there cannot be "sufficient reasons" within the meaning of the section for cancelling the bond.

It is not suggested that there is anything in the section itself, or in any other part of the Code, to give a restricted meaning to the words "sufficient reasons." But my learned brother, *Sundara Aiyar* J., was of opinion that, when S. 125 is read with the rest of the Code and due consideration given to its context, it appears that the nature of the powers conferred by the section is different from that which would result, if the section were read in its more liberal, and, what seems to me to be, its natural sense. I shall refer to the construction of the section which would permit the Magistrate to cancel the bond without fresh material on the ground that the bond should never have been ordered to be executed, as the more liberal construction; and by the more restricted construction I mean the construction which has been put upon it by the District Magistrate and accepted by my brother, *Sundara Aiyar* J., and supported before us by the learned Government Pleader.

The first head of argument before us was that, if the section is read in its more liberal sense, it will have the effect of providing for an appeal from an order requiring a bond to be executed, and it is argued that it is indicated sufficiently by the Code that there is an intention on the part of the Legislature not to permit of an appeal from such an order. This argument seems to me to assume, without

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sufficient grounds, that the jurisdiction that would arise if S. 125 were read in its more liberal sense was considered by the Legislature to be exactly in the nature of a power to entertain an appeal. It seems to me that it could not have been so considered. It is admitted that, whatever construction is placed on the section, the Chief Presidency or the District Magistrate may, if he chooses, cancel the bond on a consideration of fresh materials which were not before the Court ordering the execution of the bond. This is not generally associated with appellate powers. It is true that Courts with appellate jurisdiction have, in exceptional cases, the power to take fresh evidence, but they are, as a rule, required to give their decision on the same materials as were present before the Court of first instance. Hence, if the powers conferred by the section are liberally construed, they would not assume the form of appellate powers.

The argument above referred to seem to me equally to be incapable of withstanding a careful examination from another point of view: for, assuming that the section should be read in its more restricted sense, and if, therefore, it is taken as providing for a review on fresh material, then it would be more in conformity with the usual and recognized principles of the law of procedure to empower the Court that has made the order in the first instance to review that order; whereas in S. 125 it is contemplated that the Court which is asked to cancel the bond is, in most cases, different from the Court initially making the order. In other words, even if the section is read in its more restricted sense (as contended for by the Government Pleader), the powers created by it do not coincide with powers of review. The fact that, in the great majority of cases the powers under S. 125 would be exercised by the District Magistrate coupled with the nature of the functions annexed to the office he holds seems also to furnish an indication that, whatever interpretation is given to S. 125, it cannot have reference to a jurisdiction exactly similar to that of a Court of appeal or of revision. Neither construction makes the powers created by the section conform exactly to the powers of a Court of appeal or of revision: in either case, they are powers of a special and rather of an exceptional nature.

But assuming that the more liberal construction of S. 125 converts the jurisdiction conferred by it into that of an appellate Court, I fail to see that there is anything in the Code which would constrain us to hold that S. 125 ought necessarily to be so construed as to prevent its giving rise to powers of entertaining appeals. S. 404

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of the Criminal Procedure Code which has been referred to in this connection lays down that "No appeal shall lie ... ... except as provided for by this *Code* or by any other law ... ...". It is not stated that "no appeal shall lie except as provided by Chapter XXXI of the Code (which deals with appeals,) or even by Part VII (which deals generally with appeals, reference and revision.") Hence, it would seem that the Legislature did not contemplate the rest of the Code to be so interpreted that no appellate or revisional powers should arise under any portion of the Code except under Part VII thereof.

The learned Government Pleader also argued that, if S. 125 is read together with Ss. 124 and 126, it will appear that the power under each of these sections does not arise unless the original order to give security has been given effect to, either by the obedience of the person against whom the order is made or by imprisonment as a punishment for disobedience. Hence it is argued that it follows that the Court acting under S. 125 must proceed on the basis that the order requiring the bond to be executed was rightly made and the section markedly omits to say that the Chief Presidency or the District Magistrate may set aside the order; and yet, if the said Magistrate cancels the bond on the same material that was before the first Court, it is evident that he, in effect, sets aside the order. This argument fails to convince me for two reasons. In the first place, it seems to me that, for the reasons I have already indicated the Legislature in S. 125 contemplates a kind of jurisdiction which is different from that of an appellate Court or a Court of review. In the second place, it seems to me that, if I am right in the conclusion that the powers are different, and perhaps, in some respects, more extensive, and if I am right in assuming that the general nature of the functions exercised by the District Magistrate throws light on the nature of the powers conferred by S. 125, then it would be more in accordance with the scope of the section, as I interpret it, that the Legislature should save the Magistrate from the necessity of expressing any opinion as to the correctness or the incorrectness of the original order where he is of opinion that the bond which had already been executed should be cancelled. In other words, in the view I take of the true construction of the section, the Legislature intended the Magistrate to exercise the powers quite independently of the necessity to pronounce on the correctness or the incorrectness of the original order. This view, it seems to me, is supported by the nature of the jurisdiction created by S. 107 of the Criminal Procedure Code (under which the bond is originally ordered to be executed) and by the mode in which

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the Legislature deals with orders passed under the section. It will be observed that these orders are not subject to appeal in the ordinary way (see S. 406 of the Code). The Legislature, apparently desired that no person should complain of an order to execute a bond for the purpose of preventing a breach of the peace or disturbance of public tranquillity; but what it does provide is that, if the exigencies of public peace and tranquillity have been sufficiently safeguarded, the authorities responsible for seeing that there is no breach of the peace, or disturbance of public tranquillity may have the power of bringing about a cessation of the operation of the measures which they find to be no more necessary.

Both the learned counsel who argued the case before us sought to found an argument on the words ' at any time' which form part of the section. I accept the interpretation put on those words by each of the counsel and think that the words in question mean "however early or however late." Mr. Adam may make the application as he suggested, half an hour after the order is passed, and the Government Pleader may make it when there is only one day left for the expiration of the period for which the bond had been executed; but neither can prevent the application of the other. If I am right that this is the effect of the words " at any time", it is plain that no argument can be founded on the basis that the meaning to be annexed to them can only be one of the two mentioned by the learned counsel to the exclusion of the other, and that, if they mean " however early," they imply that there is no time for fresh material being brought; if, on the other hand, they mean ' however late,' then they imply, in the first place that the delay in obtaining fresh material is not to prejudice the applicant ; and secondly, that the section cannot have reference to an appeal, time for which would ordinarily be limited.

For these reasons, I am of opinion that under S. 125 of the Criminal Procedure Cade, the Chief Presidency or District Magistrate may cancel the bond therein referred to, if the said Magistrate is of opinion that the Court ordering the execution of the said bond ought never to have so ordered.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—Mr. Justice Wallis.

Ramakrishna Pillai ... ... *Plaintiff.**

v.

C. Karunakara Menon ... ... *Defendant.*

Defamation—Fair comment—Essentials of—Matters of public interest—Newspaper publications—Imputation of offence,

Ramakrishna Pillai v. Kurunakara Menon

No suit for defamation will lie against a person for comments made in a newspaper upon matters of public interest unless he has exceeded the bounds of fair comment or has been actuated by malice.

Publications in a newspaper are matters of public interest within the meaning of the rule.

To entitle a writer to the defence of fair comment, three things are essential. First, the comment must not mis-state facts; secondly comments must appear as comments and not as statements of fact; thirdly the comments must be warranted by the facts in the sense that a fair minded man might upon the facts bona fide hold those opinions.

The fact that the conduct imputed to the plaintiff amounts to an offence does not exclude the defence, provided these conditions are fulfilled.

J. L. Rosario for Plaintiff.

C. P. Ramaswami Aiyar for defendant.

The Court delivered the following

Judgment:—The plaintiff in this case was the Editor and Managing proprietor of the Swadeshabhimani a tri-weekly newspaper published in Malayalam in Trivandrum and the defendant is the Proprietor and Editor of the "Indian Patriot", a daily newspaper published in English in Madras. On the 26th September 1910 His Highness the Maharajah of Travancore issued a proclamation, in which it was stated His Highness was satisfied that in the public interests the Swadeshabhimani should be suppressed and the plaintiff deported and orders were given to that effect. The action of the Travancore Government was the subject of discussion in the Press and was supported by the defendant's paper on the ground that the plaintiff had brought it on himself by the articles published in his paper during the preceding three years. The present suit is brought in respect of five articles which appeared in the Indian Patriot in the months of September and October 1910 which are alleged to be defamatory of the plaintiff. The defendant pleads that, in so far as the said articles and extracts contain any assertions of fact, namely those relating to the character and tendency of the plaintiff's writings and the procedure adopted by him on various occasions in Travancore, they are true in substance and in

* C. S. No. 22 of 1911. 23rd July 1913.

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fact, and in so far as they consist of expressions of opinion, they are fair comments made in good faith and as part of ordinary duty of a journalist and without malice upon the said facts which are matters of public interest. The defendant therefore relies upon pleas of justification and fair comment. As regards the latter plea it is quite clear that the articles published by the plaintiff in the Swadeshabhimani and the action of the Travancore Government in deporting him and suppressing his paper were matters of public interest on which the defendant was entitled to comment and that no suit will lie against him for defamation unless he has exceeded the bounds of fair comment or has been actuated by malice of which there is no evidence in this case.

Now I propose, in the first place, to deal with the defence of fair comment because, if that is a good defence, it relieves me from the necessity of going into the question as to whether the defence of justification has been proved. As I have already said, there can be no doubt that fair comments upon any matter of public interest in which are included the publications in a newspaper are protected publications in the absence of malice. Whether they should properly be called priveleged or not has been the subject of discussion, but as it is laid down in *Merivale* v. *Carson*[1] and *Thomas* v. *Bradbury Agnew & Co., Ltd.*[2] by *Collins* M. R. the question whether you call such publications of comment privileged or not is of no practical consequence. A more important question which was somewhat argued at the bar is as to the extent of the right of fair comment. Perhaps the leading case is, at any rate, the passage which has been most often cited occurs, in the Judgment of *Cockburn* C. J. in *Campbell* v. *Spottiswoode*[3]. *Cockburn* C.J., says "It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them; destructive of their honour and character, and made without any foundation. I think (now these are important words), the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his

1. (1887) 20 Q. B. D. 275. 2. (1906) 2 K. B. D. 677 at p. 680.
3. (1863) 3 B. & S. 760 at p. 777 s. c. 122 E. R. 288 at p. 291.

*2

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conduct so that a Jury shall say that the criticism was not only honest but also well founded, an action is not maintainable." And later on *Crompton* J., says "It is always to be left to a Jury to say whether the publication has gone beyond the limits of a fair comment on the subject matter discussed". (That is the way in which the question has been almost invariably left to the Jury). The next case to which I would refer is *Dakhyl* v. *Labouchere*[1] a case in the House of Lords which is reported in a note in *Hunt* v. *The Star Newspaper Company Ltd*[2]. In that case the defendant had published in his paper "Truth" that the plaintiff was "a quack of the rankest species," and Lord Atkinson in giving his judgment says that in his opinion, "A personal attack may form part of a fair comment upon given facts truly stated if it not be warranted by those facts, in other words, in my view, if it be a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the Judge before whom the case is tried, but if he should rule that this inference is capable of being reasonably drawn, it is for the Jury to determine whether in that particular case it ought to be drawn." And he proceeds to cite the passage in *Campbell* v. *Spottiswoode*[3]. He says: "The well known passage from the judgment of *Crompton* J., in *Campbell* v. *Spottiswoode*[3] relied upon so strongly by Sir Edward Clarke, was not confined to literary criticism but (and that is important) applied "to writers on any public matter," and distinctly laid down the principle that if base and sordid motives which are "not warranted by the facts be imputed, the fact that the writer bona fide believed his imputation to be well-founded affords no defence." The question was again considered in the case of *Hunt* v. *Star Newspaper Company Limited*[2] in the same volume at page 309, by the Court of Appeal and the law was laid down in the same sense by *Cozens Hardy*, M. R. He says: "I cannot do better than adopt the language of *Kennedy* J. in *Joyant* v. *Cycle Trade Publishing Co.*[4] "The comment must not mistate facts, because a comment cannot be fair which is built upon facts which are not truly stated, and, further, it must not convey imputations of an evil sort, except so far as the facts, truly stated warrant the imputation"; and then he proceeds to quote *Dakhyl* v. *Labouchere*.[1] And Lord Justice *Buckley* lays down the law in the same way. "Comment which tends to prejudice may

1. (1908) 2 K. B. 325. 2. (1908) 2 K. B. 309.
3. (1858) 3 B. & S. 760 at p. 777 s. 122 E. R. 288 at p. 291.
4. (1904) 2 K. B. 292.

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still be fair; it may convey imputations of bad motive so far as the facts truly stated justify such an imputation." And later "whether the criticism be upon a literary production or the conduct of a public man, it is for the Jury, I think, to find whether the imputation based upon facts truly stated does or does not honestly represent the opinion of the person who gives expression to it and was not without foundation." Some reliance was placed by Mr. Rosario on the judgment in the same case of *Fletcher Moulton* L. J. Lord Justice *Fletcher Moulton* calls attention to the fact that where matters are stated derogatory of the plaintiff, it must appear fairly clearly, that they are stated as matters of comment and not as matters of fact, because if they are stated as matters of fact, only a plea of justification will avail. The case in *Barrow* v. *Hemchunder Lahiri*[1] and *The Englishman Ltd.* v. *Lajpat Rai*[2] in one of which the plaintiff was said to have, I think, suborned perjury to bring about the conviction of an innocent man and in the other of which Lajpat Rai was said to have tampered with the fidelity of the soldiery, those are both cases in which what was shown to have been done by the plaintiff, was a statement of fact and was held not to be protected. The learned Lord Justice also lays some stress upon the fact that imputations of dishonesty should not be lightly made, but I do not think that he intended to lay down the law differently from all the other cases in which it has been laid down; and in a still later case, in which the subject was again discussed, it is the latest case I know of, *Peter Walker and Son, Limited* v. *Hudgson*[3], Lord Justice *Buckely* says: "But the defendant may nevertheless succeed upon his defence of fair comment, if he shews that imputation of political bias, although defamatory, and although not proved to have been founded in truth, (that is to say although the justification is not proved), yet was an imputation in a matter of public interest made fairly and bonafide as the honest expression of the opinion which the defendant held upon the facts truly stated, and was in the opinion of the Jury warranted by the facts, in the sense (this is important) that a fair minded man might, upon those facts 'bona fide' hold that opinion". So that what I have to find here is not whether such imputations as the alleged libels contain upon the plaintiff are proved in the sense of justification. It may be sufficient for me to find whether, in my opinion, as a Jury here, they were warranted by the facts "in the sense that a fair minded man might upon those facts bona fide hold those opinions."

1 (1906) I. L. R. 35 C. 495. 2. (1910) I. L. R. 37 C. 760.
3. (1909) 1 K. B. 239 at p. 253.

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That is the test which I have to apply in dealing with this case.

[His Lordship next proceeds to discuss the evidence.]

But Mr. Rosario argued if I understand him rightly that to say periodically that a writer had been guilty of sedition could not be fair comment because it was imputing to him a criminal offence: and he has cited those two Calcutta cases to which I have already referred. I do not think that they lay down any such proposition. I am quite certain that no authority for that, was cited to me of any English case or any English authority. In my opinion the question whether a comment is fair or not depends upon the facts of each case: and as to published matter if a reasonable man might hold the opinion that any published matter is either seditious or obscene or blasphemous, it seems to me, that he has a perfect right to express that opinion and that it is not incumbent on him to establish a plea of justification by proving that the author of that passage had brought himself within the meshes of the Criminal Law. It is not necessary as I have already said for me to consider in this case whether, in any one or more of these articles published by the plaintiff, there is matter which if prosecuted would lead to his conviction for sedition. I am perfectly clear and I may safely say, that several of these articles are at any rate on the border line of sedition and therefore it was perfectly open to the defendant if he thought so--and I have no reason to suppose he did not think so—to characterise them as seditious. As I have said it is no business of mine to take sides one way or the other or to express any sympathy either with the plaintiff or the defendant in respect of the views of Travancore politics which they take. All I have to see is whether the defendant has infringed the liberty which as a member of the public he possesses to comment fairly and freely on the writings of another journalist and on the event which those writings gave rise to namely the deportation of the plaintiff.

In the result the conclusion that I have come to, is, that it is not shown that the defendant has exceeded the rights of fair comment and therefore it is quite unnecessary for me to deal with the issue of justification, and to find whether in fact these statements made by the defendant derogatory of the plaintiff are true.

On the finding that I have come to the suit must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Tyabji.

Manonmani Ammal... ... ... *Appellant.** (*Plff.*)

v.

Vythialinga Naicker and others ... *Respondents.*

Civil Procedure Code Order II r. 2—Purchase of shares of two co-parceners—Separate sale deeds, one after the other—Suit to recov. r one member's share—Bar to subsequent suit for other member's share.

Manonmani Ammal *v.* Vythialinga Naicker

Where a person by two separate transactions one after the other acquired the shares of two out of five members of an undivided family.

Held that he had but one cause of action against the family to have his two-fifths share marked out and put in his possession and the suit brought to recover the share acquired from one brother barred a subsequent suit in respect of the other brother's share.

Appeal from the decree of the District Court of Chingleput in A. S. No. 211 of 1909 preferred against the decree of the Court of the District Munsif of Poonamallee in O. S. No. 460 of 1907.

K. P. M. Menon for Appellant.

C. Venkatasubbaramiah for Respondent.

The Court delivered the following

Judgments:—*Miller J.*—The point is a short one but not very easy, and it is after some doubt that I have arrived at the conclusion that the Courts below are right.

The question is whether the cause of action in respect of which the two suits have been instituted is one and the same, and to arrive at the answer we must, I think, have regard to the position of affairs at the date of the earlier suit.

At that date the plaintiff had by two separate transactions acquired the shares of two out of five (or perhaps four; the number is unimportant for my present purpose) members of an undivided family. The shares had not been separated, and to obtain the benefit of his purchases the plaintiff, being driven to a suit, had to sue the whole family. At the date of the suit he could say "I am entitled to two-fifths of the family property," but he could not say "I am entitled to one fifth here and to one fifth there to one fifth of such and such fields and to one fifth of such and such other fields." His second purchase had augmented the proportion of the whole to which he was entitled, but, did not give him a right to localise a second distinct fraction of it.

*S. A. No. 840 of 1911 30th April 1913.

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Miller J.

His right was against the whole family to have two-fifths (if that be the correct fraction) marked out and put in his possession; he could not sue his vendors separately for neither of them with the concurrence of the other and of all the other members of the family was in a position to put him in possession of anything.

That being so, it seems to me he had a single cause of action against the family, and the fact that he had to put in evidence two sale deeds does not seem to affect the cause of action.

The fact that the right of possession was vested in him at different dates is not material; that is made clear by the illustration to order II r. 2 of the Civil Procedure Code.

Had the two vendors sold their shares by one deed in which both joined, it could not, I think, be denied that the plaintiff's cause of action against the family would have been single, and the case does not seem to me to be altered by the fact that there are two deeds.

For it is not the fact of acquisition which gives the cause of action. If the plaintiff, instead of asking for possession, had transferred his right to some third person, that person would have had, I venture to think, but one cause of action against the family, and the plaintiff would never have had any cause of action I take it when the claim is denied; and when the plaintiff's claim was denied, he was in possession of a right as against the family to two-fifths of their property; if, then, he sued for one fifth only, he must be taken, as a matter of law, to have omitted part of his claim in respect of his cause of action.

I do not think it necessary to discuss the numerous cases in which the provision of the Code which is now found in Order II r. 2 has been in question; each case must depend on its own facts, and it is often a difficult matter to decide what facts form part of a particular cause of action. Of the cases cited before us, *Kuppusami Aiyar* v. *Subramanya Aiyar*[1] and *Kuthirvattath Nair* v. *Manavickrama*[2] may be distinguished on the ground that in both cases different and separate parcels of land were in question in the two suits. In the latter case *Subrahmania Aiyar* J. suggests that the first suit was really incompetent, and if so, that would be a case in which there was really no cause of action in one of the suits. In *Skafkat-un-nissa* v. *Shib Sahai*[3] relied on by the District Judge,

1. (1896) 7 M. L. J. 73. 2. (1897) 8 M. L. J. 92.
3. (1881) I. L. R. 4 A. 171.

the claim was under two different titles, as here, and that case, though not entirely on all fours with this, lends support to my view of the matter.

The appeal is dismissed with costs.

Tyabji J :—In the earlier suit the plaintiff claimed partition of the co-parcenary property under the sale deed of 1904, transferring to him the share of one of the co-parceners. In the present suit the plaintiff claims partition of the share coming to him under the sale deed of 1895 from another co-parcener. The question is whether the present suit is barred under Order II Rule 2 of the Civil Procedure Code.

The present suit is not barred unless the causes of action in the two suits are the same and unless the present claim was included in the claim which the plaintiff was entitled to make in respect of the previous cause of action.

It is argued that the cause of action in the present case is distinct from the cause of action in the previous case, and the claim in the present case, it is admitted, might and perhaps ought to have been joined with the claim in the earlier suit, no necessity is shown or explanation offered why two suits are instituted; but it was contended that the present claim could not be said to be "included in the claim in respect of the cause of action" on which the previous suit was instituted. It is clear that a great portion of the "bundle of facts" which have to be proved by the plaintiff in the two suits is common, but there is one set of facts in each case which is not common, viz., the execution of the respective sale deeds and the transfer of the shares under them. It is not always easy to decide whether a particular fact is of such importance as to require it to be considered as a part of the cause of action or is such that it must be relegated into the category of the evidence by which the facts making up the cause of action are to be established. The question necessarily involves a clear determination of the cause of action.

The cause of action in each of these cases is the right to sue all the co-parceners for partition of the estate and for delivery to the plaintiff of such share as he is entitled to receive out of the co-parcenery properties at the time of the suit. The cause of action is not to have the rights of the plaintiff under the sale deeds enforced.

For, so far as the sale deeds are concerned, their function was exhausted prior to the first suit. Each of the plaintiff's vendors

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had permitted the plaintiff to step into his shoes as a co-parcener, and the plaintiff came into the Court on the basis of a new relationship that had arisen, no doubt through the medium of the sale deeds, but, which could only arise after the sale deeds had had their full effect If this is correct, then it seems to me that the sale deeds must be considered to be of secondary importance and as mere steps in that state of circumstances being arrived at which gave rise to the cause of action. On the whole, therefore, though not without hesitation, I think that in this case the execution of the two sale deeds must not be considered to form integral parts of the cause of action in each case. The plaintiff's cause of action was to have his share in the co-parcenery property partitioned and as he proceeded in the fresh suit on the basis that his share included only his rights under one of the sale deeds he is barred from claiming now under the other sale deed, no circumstances being alleged to prevent the inference of law arising that the present claim was abandoned in the first suit.

It therefore follows that the appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling.

Mohideen Batcha Sahib. } *1st accused in Calendar Case No. 183 of 1913 on the file of the Sub-Magistrate of Sathur.*

Criminal Procedure Code S. 438—Jurisdiction—Trial and conviction for minor offence—Facts disclosing more serious offence not triable by the Court —Proceedings of the Magistrate not void—Absence of prejudice to accused or inadequacy of sentence—Setting aside of conviction by appellate Court not called for.

In re Mohideen Batcha Sahib

Where a person was convicted by a Second Class Magistrate and on appeal, the Sub-Divisional Magistrate set aside the conviction and remanded the case for disposal according to law on the sole ground that the facts disclosed amounted to an offence under S. 392 which the 2nd Class Magistrate was not competent to try.

Held: that the proceedings of the Second Class Magistrate not being void, interference by the Sub-Divisional Magistrate was not called for when it could not be said the accused was prejudiced and the sentence was inadequate in the circumstances of the case,

Queen Empress v. *Gundya*[1]. *King Emperor* v. *Ayya*[2] followed.

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* Cr. R. C. No. 444 of 1913 and C. R. No. 66 of 1913. 25th September 1913.

1. (1889) I. L. R. 13 B. 502, 2. (1901) I. L. R. 24 M. 675.

In re Mohideen Batcha Sahib

Case referred for the order of the High Court under S. 438 of the Criminal Procedure Code by the District Magistrate of Ramnad in his letter dated 22nd July 1913 Dis. No. 829 May 1913.

The Public Prosecutor on behalf of the Government.

The Court made the following

Order :—The Sub-divisional Magistrate has set aside the conviction of the accused for an offence under Ss. 352, 379 and 426 of the Indian Penal Code on the sole ground that the facts disclosed in the Prosecution evidence amounted to an offence under S. 392 of the Indian Penal Code, which the original Magistrate being only of the 2nd class, was not empowered to try. He has further proceeded to remand the case to the same Magistrate for re-trial according to law presumably meaning that action should be taken under S. 346, Criminal Procedure Code. The Sub-Divisional Magistrate is wrong in considering that the Original Court's proceedings are void. It has been held both by this Court and by the Bombay High Court that, provided the Court had the power to try the offence of which it has convicted the accused, it is not necessary to quash the conviction merely because the facts disclose a more serious offence, which the Court was not competent to try, unless the accused was prejudiced or the sentence was inadequate. Vide *Queen Empress* v. *Gundya*[1] and *King Emperor* v. *Ayyan*[2].

In the present case the robbery, if robbery it were, was of the most technical and trivial description, the accused having simply slapped the complainant on the head and snatched away a basket of sweetmeats. The accused was in no way prejudiced and the sentence imposed was perfectly adequate. There is no reason for subjecting the accused to a fresh trial.

Under these circumstances the order of the Sub-Divisional Magistrate directing re-trial is set aside. He is directed to restore the appeal to his file and dispose of it according to law, in the light of the above remarks.

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1. (1889) I. L. R. 13 B. 502.
2. (1901) I. L. R. 24 M. 675.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Justice Tyabji.

Vidyapurna Thirthaswamiar ... ... *Plaintiff.** (*Appellant*).

v.

Rangappayya and other ... ... *Defendants.* (*Respondents*).

Thirtha-swamiar *v.* Rangap-payya

Landlord and tenant—Forfeiture—Act showing the intention to determine the lease—Not necessary in the case of agricultural leases—Whether before Transfer of Property Act or after—Transfer of Property Act S. 111—Second appeal—Relief against forfeiture in—Absence of application for, in lower Courts not withstanding.

The overt Act required by S. 111 Transfer of Property Act showing the landlord's intention to determine the lease on the ground of forfeiture is not necessary in the case of an agricultural lease whether the lease is one executed before the Act or after.

Padmanabhaya v. *Ranga*[1] followed.

The High Court in Second Appeal is not precluded from granting relief against forfeiture because the tenant did not make an application for it in the Courts below.

Krishna v. *Baburaya*[2] followed.

Second Appeal from the decree of the Court of the Subordinate Judge of South Canara in A. S.No. 47 of 1913 preferred against the decree of the Court of the District Munsif of Mangalore in O. S. No. 281 of 1908.

B. Sitarama Rao for Appellant.

K. P. Madhava Rao, K.Y. Adiga and *K. P. Lakshmana Rao* for Respondents.

The Court delivered the following

Judgment:—*Sadasiva Aiyar J*:—The plaintiff is the appellant before us. The defendants Nos. 2 to 7, 9, 10, 13 to 21 and 23 to 38 have been made respondents in this second appeal. The suit was for ejecting the defendants from the plaint lands on the ground that the principal defendants have forfeited their rights as Mulgeni tenants according to the terms of the original lease deed of 1863.

The Lower Court refused to give a decree for possession in the plaintiff's favor on the ground that some overt act should have been done by the plaintiff (landlord) showing an intention to determine the tenancy required by S. 111 of the Transfer of Property Act and

* S. A. No. 740 of 1912. 24th July 1913.

1. (1910) I. L. R. 34 M. 161. 2. (1912) 23 M. L. J. 715.

Thirtha-swamiar v. Rangappayya

Sadasiva Aiyar J.

by the ruling reported in *Venkatramana Bhatta* v. *Gundaraya*[1], before the plaintiff acquired a legal right to eject the defendants. The case in *Venkataramana Bhatta* v. *Gundaraya*[1], however• proceeded on the ground that the Transfer of Property Act applied to the lease in question in that case. That this assumption was a mistake was pointed out in *Padmanabhayya* v. *Ranga*[2] and *Ramakrishna* v. *Baburaya*[3]. The lease in question in the present case does not come within the provisions of the Transfer of Property Act both on the ground that it came into existence in 1863 long before the Transfer of Property Act was enacted and also on the ground that the chapter in which S. 111 of the Transfer of Property Act occurs does not apply to agricultural leases unless the Local Government especially notified that the provisions of that chapter should apply (S. 117). The case in *Venkatramana Bhatta* v. *Gundaraya*[1] was evidently also not governed by the Transfer of Property Act on account of both these reasons, though only one of the reasons was mentioned in *Padmanabhaya* v. *Ranga*[2] as having been overlooked by the learned judge who decided *Venkatramana Bhatta* v. *Gundarayya*[1]. As pointed out in the judgment in *Korapalu* v. *Narayana*[4] delivered to-day the provisions in S. 111 of the Transfer of Property Act (about a further act being necessary besides a breach of the covenant in the forfeiture clause) before a suit could be brought was probably a relic brought over into the Indian Statute from the antiquated technicality of the old English Common Law which required the formality of re-entry by the lessor of the leased lands before the lease could be determined for breach of covenants; but this formality is unnecessary in the case of leases not governed by the Transfer of Property Act. As said in *Padmanabhayya* v. *Ranga*[2] the forfeiture is complete "when the breach of the condition, or the denial of the title occurs but, as it is left to the lessor's option to take advantage of it or not, the *election was not a condition* precedent to the right of action, but the institution of the action was simply a mode of manifesting the election." I would put it even more strongly by saying that, as the breach of the condition gives rise to a cause of action, there is strictly no question of *election between two different rights* but there is only an election whether he is to retain the right created or to give up the right. The retention requires no definite physical act while the waiver does. The word 'election' is not the appropriate word to use as regards the bringing of the action based on the right created in the plaintiff by the forfeiture.

1. (1907) I. L. R. 31 M. 403
2. (1910) I. L. R. 34 M. 161.
3. (1912) 23 M. L. J. 715.
4. (1913) 25 M. L. J. 315.

Thirtha-swamiar v. Rangappayya — Sadasiva Aiyar J.

The word 'election' should be used only where the lessor has elected by an act to waive the right created by the tenant's default. There are not two alternative elections, the one giving rise to a right and the other not giving rise to that right, but only one election dealing with the waiver of the right created. The Lower Courts were therefore wrong in holding that the cause of action had arisen to the plaintiff before the suit was brought by reason of his not having done some overt act declaring his intention to take advantage of the forfeiture. In this view it is unnecessary to notice the other contentions of Mr. B. Sitarama Row who appeared in the case for the appellant namely that the Lower Courts were wrong in treating certain acts relied upon by the plaintiff as not legally valid indications of his intention to determine the lease. The respondents, however, offered at the hearing of this second appeal to pay the rent in arrear (relying on the principle of the provision enunciated in S. 111 of the Transfer of Property Act) and to be relieved by the Court against the incurred forfeiture. We think we are not precluded from granting the respondents' prayer simply because in the Lower Courts such offer was not made during the hearings in that Court. *Ramakrishna* v. *Baburaya*[1]. We therefore direct that on defendants' paying into Court the said arrears and full costs in all Courts within two months of this date the forfeiture be relieved against and the Lower Court's decree confirmed, but that in default the plaintiff do recover possession of the plaint properties from the defendants with all costs and subsequent mesne profits. The Lower Court's decree will be modified as above.

Tyabji J.:—I agree.

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1. (1912) 23 M. L. J. 715.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On appeal from the High Court at Allahabad.]

Present :—Lords Atkinson and Parker, Sir John Edge and Mr. Ameer Ali.

Net Ram Singh and others ... (*Plaintiffs. Appellants**)

v.

Musammat Tursa Kunwar ... (*Defendant. Respondent*)

Net Ram Singh *v.* Musammat Tursa Kunwar

Hindu Law—Joint-family-Partition—Right by survivorship—Entries in Revenue records and acts indicating separation—Presumption of jointness rebutted.

Where it appeared that on the death of the father specified areas forming parts of what was admittedly family land was registered separately in the names of the sons and three of them also separately mortgaged the lands standing in their names as if they were their exclusive property,

where it was also admitted that some other village belonging to the family was partitioned,

where it further appeared that the brothers were in separate pessession of their respective sir lands.

Held that the entries in the revenue records, though themselves inconclusive, taken along with the other circumstances which were consistent only with the hypothesis of division sufficiently rebutted the presumption of jointness of the family.

Appeal heard exparte from a Judgment and Decree of the High Court dated (March 30, 1910,) which had varied a Judgment and Decree of the Additional Subordinate Judge of Aligarh dated November 30, 1908.

One Narayan Singh had two wives. By one he had a son Chhiddu Singh who had married Tursa Kunwar, the defendant-respondent in the suit, while by the other he had four sons, Dambar Singh whose wife was Janki and whose son was Sher Singh, Net Ram Singh, Knat Ram Singh and Kanhai Ram Singh. At the time Narayan Singh died Chhiddu alone was of age; the other half-brothers of his were minors. On coming of age the first to die was Dambar Singh who was succeeded by his son, Sher Singh, on whose death his mother Janki, took possession of what was her husband's share. Her name was entered in all revenue papers. Janki also died and the share of property in her possession devolved on all the brothers of her husband. Chiddu Singh having died, his widow, Tursa Kunwar got her name entered in all revenue papers both in respect of her husband's original share as well as what he was entitled to on the death of Janki in the share originally belonging to Dambar. There-

*18th July 1913.

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upon Net Ram Singh and other half-brothers of Chhiddu claimed his property from his widow on the ground, that they were all joint and the widow of Chhiddu, Tursa Kunwar, was entitled to maintenance only. There were certain villages which stood in the name of Chhiddu alone while the names of other brothers of his appeared in respect of others. In 1898 a certain village Susayan was partitioned between them. In Khewat too, the share of each brother was defined. Each had enjoyed his share of the income and the bullocks of each were kept separate. There had been mortgages executed by them severally and their names were entered in revenue papers in proportion to their shares. The Subordinate Judge however decided that the family was joint except a certain village which was Wakf and another which was admittedly divided. On appeal the High Court reversed the findings of the lower court in so far as it had held the family to be joint and confined what was held to be separate. An appeal to His Majesty in Council was then preferred.

B. Dube on behalf of the appellants contended that mere entries in revenue records did not rebut the ordinary presumption that a Hindu family was joint.

The respondent did not appear.

The judgment of their Lordships was delivered by

Mr. Ameer Ali :—The suit which has given rise to this Appeal, was brought by the Plaintiffs in the Court of the Subordinate Judge of Aligarh, to obtain a declaration that, as members of a joint undivided Hindu family, they became entitled by right of survivorship to the shares of their half-brother Chhiddu Sing, in the properties mentioned in the schedule to the plaint, upon his death in 1907. The Plaintiffs and Chhiddu Sing are the sons by different mothers of one Narayan Sing, who died in 1879. They allege that after their father's death the family continued joint during the whole of Chhiddu's lifetime, and that in 1907 after Chhiddu's death his widow, Tursa Kunwar, the Defendant to the present action, obtained from the Revenue Courts an order to have her name recorded in the Collector's Register as proprietor in place of her deceased husband.

The Defendant, Tursa Kunwar, contested the claim on the ground that her husband was at the time of his death separate from his brothers, and that consequently his share in the several properties had rightly devolved on her. In support of her contention she relied mainly on a number of documents consisting chiefly of entries in revenue records and mortgage deeds separately executed by the brothers.

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The Subordinate Judge, upon a review of the evidence, was of opinion that the Plaintiffs had established their allegation, and accordingly decreed their claim. On appeal, the High Court of Allahabad has taken a different view. It has held in effect that whatever might have been the position among the Plaintiffs *inter se*, the evidence and inferences from facts proved, left no room for doubt that at the time of his death Chiddu was separate from his brothers. The learned Judges accordingly varied the decree of the Subordinate Judge and dismissed the Plaintiff's suit, save as regards one village, with respect to which they agreed with the Lower Court.

The Plaintiffs have appealed to His Majesty in Council, and the main contention advanced on their behalf is that the High Court was in error in relying on the entries in the revenue records, which by themselves are not sufficient to rebut the presumption of Hindu law relating to jointness or to prove separate possession by the different members of a family which in its inception was admittedly joint.

Their Lordships, however, observe that the learned Judges in the Court below have not rested their Judgment merely on entries which, standing by themselves, may be regarded as inconclusive. They have drawn inferences from the acts of the brothers which are consistent only with the hypothesis of separation. They say:—

"Not only do we find this separate entry of names in regard to specified areas of the village Nimgaon, but we further find that on the 8th of March 1900, three separate mortgages were made by Net Ram, Kanhai Singh, and Mukhram Singh, respectively. Each of them purported to mortgage a specified portion of the land in Nimgaon, separately entered in their names, and described it as owned and possessed by him alone. So that not only were their names separately entered in the revenue papers in regard to specified areas, but they dealt with those areas as separate owners thereof."

The Plaintiffs made no attempt to explain how, if the brothers were joint, as they allege, at the time of the transactions, separate mortgages were executed by them in respect of specified areas held by each separately in the village of Nimgaon. The circumstances connected with these mortgages were within their knowledge, and it lay upon them to show that the transactions, although separate, were consistent with jointness.

The learned Judges refer also to the admitted partition among the five brothers of the village of Susayan in 1898, to the entry of Chhiddu's name alone in respect of one village, and of the names of his four half-brothers in respect of another, to the separate enjoy-

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ment of their respective *Sir* lands by Chhiddu and the Plaintiffs all tending to show a separation in estate before Chhiddu's death.

On the whole, their Lordships see no reason to disturb the finding of the High Court, and they will, accordingly, humbly advise His Majesty that the Appeal be dismissed. As the Respondent does not appear there will be no costs.

Solicitors for appellants:—*Barrow, Rogers* and *Nevill.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the Court of the Judicial Commissioner at Lucknow.]

Present:—Lords Atkinson and Parker Samuel Griffith, Sir John Edge and Mr. Ameer Ali.

Kunwar Partab Singh and another ... (*Plaintiffs*).* *Appellants.*

v.

Bhabuti Singh ... ... (*Defendant*). *Respondent.*

Partab Singh v. Bhabuti Singh

Code of Civil Procedure (1882) Ss. 441, 443, 456 and 462—Representation of minor in a suit—Compromise on his behalf—Guardianship—Restoration to original position—Code of Civil Procedure 1908 S. 98—Duty of the Bench to try point of law referred to try—Practice.

Where A had represented minors in a suit to pre-empt, without being appointed guardian ad litem by the Court as required by S. 443 of the Civil Procedure Code of 1882 and entered into a compromise on their behalf without drawing the attention of the Court directly to the fact that a minor was a party to the compromise as S. 462 of the Civil Procedure Code of 1882 required:—

Held, that the minors were not in law represented in the suit and that the decree was not binding on them, nor was the compromise of any effect against them and that they should be restored to the position previous to the irregularity complained of.

Monohar Lall v. *Jadu Nath Singh*[1] approved.

When two judges had differed on a point of law and the matter was referred to a third Judge who had not confined his opinion to that specific point:...

Held, that he ought to have given his opinion on the point referred to alone as required by S. 98 of the Civil Procedure Code (1908).

Appeal from a Judgment and Decree of the Court of the Judicial Commissioner, dated March 1910 reversing a Judgment and Decree of the Subordinate Judge of Sitapur, dated July 29, 1908.

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* 30th June 1913.

1. (1906) L. R. 33 I. A. 128.

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The Appellants were co-sharers in the village of Anthana which was divided into two mahals Ismailganj and Khushalpur. In Khushalpur the Respondent also had a small rent-free holding. On August 3, 1898 one Syed Sadiq and others who were also co-sharers in the village sold their shares in both mahals to one Babu Ram and others persons, the bulk of the property being in Mahal Ismailganj. On June 26, 1899 the respondent sued the parties to sale for pre-emption. Not being a co-sharer in Mahal Ismailganj, the respondent who was the guardian of the appellants who were minors, arranged with one Hari Pershad to file a second suit on behalf of the minors against the same persons for pre-emption. Hari Pershad acted throughout under the direction of the respondent. According to the usual practice the appellants and respondents became co-defendants in each other's cases. Although professed to act as guardian of the minors, Hari Pershad was never appointed guardian *ad litem* by any order of the Court as required by S. 443 Civil Procedure Code (1882) and that no application was ever made for that purpose under S. 456. The result of the case, if tried out, would have been in favour of the appellants in respect of Ismailganj while lots would have been drawn between appellants and respondent as regards the small share in Khushalpur. On December 15, 1899 the parties to the respondent's suit entered into a compromise whereby respondent alone was to have a decree for possession of the whole property on payment of the price entered in the deed of sale. This compromise was signed by Hari Pershad who was described in the title of the suit as guardian of the minor defendants. No sanction was asked for or obtained as required by S. 462 of the Civil Procedure Code. In the appellant's suit he filed an application for the dismissal of the suit which was accordingly dismissed. The guardianship of the respondent for the appellants was removed by an order of the Deputy Collector of Sitapur in July 1907. On February 22, 1908 the appellants brought a suit in the Court of the Subordinate Judge of Sitapur for a declaration that the deed of compromise and the decree of December 15, 1899 had no living force against the plaintiffs and that they were entitled to be restored to the position they held prior to the proceedings held on September 15, 1899. The Subordinate Judge granted the appellants' prayer and gave them a decree in terms prayed for. Against the findings the respondents appealed to the Court of the Judicial Commissioner when the appeal was heard by the Judicial Commissioner and the First Additional Judicial Commissioner, the former holding that the proceedings in 1899 were not binding on the minors. He doubted whether the suit was brought under S. 42 of the Specific

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Relief Act, but in any event he thought that the discretion of the Court should be exercised in favour of the appellants while the First Additional Judicial Commissioner differed with him on the last point. The result was that the appeal stood dismissed; but the Court directed that the appeal be laid before the 2nd Additional Judicial Commissioner under S. 98 of the Civil Procedure Code of 1908 in as much as the difference arose on a point of law. He, however, decided in favour of the respondent and expressed his opinion on the case in general. From this decision an appeal was preferred to the Judicial Committee.

Grey (with him *Jacob*) on behalf of the appellants contended that the Judicial Commissioners not having differed on any point of law, the appeal should have been dismissed under the provisions of S. 98 of the Civil Procedure Code of 1908. The exercise of the discretion of the Court to grant or refuse relief to appellants was not a point of law with in the meaning of that section. The Judicial Commissioner had no power to refer any point of law, while the 2nd Additional Judicial Commissioner had no power to come to any findings apart from the specific point referred to him. The relief was already given by the Subordinate Judge and no sufficient reason was given to interfere with the exercise of his discretion. They ought to have found that no sanction was given to the compromise or withdrawal. The respondent as the guardian abused his authority and brought about a compromise much to his own advantage and to the detriment of the minors. The appellants were not bound by the proceedings at all.

Reference was made to *Ramanadhan Chetti* v. *Murugappa Chetti*[1], *Isri Dutt Koer* v. *Musammat Hansabutti Koerani*[2], *Lalta Singh and others* v. *Ganesh Singh*[3].

De Gruyther K. C. and *Lowndes* for the respondent contended that in case of pre-emption the suit had to be brought within one year. (*Ameer Ali* : your point is that the suit was really brought not for the minor but the name of the minor in the suit was made use of for some ulterior purpose. You managed any how to get hold of the property.) There are concurreut findings of two courts. [*Lord Atkinson*: The question of concurrent findings applies to cases where there has been decision of two courts below, but not to a case when there had been no judgment of one, although decision had been by mistake entered.] The dismissal of suit in 1899 was not procured

1. (1906) L. R. 33 I. A. 139. 2. (1883) L. R. 10 I. A. 150.
3. (1887) I. L. R. 9 A. 625, 642 (F. B.)

by any fraud on the part of the respondent, nor was it prejudicial to their interests.

Grey replied.

The Judgment of their Lordships was delivered by

Sir John Edge:—The suit in which this Appeal from a decree of the Court of the Judicial Commissioner of Oudh has arisen was brought by Kunwar Partab Singh and Kunwar Ahbaran Singh in the Court of the Subordinate Judge of Sitapur against Bhabuti Singh and others on the 22nd February 1908. The Plaintiffs, who are the Appellants here, sought by their suit to have it declared that a decree which was made on the 15th December 1899 in a suit for pre-emption which had been brought by Bhabuti Singh, who is Respondent here, on the 26th June 1899 against certain vendees and others, and in which the Appellants, who were then minors, had been added as defendants, was not binding as against them. The Plaintiffs-Appellants also sought in this suit to have the decree set aside which had been made on the 15th December 1899 in a suit for pre-emption which had been brought on the 27th July 1899 by them under the guardianship of one Hari Pershad against vendees and others and in which Bhabuti Singh had been added as a Defendant, and they claimed to be restored to the position which they had prior to the 15th December 1899 and such other relief as they were entitled to.

The material facts which their Lordships find are briefly as follows. The Plaintiffs were the sons of Raja Balbhaddar Singh who died on the 27th December 1897. The property of the joint family consisted of, amongst other things, shares in Mahal Ismailganj and Mahal Khushalpur, in respect of which Raja Balbhaddar Singh was at his death recorded in the Revenue Papers as the proprietor. After the death of Raja Balbhaddar Singh the Defendant-Respondent, Bhabuti Singh, assuming to act as the guardian of the Plaintiffs and as the manager of their property obtained in April 1898 mutation of names in the Revenue Papers in their favour. Syed Mohammad Ismail, Syed Idur Hasan and Syed Mohammad Sadiq on the 3rd August 1898 sold certain shares in Mahal Ismail-ganj and Mahal Khushalpur to Munshi Niaz Ahmad, Babu Ram and Bhagwan Das. It was in respect of that sale that the suits for pre-emption of the 26th June 1899 and the 27th July 1899 were brought. The vendors and the vendees were original Defendants to these suits. Bhabuti Singh had a right of pre-emption equal but not superior to that of Partab Singh and Ahbaran Singh in respect of the shares which were sold in Mahal Khushalpur, and he had a right

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of pre-emption inferior to theirs in respect of the shares which were sold in Mahal Ismailganj. It is obvious that the interests of the minors Partab Singh and Ahbaran conflicted with the interests of Bhabuti Singh. On the 26th June 1899 Bhabuti Singh on his own behalf brought a suit to pre-empt the shares which had been sold in the two Mahals, and made the vendor and vendees Defendants to the suit. On the 5th August 1899 Bhabuti Singh caused Partab Singh and Ahbaran Singh, who were then minors, to be added as Defendants to that suit. According to the amended plaint, Partab Singh and Ahbaran Singh, minors, under the guardianship of Hari Pershad, were added as Defendants under an Order dated 5th August 1899. The Court appears to have made an Order on the 5th August 1899 that Partab Singh and Ahbaran Singh should be added as Defendants, but it does not appear that the Court had ordered that they should be added as Defendants under the guardianship of Hari Pershad. The amendment of the plaint adding Partab Singh and Ahbaran as Defendants was not attested by the signature of the Judge. No Order appointing Hari Pershad as a guardian for the suit for Partab Singh or Ahbaran Singh was applied for or was made. By section 443 of the Code of Civil Procedure, 1882, it was enacted that :—

"Where the Defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for such minor, and generally to act on his behalf in the conduct of the suit."

By section 441 of the same Code it was enacted that :—

"Every application to the Court on behalf of a minor (other than an application under section 449) shall be made by his next friend, or by his guardian for the suit."

The result is that the minors, Partab Singh and Ahbaran Singh, were not in law represented in the suit which was brought by Bhabuti Singh.

On the 27th July 1899 Bhabuti Singh, who was then the *de facto* guardian of the minors Partab Singh and Ahbaran Singh, and the manager of their property, caused a suit for pre-emption in respect of the sale of the 3rd August 1898 to be brought by Partab Singh and Ahbaran Singh under the guardianship of Hari Pershad against the same vendors and vendees who were Defendants to the suit of the 26th June 1899. The shares which it was sought to pre-empt by the suit of the 27th July 1899 were the same shares which it had been sought to pre-empt by the suit of the 26th June 1899. On the 7th August 1899 Bhabuti Singh was added as a Defendant to the suit of the 27th July 1899. On the 27th July

1899 Hari Pershad had in the suit in which Partab Singh and Ahbaran Singh were the Plaintiff's field an application to be appointed their guardian *ad litem*. The application puaported to be made under S. 456 of the Code of Civil Procedure, 1882. The Subordinate Judge to whom the application was made by his Order of the 27th July 1899 held that the application was unnecessary, and directed that the costs should be borne by the Plaintiffs in that suit in any event.

Bhabuti Singh, the vendors, the vendees, and Hari Pershad, professing to act on behalf of Partab Singh and Ahbaran Singh, entered into an agreement of compromise, and on the 15th December 1899 filed in the suit in which Bhabuti Singh was the Plaintiff a petition, in which it was stated that it was agreed that Bhabuti Singh should pay Rs. 15,000 without costs to the vendees, and that a decree for possession of the property sold should be passed in favour of Bhabuti Singh by right of pre-emption. On that petition the then Subordinate Judge passed a decree in that suit in favour of Bhabuti Singh. As Hari Pershad had not been appointed guardian for the suit for the minors Partab Singh and Ahbaran Singh, they were in law unrepresented, and the decree did not bind them. Further, Hari Pershad had not obtained the leave of the Court to enter into that agreement of compromise on behalf of the minors Partab Singh and Ahbaran Singh.

In pursuance of the agreement of compromise to which their Lordships have referred, Hari Pershad, professing to act as guardian of the minors Partab Singh and Ahbaran Singh, on the 15th December 1899, presented to the Court a petition in the suit in which Partab Singh and Ahbaran Singh were the Plaintiffs, in which it was stated that it had been settled between the parties that a decree should be passed in favour of Bhabuti Singh in his suit; that the compromise had been filed in Court; and that Partab Singh and Bhabuti Singh were willing to withdraw their claim; and it was prayed that the withdrawal of their claim should be sanctioned, and that their suit should be dismissed. That petition was signed by Hari Pershad Bhabuti Singh, the vendors, and the vendees. Hari Pershad appeared in Court in support of that petition, and stated that: "Since Bhabuti Singh has acquired this *hakkiat* on the basis of "pre-emption, therefore the minors have now no objection, and they "do not advance a claim to the said *hakkiat* as against Bhabuti "Singh." On that petition the then Subordinate Judge dismissed the suit of Partab Singh and Ahbaran Singh. It does not appear that the Subordiuate Judge was informed that the minors Partab

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Singh and Ahbaran Singh were in law unrepresented in the suit of the 20th June 1899, in which Bhabuti Singh had obtained a decree as against them and others for the pre-emption of the shares which Partab Singh and Ahbaran Singh were in their suit claiming to pre-empt; nor does it appear that the Subordinate Judge was informed that the petition for the dismissal of the suit of Partab Singh and Ahbaran Singh was made in pursuance of an agreement of compromise which Hari Pershad acting as next friend of the minors Partab Singh and Ahbaran Singh, had entered into without the leave of the Court. This Board has held in *Manohar Lal* v. *Jadu Nath Singh and others*[1] that in cases to which S. 462 of the Code of Civil Procedure, 1882, applies there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown, by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained, and that it is not sufficient proof that the exigencies of S. 462 were complied with to show that the minor was described in the title of the suit as a minor, as in that case, suing "under the guardianship of his mother," and that the terms of the compromise were before the Court. The agreement of compromise in pursuance of which Hari Pershad obtained the dismissal of the suit of Partab Singh and Ahbaran Singh was void as against them and on that ground, if there were no other, they are entitled to have the decree dismissing the suit of the 27th July 1899 set aside.

Hari Pershad had been a karinda of Raja Balbhaddar Singh, and he acted in a subordinate capacity under Bhabuti Singh in the management of the property of Partab Singh and Ahbaran Singh after Bhabuti Singh assumed the guardianship of the minors. Their Lordships agree with the learned Judicial Commissioner that in the proceedings to which they have referred "Hari Pershad was a mere "dummy, that there was no one to protect the interests of the "Plaintiffs (Partab Singh and Ahbaran Singh), and that in fact "Bhabuti Singh took advantage of his position." Their Lordships find that Hari Pershad was introduced into the suits of 1899 by Bhabuti Singh as the guardian or next friend of the minors Partab Singh and Ahbaran Singh to advance the interests of Bhabuti Singh and to defeat the interests of Partab Singh and Ahbaran Singh, for whom previously and subsequently Bhabuti Singh was acting as guardian and as the manager of their property. Hari Pershad throughout acted under the directions and on behalf of

1. (1906) 33 I. A. 128.

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Bhabuti Singh and in his interests and contrary to the interests of Partab Singh and Ahbaran Singh, and to their detriment. Upon these findings of fact it follows as an obvious conclusion that the compromise and the proceedings which were taken in pursuance of it were not binding upon Partab Singh and Ahbaran Singh, and it is clear, apart from the other consideration which their Lordships have already discussed, that Partab Singh and Ahbaran Singh are also on these findings of fact entitled to relief.

The Subordinate Judge of Sitapur in this suit gave Partab Singh and Ahbaran Singh a decree on the 29th July 1908. From that decree Bhabuti Singh appealed to the Court of the Judicial Commissioner of Oudh. The appeal was heard by a bench consisting of the Judicial Commissioner and the First Additional Judicial Commissioner. The learned Judicial Commissioner, on the facts found by him, held that Partab Singh and Ahbaran Singh were entitled to the decree which they had obtained from the Subordinate Judge, and that the appeal shall be dismissed with costs. The First Additional Judicial Commissioner agreed with the findings of the Judicial Commissioner on all the material facts. In his Judgment the First Additional Judicial Commissioner stated :—

"I agree with my learned colleague in holding that it is satisfactorily established that the Appellant [Bhabuti Singh] was *de facto* manager of the minors' property at that time [1899], and that Hari Pershad in withdrawing the minors' suit acted under his instructions. If the case had been fought out the minors [Partab Singh and Ahbaran Singh] would probably have obtained a decree for the larger portion of the property and lots might have been drawn with respect to a smaller portion thereof. In arranging for this compromise the Appellant acted in his own interests, and the reason why he got a pre-emptive suit instituted on behalf of the minors was to protect himself in case other persons who had a better right of pre-emption than himself instituted suits claiming pre-emption of the property. After the period of limitation for such suits had expired he withdrew the minors' claim and obtained a decree in his own favour."

Notwithstanding that finding the First Additional Commissioner, for reasons which appear to their Lordships to be irrelevant, considered that exercising a discretion under S. 42 of the Specific Relief Act, 1877, he ought to refuse to grant the relief for which Partab Singh and Ahbaran had prayed, and held that the appeal should be allowed and the suit dismissed with costs. S. 42 of the Specific Relief Act, 1877, did not apply. The Judicial Commissioner and the First Additional Judicial Commissioner having differed in opinion on the point of law as to whether S. 42 of the Specific Relief Act, 1877, applied to the case, directed that the

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appeal should be laid before the Second Additional Judicial Commissioner under section 98 of the Code of Civil Procedure, 1908. The Second Additional Judicial Commissioner did not apparently confine himself to a consideration of the point of law with which alone he had under S. 98 of the Code of Civil Procedure, 1908, jurisdiction to deal; he apparently agreed with the opinion of the First Additional Judicial Commissioner that S. 42 of the Specific Relief Act, 1877, applied, and held that the appeal should be allowed and the suit should be dismissed with costs in both Courts. In accordance with the opinions of the First Additional Commissioner and the Second Additional Judicial Commissioner a decree was passed on the 14th March 1910 by the Court of the Judicial Commissioner of Oudh allowing the appeal and dismissing the suit with costs. From that decree this appeal has been brought.

Their Lordships are of opinion that this appeal should be allowed and the decree of the Court of the Judicial Commissioner should be set aside, and that the Appellants, Partab Singh and Ahbaran Singh, should have a decree setting aside the decree of the 15th December 1899 in their suit, and declaring that the agreement of compromise and the decree of the 15th December 1899 in the suit of Bhabuti Singh are not binding upon them or either of them, and that they are entitled to such rights as they had before their suit was dismissed on the 15th December 1899. Their Lordships will advise His Majesty accordingly. Bhabuti Singh, the Respondent must pay the costs of this appeal and of his appeal to the Court of the Judicial Commissioner of Oudh.

Solicitors for appellants:—*Ranken Ford, Ford* and *Chester*.

Solicitors for respondent:—*T. L. Wilson and Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[In its ordinary Original Civil Jurisdiction.]

PRESENT:—Mr. Justice Wallis.

K. R. V. Firm ... ... *Plaintiff.**

v.

Sathyavada Sitharama Swami and others... *Defendants.*

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Limitation Act (Act IX of 1908) S. 19—Partnership—Acknowledgment by a partner—Trading Partnership—Necessary or usual in—Not binding, in the absence of express authority—Conflict—Correctness of rule doubted.

According to the course of decisions in Madras, acknowledgment by one partner is not sufficient to save the bar of limitation against his co-partners though the acknowledgment is an act necessary for or usually done in the course of partnership business, in the absence of proof that he had express authority to do so.

The correctness of the decisions doubted and the conflict between Bombay and Allahabad and Madras pointed out.

Goodwin v. Parton[1], *Watson v. Woodman*[2] referred to

It is the almost invariable practice of trade creditors here to insist upon a written acknowledgment in their books being made by the debtors as a condition of giving credit and engaging in further transactions and that whether the debtor is carrying on business singly or in partnership of which the Court, on account of the practice constantly coming within its cognisance, may well take judicial notice.

C. P. Ramasami Aiyar for Plaintiff.

T. S. Rajagopala Aiyar for the 2nd defendant.

The Court delivered the following

Judgment :—This is a suit by the plaintiff, a firm of merchants carrying on business in Madras, against the three defendants, who are brothers alleged to be carrying on business in partnership in the mofussil for the price of goods sold and delivered with interest according to agreement; and the plaint alleges that accounts were settled on the 7th January 1909 when Rs. 3976-0-6 were found due to the plaintiffs and the 1st defendant signed for that amount in the books of the plaintiffs. The 1st and 3rd defendants do not contest the suit. The 2nd defendant has filed a written statement in which he denies carrying on business in partnership with the 1st and 3rd defendants and says that the business belonged exclusively to the 1st defendant. He also denies that the business was a family trade and says there was no meaning in calling the defendants members of an undivided Hindu family as there is no family property. He also pleads that the suit is barred by limitation.

*C. S. No. 7 of 1912 10th September 1913.

1. (1879) 41 L.T. 91 affirmed in (1880) 42 L.T. 568. 2. (1875) L.R. 20 Eq. 730.

The transactions with the 1st defendant are proved and are not barred owing to the acknowledgment by the 3rd defendant. There must therefore be judgment against him in any event. As regards the 2nd defendant, I find it proved against him that he was a partner with the 1st defendant. His denial that he had anything to do with the business is contradicted by the letters exhibited in his own writing. It is clear that the defendants were undivided and were working together for profit in the business and this it seems to me renders them partners within the definition in S. 239 of the Indian Contract Act. The business was no doubt carried on in the name of the 1st defendant as appears from the plaintiff's Ledger, but there is nothing unusual in that. In the box the 2nd defendant said something about being divided in status but not by metes and bounds. In the written statement however he did not deny he was undivided, but only that there was any joint family property, and before he went into the box his vakil had expressly admitted that he was undivided and that judgment must in any event be given on that basis.

As regards limitation. it is contended that the written acknowledgment by the 1st defendant of January 1909 does not affect the other defendants and that the suit is barred as against them under two recent decisions of this court in *Valasubramania Pillai* v. *S. V. R. R. M. Ramanathan Chettiar*[1] and *Sheik Moideen Saib* v. *The Official Assignee of Madras*[2]. This is a question of very great importance, because written acknowledgments such as this are a very ordinary, not to say, necessary incident of business at any rate in this part of India, and any decision affecting their validity must have a far reaching operation. As is well known the object of this legislation was to restrict the rule laid down by Lord Mansfield and the Court of King's Bench in *Whitcomb* v. *Whiting*[3], that any acknowledgment or payment by one co-debtor was sufficient to take the case out of the statute of Limitation as regards the others. This was effected as to acknowledgments by Lord Tenderten's Act 9 Geo. 4 c. 14, and as to payments by the Mercantile Law Amendment Act 1856, 19 and 20 Vic. c. 97 S. 14. The Indian Act of 1859 dealing only with acknowledgments provided generally (S. 4) that "if more than one person be liable none of them shall be chargeable by reason only of a written acknowledgment signed by another of them". The Act of 1871 S. 20 contained the following explanation 2. "Nothing in this section renders one of several partners or executors chargeable by reason

1. (1908) I. L. R. 32 M. 421.
2. (1911) I. L. R. 35 M. 142.
3. (1781) 1 Sm. L. C. (Tenth Edition) 561.

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of a written promise an acknowledgment signed by another of them." S. 20 of Act XV of 1877 provided that "Nothing in Ss. 18 and 19 renders one of several joint contractors, executors or mortgagees chargeable by reason only of a written acknowledgment &c." This is very near the language of Lord Tenderten's Act. "No such joint contractor, executor or administrator shall lose the benefit of the said enactments so as to be chargeable in respect or by reasonon ly of any written acknowledgment or promise made and signed by any other or others of them." The main alteration for the present purpose is that, in the Indian Act partners are mentioned separately and not included under joint contractors. It has never been held so far as I know that the specific mention of the word partners makes any difference. Construing the language of the English sections *Starling* J. in *In re Macdonald*[1] said that the word "only" is emphatic and in *In re Tinker*[2] *Lindley* L. J. observed that "the object of the enactment was not to facilitate frauds by debtors upon creditors, but to protect debtors against state claims," and Lord *Herschell* observed that "it was not intended to have any application where the payment was made by him for and on behalf of another co-debtor at his request." It had previously been held by the Court of Queen's Bench in *Goodwin* v. *Parton*[3] that one of two partners must be presumed in the absence of proof to the contrary to have authority to make a payment on account of a debt due to the firm so as to take the debt out of the Statutes of Limitation against the other. This case was affirmed by the Court of Appeal in *Goodwin* v. *Parton*[4], and the same presumption is treated as applicable to acknowledgments in Lindley on Partnership and other text books though I have not found any express decision on the point. In *Khudu Ram Dutt* v. *Kishen Chand*[5] a case under the Act of 1871 where a question arose as how far an acknowledgment by one partner was binding on another, the Court seems to have been of opinion that if by the ordinary rules of partnership such an acknowledgment would be binding on the other co-partners that would be sufficient, but the language is not very clear. In *Prengi Moha* v. *Dorsa Doongersey*[6]. *Scott* J. ruled "It must be shewn that the partners signing the acknowledgment had the authority express or implied to do so. In a going mercantile concern such agency is I think to be presumed as a rule. See Lindley on Partnership. *Goodwin* v. *Parton*[3];" but he held following *Watson* v. *Woodman*[7], that as the

1. (1897) 2 Ch. 181 at 188.
2. (1894) 3 Ch. 429 at 437.
3. (1879) 41 L. T. 91.
4. (1880) 42 L. T. 568.
5. (1876) 25 W. R. 145.
6. (1886) I. L. R. 10 B. 358.
7. (1875) 20 Eq. 721.

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partnership had ceased to be a going concern when the acknowledgment was made it was not binding, as the presumption no longer applied. In *Gadu Bihi* v. *Pursotam*[1] the Allahabad High Court referred to this decision with approval and held that where an acknowledgment was effected in the ordinary course of business of the firm and was such a transaction as was contemplated in S. 251 of the Indian Contract Act, it was sufficient to save limitation. In *Dulsukram* v. *Kalidas*[2], *Candy* J. referred to *Scott* J.'s ruling with approval, and stated that it had been approved by *Sargeant* C. J. in an unreported case, but the Court eventually sent down an issue whether assuming the partnership to have been existing when the acknowledgment was made, such acknowledgment was or was not an act necessary for as usually done in carrying on the business of the partnership (S. 291 of the Indian Contract Act) in which case they held it must be taken to have been done under the authority of the other partners. Here it may be observed that S. 251 of the Indian Contract Act of 1872 which was subsequent to Limitation Act IX of 1871 S. 20 in which partners are expressly mentioned, is quite general in its terms and makes no exception as to payments and acknowledgments made in the necessary or ordinary course of the partnership business. Now if as here held, it be enough to shew that the acknowledgment was an act necessary for or usually done in carrying on the business of the partnership, that would seem to conclude the question so far as relates to trading partnerships in this part of India. It is the almost invariable practice of trade creditors here to insist on a written acknowledgment in their books being made by the debtors as a condition of giving credit and engaging in further transactions no doubt as a safeguard against idle and dishonest defences being set up if they should ultimately be obliged to sue. Such acknowledgments are made as a matter of course by the trade-debtors, whether carrying on business singly or in partnership and are forthcoming in almost every suit for the price of goods sold and delivered. This is a matter within the daily experience of Courts of first instance and I think they are entitled to take judicial notice of it if relevant and need not require it to be proved by evidence in each case.

Coming now to the decisions of this Court it was held by *Subramania Aiyar* and *Boddam* J. J. in *Rajagopala Pillai* v. *Krishnasami Chetty*[3], that where a partnership is dissolved by the death of one of the partners, the surviving partners cannot bind the

1. (1888) I. L. R. 10 A. 418. 2. (1902) I. L. R. 26 B. 42.
3. (1898) 8 M. L. J. 261.

representatives of the deceased partner by their acknowledgment of a debt of the firm unless they are specifically authorised to do so. Here the learned judges would appear to have been of opinion that but for the previous death of the partner the acknowledgment would have been binding but the point did not arise directly. The first case on which the defendant relies is a decision of the learned *Chief Justice* and *Abdur Rahim* J. in *Valasubramania Pillai* v. *S. V. R. R. M. Ramanadhan Chettiar.*[1] In that case the learned judges dissented from the ruling of *Scott* J. in *Prenji Maha* v. *Doosa Doongersey*[2] that in a going mercantile firm agency is to be presumed, which they treated as obiter, and laid down that something more must be shewn, that there must be "some evidence that in the course of business the partners who made the payment had authority to do so on behalf of the firm." If I understand the learned judges rightly they were of opinion that it was not enough to show that the payment was an act necessary for as usually done in the course of partnership business, S. 251, but there must be evidence as to the authority of the partners who made the payment. The argument is not reported, and it does not appear if the decision in *Goodwin* v. *Parton*[3] was not brought to the notice of the Court or was regarded as inapplicable. The next case *Sheik Moideen* v. *The Official Assignee of Madras*[4], was a decision of the learned *Chief Justice* and *Sankaran Nair* J. In that case the acknowledgment had been made by the partner in charge of a branch with reference to a debt contracted by that branch, and the learned judges held on appeal from a decision of my own, that there was no evidence that the partner making the acknowledgment had authority to do so on behalf of the firm, and that it was not a legitimate inference for the fact of his being in management that he had such authority.

In this case *Dalsukran* v. *Kalidas*[5] was referred to as well as *Prengi Moha* v. *Dossa Doongersey*[2] but the Court was of opinion that it did not help the respondent plaintiff. The conclusion to which I have come on the examination of the authorities is that there is a conflict between the decisions of the Bombay and Allahabad High Courts and the decisions of this Court. According to the former it is enough to show that the payment or acknowledgment was an act necessary for or usually done in the course of the partnership business to make it operative when done by one

1. (1909) I. L. R. 32 M. 421.
2. (1886) I. L. R. 10 B. 358.
3. (1879) 41 L. T. 91 affirmed in (1880) 42 L. T. 568.
4. (1911) I. L. R. 35 M. 421.
5. (1902) I. L. R. 26 B. 42.

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partner against the others. According to the two Madras decisions evidence of authority from the other partners is necessary and cannot be presumed. These decisions are binding on me though I confess I should be glad either to see them reconsidered or the law altered because there is no real doubt in these cases about the acknowledgment being made with the knowledge and consent and for the benefit of all the partners, though the creditors may have no means of proving this, so that the effect of the more stringent rule is to facilitate fraud by debtors upon their creditors.

Coming now to the evidence in the present case all that appears is that the 2nd defendant's letters two years before the date of the acknowledgment show that a settlement as it is called was contemplated of which a signature in the plaintiff's books would be a usual and necessary incident, and that they (plural) were coming to Madras to make it; that the plaintiff carried on business in Madras and the defendants in the Godaveri District; and that the 1st defendant came up to Madras and signed the acknowledgment in the books of the plaintiff's firm. Exhibit A is as follows. "Remaining debit balance 3976-0-6. We bind ourselves on demand to pay to the plaintiff's order to persons possessing this order at Madras Rs. 3976-0-6 being the principal together with interest thereon at one per cent. per mensem from this date.

Sathyavada Sitharamaswami

(1st defendant's signature)."

The business was carried on in the name of the 1st defendant; and it is argued for the plaintiff that the use of the plural verb in the original shows that he was acting on behalf of others as well as himself and this is borne out by the interpreter. It may therefore I think be taken that the acknowledgment purports to be made by the 1st defendant not merely on his own behalf but on behalf of the firm. There is also evidence in B that the 2nd defendant was in the habit of going to Madras and making payments on account of the firm. This evidence however does not show that the 2nd defendant was authorised to make the acknowledgment in question on behalf of the others, and following the decisions already referred to I hold that the suit is barred as against the 2nd and 3rd defendants. I may say I attach no importance to the 2nd defendant's statements in the box that the business had stopped two years previously as his evidence as a whole shows he is not entitled to any credence, and the reference to stopping on account of cholera in one of his letters

does aot clearly refer to stopping business and in any case to more than a temporary stoppage. There will be judgment for the amount claimed with further interest at contract rate to date and costs with further interest at 6 p. c. against the 1st defendant and against the 2nd and 3rd defendants to the extent of the joint family properties in their hands. K.R.V. Firm v Sitharama Swami

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arnold White Kt. Chief Justice and Mr. Justice Tyabji.

Batcha Sait ... ... (*Defendant-Appellant*)*

v.

Abdul Gunny alias Abdul Karim Sait and others ... ... } (*Plaintiffs-Respondents*)

Civil Procedure Code (V of 1908)—2nd Schedule Para 16—Decree passed in accordance with award—No appeal, whatever the ground of invalidity—S. 115—Revision—Formal application, not necessary—No interference, unless wrong exercise of jurisdiction clear.. Batcha Sait v Abdul Gunny

No appeal lies from a decree passed in accordance with an award, whatever the ground on which the validity of the award is impeached.

The ru.e laid down in *Suryanarayaniah v. Sarabhaiah* [1] applies *a fortiori* to cases governed by the new Code.

No formal or written application is necessary for the High Court to interfere in revision.

The policy of the legislature is that judgments in accordance with awards should be final and the High Court will not interfere with them in revision unless it is clear that the Lower Courts have exercised jurisdiction wrongly.

Velu Pillai v. Appasami Goundan[2] distinguished. *Kanakkunagalinganaik v. Nagalinga Naik*[3], referred to.

Appeal from the decree of the District Court of Coimbatore in O. S. No. 33 of 1908.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for Appellants.

C. V. Ananthakrishna Aiyar for Respondents.

The Court delivered the following

Judgment :—*The Chief Justice.*—This is an appeal against a decree on a " judgment according to the award " under paragraph 16 of the 2nd Schedule to the Code of Civil Procedure. The decree is impeached by the appellant on two grounds : it is said

*A. No. 15 of 1911. 1st April 1913.

1. (1910) 21 M. L. J. 263.
2. (1911) 1 M. W. N. 141.
3. (1909) I. L. R. 32 M. 513.

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White C. J.

first that there has been no award, secondly, that, on the application to the District Judge to pronounce judgment according to the award, the learned Judge ought to have given an opportunity to one of the arbitrators who is described by the learned Judge as the " dissenting arbitrator", to give evidence, that he did not give that opportunity and, that being so, the judgment according to the award is bad.

On behalf of the respondents a preliminary objection was taken that no appeal lies. It seems to me that, on the authority, of the Full Bench decision which is reported in *Suryanarayana Rao* v. *Subbiah*[1] the preliminary objection is good and should be upheld. The judgment in the Full Bench case was with reference to a case which arose under the Code of 1882. Now the doubts which had arisen under the provisions of the old code were removed by certain amendments being made in the corresponding provisions of the second Schedule to the new Code. Paragraph 15 which corresponds to S. 521 of the old Code provides that no award should be set aside " except on one of the following grounds". In paragraph 15 (1) (*c*) we have a new ground viz., the award having been made after the expiration of the period allowed by the Court. At the end of the paragraph we have the general words added " or being otherwise invalid." These amendments of the law were made for the purpose of removing doubts which had arisen. If, on the authority of the Full Bench case, the objection that no appeal lies would have been good under the old Code, *a fortiori* it is a good objection as the law now stands. The time prescribed for an application to set aside an award is ten days from the submission of the award. (Limitation Act 1908, Schedule I Article 158). Under paragraph 15 of the Second Schedule to the Code of Civil Procedure as amended, the Court might have set aside the award in the present case on the ground that it was otherwise invalid if the application had been made in time. In the present case, the award would seem to have been submitted on the 29th June. The application to set it aside was made on July 18th 1910. This would seem to have been overlooked. The order refusing to set aside the award appears to have been made at the same time (Sep. 2nd 1910) as the judgment according to the award under paragraph 16 of the Schedule to the Code of Civil Procedure (which corresponds to S. 522 of the old Code) was given. In the present case the judgment according to the award was presented after the time for making the application to set aside the award had expired. But even if this

1. (1910) 21 M. L. J. 263.

had not been so, as it seems to me, inasmuch as an application to set aside the award had been made and refused it would have been open to the Court to pronounce judgment even though the 10 days had not expired. The words "after the time for making such an application had expired" would seem to apply only where there has been no application made to set aside the award. The law is thus stated by Mr. Bannerjee in his book on the Law of Arbitration in India—and I think correctly on page 293 "In order to secure finality to the judgment and decree the necessary conditions are that there has been no order remitting the award, and that no application has been made to set aside the award within ten days, or if an application has been made it has been refused after judicial determination by the Court."

In the present case the Court refused to set aside the award. The judgment pronounced under paragraph 16 is therefore final under paragraph 16 (2). Then we are asked to deal with the matter by way of revision. There is no formal application before us to revise but, as has been pointed out, under S. 15 of the Code, a formal application is not necessary. In *Ghulam Khan* v. *Muhammad Hassan*[1] the Privy Council observed (on page 185) "Their Lordships are inclined to agree with the view of *Clark J.* in 84 P. R. 1901. That in the case of an award revision would be more objectionable than an appeal." We are asked to interfere on the ground that the learned judge ought to have given one of the arbitrators an opportunity to give evidence on the hearing of the application to set aside the award. Speaking of this arbitrator, the judge said "he was here on the 11th August......now he has been summoned, but cannot be found. Petitioner's case turns on that man; yet petitioner took no steps to secure his presence on the last occasion." Then he says "I see no reason to adjourn this matter further; panchayetdars have given an award, but all that has really happened is that the third, the absent man, does not agree with them in some points and so did not sign the award." If it were quite clear that the learned Judge has exercised jurisdiction wrongly in this case, we might be prepared to take the strong step of interfering on revision but the general policy of the legislature is clear that in these matters the judgment in accordance with an award should be final. Mr. Ramachandra Aiyar has been unable to call our attention to any case in which this Court has interfered by way of revision where a decree has been passed in accordance with an award given by arbitrators excepting a case decided by Mr. *Justice Wallis*: *Velu Pillai* v. *Appasami*

1. (1901) I. L. R. 29 C. 169

Batcha Sait v. Abdul Gunny

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Pandaram[1]. In that case it does not appear that there was any application to set aside the award and judgment was pronounced two days after the award was submitted. It was not a case of impeaching an award but a case where the express provisions of paragraph 16 of Schedule II of the Code of Civil Procedure had been contravened. I may refer to a decision of Mr. Justice *Munro* and Mr. Justice *Abdur Rahim* in *Kanakku Nagalinga Naick* v. *Nagalinga Naick*[2]. There it was held under the old section that no appeal lay against a decree passed in accordance with an award excepting on the ground stated in the section and that no appeal will lie on the ground that an award is void *ab initio*. I refer to this case for the purpose of pointing out that it was never suggested there that the Court should or could interfere in the exercise of its powers of revision. I think we should uphold the preliminary objection and dismiss the appeal with costs and I think we should decline to interfere by way of revision.

Tyabji J :—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Oldfield.

Gangu Reddi ... ... (*Petitioner-Complainant*)*

v.

C. Samarapathy Mudali ... (*Respondent-Accused.*)

Criminal Procedure Code S. 203—Dismissal of a complaint—Presidency Magistrate—Dismissal without finding complaint false or unsustainable—Irregular—Motives of complaint or result of the proceeding irrelevant—Charter Act S. 15.

Gangu Reddi v. Samarapathy Mudali

In the absence of a finding that the complaint is false or unsustainable on the evidence likely to be available, passing of an order of dismissal thereon under S. 203 by the Presidency Magistrate constitutes an irregularity with which the High Court has power to deal under S. 15 of the Charter Act.

That the Magistrate considered the probable result of the proceeding undesirable or the motives and the conduct of the complainant discreditable are not relevant considerations in the matter of the disposal of a complaint under S. 203.

The decision under that section must be reached by the exercise of discretion based on judicial considerations.

In the matter of *Ganesh Narayan*[3] followed.

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* Cr. R. C. 381 of 1913 Cr. R. P. No. 207 of 1913. 19th September 1913.

1. (1911) 1 M. W. N. 141. 2. (1909) I. L. R. 32 M. 510.

3. (1889) I. L. R. 13 B. 590.

Gangu Reddi v. Samarapathy Mudali

Petition under Ss. 435 and 439 of the Code of Criminal Procedure Code 1898 and S. 15 of the Charter Act praying the High Court to revise the order of the 29th April 1913 passed by the 3rd Presidency Magistrate George Town in Application No. 4763 of 1913.

V. Visvanatha Sastri for Petitioner

T. Pattabhirama Aiyar for Respondent.

The Court made the following

Order :—A preliminary objection has been taken that the petition will not lie under the Criminal Procedure with reference to *Debi Bux Shroff* v. *Jutmal Dungarwell*[1] and previous cases including *Charoobala Dabee* v. *Barendranath Mozumdar*[2].

The course of authority in Calcutta has not been consistent. In this Presidency the point was raised in the case reported at VI Weir 255, but was not decided. I have however allowed the petitioner to amend his petition by inserting a reference to S. 15 of the Charter Act. And, as I find that it can be supported on the merits with reference to that provision it is not necessary to decide whether I have jurisdiction under the Criminal Procedure Code also.

The petitioner charged the accused with offences punishable under Ss. 498 and 497 I. P. C. The Magistrate declined to grant summons, in effect dismissing the complaint under S. 203 of the Criminal Procedure Code. His recorded reasons included nothing resembling a finding that the charges were false. They were only that gross delay had occurred and that the charges were made for ulterior and improper motives. S. 203 authorises the Magistrates to dismiss in case he finds no sufficient ground for proceeding. But the decision whether there is sufficient ground must be reached by the exercise of discretion, based on judicial considerations. That the Magistrate considered the probable result of proceeding undesirable or the motives and conduct of the complainant discreditable are not relevant considerations. In the matter of the Petition of *Ganesh Narayan Satte*[3]. In the absence of any finding that the complaint was false or unsustainable on the evidence likely to be available, the passing of the order of dismissal constituted an irregularity with which this Court has under S. 15 of the Charter Act jurisdiction to deal.

The order must be set aside and the complaint remanded to the Chief Presidency Magistrate for disposal according to law by him or such other Presidency Magistrate as he may direct.

1 (1899) I. L. R. 27 C. 126. 2 (1906) I. L. R. 33 C. 1282.
3 (1889) I. L. R. 13 B. 590.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the Court of the Judicial Commissioner, Central Provinces.]

Present:—Lords Atkinson and Parker of Waddington, Sir Samuel Griffith, Sir John Edge and Mr. Ameer Ali.

Ramkishore Kedarnath and others ...(*Plaintiffs.*) *Appellants.**

v.

Jainarayan Ramrachpal and others ...(*Defendants.*) *Respondents.*

Hindu Law—Mitakshara School—Alienation by father of ancestral property—impeachment of partition by sons—Limitation Act of 1877—Sec. 7—Dhusars of Gudgaon settled in Central Provinces—Direction to bring a suit for partition.

Kedarnath. *v.* Jainarayan Ramrachpal

Where a childless Hindu A had adopted B and the widow of A's brother on A's death adopted C and subsequently B partitioned the ancestral property during the minority of his sons, with C, in a suit brought by B's son on attaining majority impeaching partition:—

Held, that "although a partition made by a Hindu father may under some circumstances bind his minor sons, yet if on the partition a share is given to an absolute stranger the partition may be impeached as a disposition of property made without consideration, unless it can be supported as a *bona fide* compromise of a disputed claim.

Balkishan Das and others v. *Ram Narain Sahu and others*[1] distinguished.

Held also that in as much as C was joined as defendant with B (father) C had a right to say that he stood in the shoes of B (father) and claim partition of ancestral property with B's sons.

Held also (in effect) that Dhusars of Gudgaon settled in Central Provinces were governed by the Hindu Law of the Mitakshara School.

Held further that within three years after coming of age a son could impeach his father's alienations under Sec. 7 of the Indian Limitation Act 1877.

Appeal from a Judgment and Decree of the Court of the Judicial Commissioner dated July 26, 1909 confirming a judgment and Decree of the District Judge of Wardha dated September 1, 1908.

One Harbhajan, a Dhusar, whose ancestors claiming to belong to a sect of Brahmins called Bhargaon had settled in the Wardha District of Central Provinces, died in 1869 leaving two sons, Ramnath and Rambilas, neither of whom was blessed with a son. In 1877 Ramnath adopted Kedarnath, the father of the Plaintiffs. Rambilas died without leaving even an adopted son in 1881. Ramnath allowed Jaidevi Bai the widow of his brother, Rambilas, to have her name entered in place of that of her husband. In 1883

* 11th July 1913. 1. (1903) L. R. 30 I. A. 139, 150.

Ramnath died and Kedarnath came into possession of the ancestral property in dispute. In 1888 Jaidevi made an application to the Collector that as she had adopted one Jainarayan, the defendant, his name should be substituted for that of her own, which was granted. Thenceforth both Kedarnath and Jainarayan remained in joint possession of the property till 1897 when Jaidevi died, about a year after the property was divided between them. On coming of age Rajkishore and his three minor brothers brought a suit in 1907 challenging the powers of their father, Kedarnath, to give away a portion of ancestral property to Jainarayan and claimed back the property in possession of the latter who, *inter alia*, alleged that he was an adopted son of Jaidevi, that according to the custom among the Dhusars she could adopt an only son, married or unmarried, with the authority of her husband or consent of the next reversioner provided the adoptee was her husband's agnate and that in any case their father Kedarnath have acquiesced in his possession by which the Plaintiffs were bound and whose right to sue was barred by limitation. The District Judge held that the Plaintiffs were bound by their father's conduct in admitting Jainarayan as a co-parcener in the family property and by the partition effected between them. He also decided that what was done was in the nature of a family arrangement by which the plaintiffs were estopped from disputing the validity of Jainarayan's adoption and that the latter's possession which was adverse barred the Plaintiff's claim. On appeal to the Court of the Judicial Commissioner it was held that the conduct of the father bound the sons in the absence of any allegation of fraud or collusion on the part of the former. The appeal was accordingly dismissed. The Plaintiffs—Appellants then appealed to the Privy Council.

De Gruyther K. C., Mitra and *Dr. Abdul Majid* appeared for the Appellants.

G. R. Lowndes appeared for the Respondents.

De Gruyther K. C. contended that as the result of adoption in 1889 Kedarnath became a member of the family and later became sole owner. He made a gift of some property to Jainarayan in 1898. Even were the facts proved against us, what would be the effect ? Jainarayan 'was living as a joint member and jointly enjoying the property by reason of plaintiffs' father's inaction and acquiescence in this mode of enjoyment.' By conduct a member of the joint family had effected the alienation of a portion of joint property and the claim was for restoration of the same to the joint family. It would therefore be unreasonable to compel them to ask

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for partition. By Art. 126 of the Limitation Act a son could bring an action to set aside the alienation of the father. Neither a compromise of a disputed claim nor any family arrangement was ever pleaded or proved.

Reference was made to *Madho Parshad v Mehrban Singh*[1] *Harnabh Pershad v. Mandil Dass*[2].

Lowndes on behalf of the respondents contended that the tenor of acquiescence was wrongly used by the Courts in India. It was really an action giving away. All over the Punjab adoption by custom was fully recognised and the most important element in it was the intention. Such adoption accepted by the father would be binding on the son as any bona fide act on the part of the former meant that he was depriving himself of the property as much as his sons. The Respondents' claim being good against Kedarnath the only suit which the Appellants could have against him would be one for partition of the whole of the family properties. In the absence of any allegation of fraud or collusion the acceptance by the Appellants' father of Respondent as a member of the joint family and the partition with him of the family properties were binding on the sons, whose claim was now barred by limitation.

Reference was made to *Jagannath and another* v. *Munna Lall*[3], *Radhabai and another* v. *Anantram Bhagwant Deshpande*[4], *Hasmat Rai* v. *Sundar Das*,[5] *Maynes Hindu Law (7th edition)* p. 346.

DeGruyther in reply.

The Judgment of their Lordships was delivered by

Sir Samuel Griffith:—This was a suit instituted—to use the words of Art. 126, of Schedule 2, to the Indian Limitation Act of 1877—" by a Hindu governed by the law of the Mitakshara, to set " aside his father's alienation of ancestral property."

The Plaintiffs, the Appellants, are the four sons of the Defendant Kedarnath. The Defendants are one Jainarayan, Kedarnath, and certain assignees from the former. The case made by the plaint, so far as material to the present Appeal, is that the Plaintiffs and their father were the owners of a joint undivided ancestral estate subject to the Mitakshara law, and that Kedarnath, in October 1898, improperly made a disposition of part of it by way of partition to the Defendant Jainarayan. The relief formally claimed was that "each

1 (1890) L. R. 17 I. A. 194. 2. (1899) I. L. R. 27 C. 379.
3. (1894) I. L. R. 16 A. 231, 233. 4. (1884) I. L. R. 9 B. 198.
5. (1885) I. L. R. 11 C. 399.

"of the Defendants may be ordered to deliver them the possession "of whatever property he has with him out of that mentioned in "paragraph 11," with consequential relief.

The suit was instituted on 20th December 1907. The first Plaintiff was alleged to have been born on 20th December 1886, the other Plaintiffs being younger. The Plaintiffs alleged that the estate had descended to two brothers, Ramnath and Rambilas, neither of whom had issue, that in 1877 the former adopted the Defendant Kedarnath, that Rambilas died in 1881 and Ramnath in 1883, whereupon Kedarnath became solely entitled, that about 1886 or 1887 the widow of Rambilas, whose name had previously, with the consent of Ramnath, been entered in the local register as a joint owner in place of Rambilas, adopted Jainarayan as the son of Rambilas, and that his name was thereupon entered as owner in her place, that the adoption of Jainarayan was invalid for various reasons stated, and that in 1898 Kedarnath "gave" a specific part of the estate to Jainarayan, who has since claimed and enjoyed the separate possession of it. Under these circumstances, the Plaintiffs claimed restitution of the part so given.

Amongst other defences, Jainarayan set up that the Plaintiffs are bound by the acquiescence of their father Kedarnath in the admission of Jainarayan to the family, and that the suit is barred by the Limitations Act.

In proceedings before the District Judge for the purpose of settling preliminary issues of law, the Plaintiffs' pleader admitted that "Plaintiffs' father had actually given possession of the property "in suit to Defendant No. 1 (Jainarayan) to enjoy it exclusively by "himself in 1898. Previously he was living as a joint member and "jointly enjoying the property by reason of Plaintiffs' father's "inaction and acquiescence in this mode of enjoyment." The case was decided in the Courts below upon the allegations in the plaint together with this admission. The first three issues were finally settled as follows:—

1. Whether Plaintiffs can maintain the suit in its present form without suing for partition ?

2. Are plaintifts bound by the acquiescence of their father in admitting Defendant No. 1 into the family and allowing him a share in the property ?

3, Since Defendant No. 1 has been in joint possession of property with Kedarnath since 1887 and in separate possession of his share since 1897-98, has he acquired an absolute title to the proper-

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ty in dispute? If Plaintiffs' father's claim is time-barred, has their claim become time-barred also?

There was some controversy as to the effect of the admission already stated. But their Lordships think that, as the issues were settled in presence of the parties, it must be construed in the sense recited in the third issue. The learned Judge of First Instance answered the first and second issues in the affirmative, and as to the third issues held that the Defendant Jainarayan had acquired an absolute title to the property in suit by adverse possession for more than 12 years.

On appeal to the Court of the Judicial Commissioner, the learned Additional Commissioner held that as the first Plaintiff had instituted the suit within three years of attaining the age of 21, he was entitled to the benefit of Section 7 of the Limitations Act of 1877 and the suit was not barred as against him, but he held that it was barred as against his younger brothers, who were born after the commencement of what he regarded as the adverse possession of the Defendant Jainarayan. It was, however, conceded before this Board, and, as their Lordships think, rightly conceded, that if the first Plaintiff succeeds in the suit his younger brothers born before a partition of the estate will be entitled to share in the relief.

The learned Additional Commissioner also held that the first Plaintiff was bound by his father Kedarnath's acquiescence in Jainarayan's joint enjoyment of the family property and consent to a partition with him, since in such acquiescence and consent he must be held to have acted in a representative and not in a personal capacity.

The basis of the suit is that the adoption of Jainarayan was wholly invalid, in which case he was in the view of the law an absolute stranger. It is not disputed that the validity of an adoption may be contested by persons prejudicially affected by it. And it seems to their Lordships to be clear that, although a partition made by a Hindu father may under some circumstances bind his minor sons, as was held by this Board in *Balkishen Das and others* v. *Ram Narain Sahu and others*[1] yet if on the partition a share is given to an absolute stranger the partition may be impeached as a disposition of property made without consideration, unless it can be supported as a *bona fide* compromise of a disputed claim. There are no materials before the Board to enable them to form a conclusion in favour of the Respondent on this ground, as suggested by

1. (1903) 30 I. A. 139, 150.

the learned Additional Judicial Commissioner, even if such a case had been set up by him.

Their Lordships are therefore of opinion that if the adoption of Jainarayan was wholly invalid the Plaintiffs would be entitled to succeed in the absence of any other defence.

With respect to the form of suit, it was rightly pointed out by the learned Counsel for the Appellants that to deny any relief except in a suit for partition would be to deny the right of relief altogether, since the basis of their claim is that they are still entitled to the estate as a joint undivided estate, and desire to enjoy it as such. It may well be, however, that, as between Kedarnath and Jainarayan, the latter may be entitled to insist that he stands in the shoes of the former as to the share which would come to Kedarnath upon a partition; and that the Court, if that position were established, would itself, at Jainarayan's instance, decree a partition as between the Plaintiffs on the one hand and Kedarnath on the other. Their Lordships think that on the present pleadings it is open to Jainarayan to set up such a case, but express no opinion as to its validity either in law or fact.

Under these circumstances, their Lordships, being of opinion that they cannot, on the materials before them, finally determine the rights of the parties, will humbly advise His Majesty to set aside the judgments and decrees appealed from, and remand the suit for trial, with a declaration that it is competent for the Court, in the event of the Respondent Jainarayan failing in his other defences, to make the whole or any part of the relief granted to the Plaintiffs conditional on their assenting to a partition so far as regards Kedarnath's interest in the estate, so as to give effect to any right to which the Respondent may be entitled claiming through Kedarnath.

The Respondents must pay the costs of the hearing on the preliminary issues in the District Court, and the costs of the Appeal to the Judicial Commissioner, but there will be no order as to the costs of this Appeal.

Solicitor for Appellants:—*E. Dalgado.*

Solicitors for Respondents:—*T. L. Wilson & Co.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court at Madras.]

Present:—Lords Atkinson & Parker of Waddington, Sir Samuel Griffith, Sir John Edge and Mr. Ameer Ali.

Vaithinatha Pillai ... ... *Appellant.**

v.

The King-Emperor ... ... *Respondent.*

Inadmissible evidence—Hearsay—Contradictory statements—Circumstantial evidence—Violation of principles of natural justice—Substantial injustice—Practice.

Vaithinatha Pillai v. King-Emperor

Where "by some disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done," the Judicial Committee is bound to advise His Majesty that the conviction should not be allowed to stand.

Dillet's Case[1], approved.

However strong and convincing the evidence of an adequated motive may be, that evidence can never counteract the harm done by the reception of inadmissible evidence or the injustice its use may lead to nor by itself supply the want of all reliable evidence direct or circumstantial of the commission of the crime with which an accused person may be charged.

Where an accused person after he is arrested makes a confession implicating the other accused and the confession is sought to be used against them it is incumbent on the prosecution to disclose the name of the officer who made the arrest and produce him or any other witness who could speak to the circumstances in which the confession is made so as to enable the defence by cross-examining the witness to ascertain what inducements were offered to the accused to make it and what generally were the circumstances that attended the confession.

Appeal from the Judgment of the High Court at Madras dated August 5, 1912 affirming a conviction for murder by the Court of the Additional Sessions Judge of Tanjore, dated April 1, 1912.

The facts of the case and the arguments of Counsel have already been reported in the Madras Law Journal, July 1913 (2) p. 1-3 with the preliminary judgment given by their Lordships on June 19, 1913.

The reasons for the Report of their Lordships was delivered by

Lord Atkinson:—The Appellant in this case was, by the Additional Sessions Judge of Tanjore, convicted on the 1st of April 1912 of the abetment of the murder of his daughter-in-law named Dhanam, wife of his son Aiyasami, and was sentenced to death. By

* 24th July 1913.

1. (1887) 12 A. C. 459.

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two orders of the High Court of Judicature at Madras, dated respectively the 19th of June and 5th of August 1912, this conviction and sentence was confirmed. The two Judges of the High Court before whom the conviction came for confirmation, namely, *Bakewell* and *Sadasiva Aiyar*, JJ., differed in opinion. The case was then under the 378th section of the Code of Criminal Procedure, referred to a third Judge, *Sankaran Nair* J., and these orders are practically the orders of *Bakewell*, J., and the last-named Judge. This Appeal has been taken from these latter orders. In the view which their Lordships take of the case it will be quite unnecessary to deal with many of the topics discussed at great length both in the Court of the Sessions Judge and the High Court. For instance, many witnesses were examined to prove that the Appellant had some motive to procure the murder of his daughter-in-law which, however inadequate to tempt ordinary human beings to commit such a crime, was quite sufficient to tempt a person such as the Appellant, with his views, opinions and passions, to commit it. The motive suggested was in the main this, that the son was greatly under the influence of his wife, the stronger character of the two, and was by her instigated to insist on her husband's right to the partition of certain lands between the members of the family, on the ground that they were the property of a joint Hindu family, while the Appellant insisted that he had himself acquired them.

A minor and subsidiary motive was also suggested, which consisted in this, that the father gave an asylum in his house to a daughter named Thanga Babu—a child widow as she was styled, that is, a girl who had married when she was only ten years old and lost her husband by death before they had ever lived together as man and wife. Unfortunately this woman had lapsed, or was alleged to have lapsed, from virtue, and the deceased woman, considering apparently that the reputation of the family would be compromised by the presence of the erring one in her father's home, refused to live there unless the sinner was compelled to leave. In order to satisfy these scruples the Appellant had sent this woman away, but permitted her to return to him. It was proved that this action caused, as was but natural, feelings of hostility and illwill to be entertained towards the deceased by Thanga Babu. Both the Sessions Judge and the Judges of the High Court appear to have thought that these facts might well have furnished the Appellant with a motive not only strong enough to lead him to procure the murder of his daughter-in-law, but of such overmastering force as to embolden him to run the risk of killing her in the open reckless

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manner suggested in the case, in the presence, and with the aid, of four or five accessories, in whose power he would thus absolutely put himself. These learned Judges, it was urged, are well acquainted with, and are the best judges of, the habits, opinions, and feelings of the race and class to which the Appellant and his family belong, as well as of those in the midst of whom they lived. However this may be, their Lordships think it safer, on the whole, to accept, for the purposes of this Appeal, the conclusion at which they have arrived on this point. If, however, motive impels so irresistibly persons such as these to the commission of serious crime, it is difficult to see why the enmity existing between Thanga Babu and the deceased, caused as it was, might not also have moved this insulted woman to procure, or aid in, the removal of her enemy by foul means. But however these things may be, and however strong and convincing the evidence of an adequate motive may be, that evidence can never counteract the harm done by the reception of inadmissible evidence, or the injustice its use may lead to, nor by itself supply the want of all reliable evidence, direct or circumstantial, of the commission of the crime with which an accused person may be charged.

Their Lordships, desire to abstain, as far as possible, from expressing any opinion upon either the guilt or innocence of any of the persons who have been accused of aiding in this murder, or upon the credibility of any witness who was not a witness against the Appellant. Their task is to determine whether in the prosecution of the Appellant—to use the words of Lord Watson when delivering the Judgment of this Board in *Dillet's Case*[1], "by some dis-"regard of the forms of legal process, or by some violation of the "principles of natural justice or otherwise, some substantial and "grave injustice has been done." If they come to the conclusion that injustice of that kind has been done, then whatever doubts they may have of the Appellant's innocence, or whatever suspicions they may entertain of his guilt, or however great may be their reluctance to interfere with, or overrule the decisions of the Indian Courts in criminal matters, they think they are bound humbly to advise His Majesty that the conviction should not be allowed to stand.

Their Lordships have come to the conclusion that injustice of the kind mentioned has in this case been done, mainly owing to this, that a vast body of wholly inadmissible evidence, hearsay and other, has been admitted; that when admitted it has been used to the grave prejudice of the accused; and that at the end of the hearing before the Judge of First Instance there did not exist any reliable evidence

1. (1887) 12 A. C. 459.

upon which a capital conviction could be safely or justly based. The fact that their Lordships found their Judgment on these points relieves them from the necessity of examining in detail any portions of the voluminous evidence not directly bearing upon them.

The Appellant is a wealthy and apparently respectable land-holder of good position, living at the village of Pandi, in the Tanjore District of Madras. Aiyasami is the son of his third wife. He was brought up by his paternal uncle, one Sami Thevan, a village Munsif, and was at the time of the trial about 25 or 26 years of age. He is described by the Sessions Judge as dull and weak-minded, and an effort was made to show that from his temperament and character, as well as from some past exhibitions of unprovoked and unreasoning violence, he was a man likely to have an attack of homicidal mania. His wife, the deceased woman, was also a member of a respectable family. She was apparently a resolute and clever woman, about 22 years of age, and had acquired considerable ascendancy over her husband. There were two children of the marriage, both alive, and aged respectively about four and one and a half years. For six or seven years previous to the year 1911 he and she had been living with her relatives in a village in the neighbourhood of Pondi. The father and the son were upon bad terms. At length, by the intervention of friends, a reconciliation was to some extent effected, and Aiyasami, his wife, and two children went on the 13th of September 1911 to reside in the Appellant's house, to see, it was stated, whether they would get on together; one of the terms, however, insisted upon by them was that Tanga Babu should not be permitted to reside in her father's house. It is not disputed that Aiyasami and his wife retired together to rest on the night of the 22nd of October in their father's house, and that she was, during the night and before dawn, murdered with the most brutal and savage ferocity. Thirteen wounds were found to have been inflicted upon her body, all upon the left side, some few slight, but most of them very severe, and many such as could only have been inflicted with some sharp instrument used with very great force. For instance, wound No. 2 was an incised wound an inch long, half an inch wide, and half an inch deep over the left temple. Another, No. 3, a quarter of an inch long, one-eighth inch wide, one-eighth deep just behind the left ear, the lobe of the ear being cut off. No. 4, a cut three inches long, half an inch wide, and half an inch deep on the up part of the neck on the left side, dividing the local blood-vessels in its course. No. 6, a transverse cut three inches long and half an inch wide, extending down to the bone on the left side of the lower jaw, and five or six

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other wounds of almost equal severity. Such a wound as No. 4 would according to the evidence of Colonel Hasell Wright, an Army medical officer, examined as a witness, have probably rendered the woman unconscious and unable to talk or walk, as also probably would have wound No. 9. Wound No. 1 would, he thought, probably have stunned her if caused by the weapon called an aruval, or bill hook then shown to him, and the fact that the wounds were all transverse would point, in his opinion to their having been inflicted by one man in the light, not by two men in the dark, while the absence of wounds on the hands of the deceased would indicate that the woman was murdered in her sleep rather than while struggling to protect herself.

On the 23rd of October 1911, the day after the murder, an inquest was held upon her body and a verdict returned by the jury that Aiyasami Pillai, her husband, had murdered her with a bloodstained aruval then produced to them. This weapon had been found in the place where the deceased woman had slept, had been taken possession of by the police, and was produced at the inquest. On the 22nd of November 1911, Aiyasami Pillai was brought before the Second Class Magistrate at Tiruturaipundi in the Tanjore district, charged with the murder of his wife, with the view apparently of his being returned for trial for the crime. The depositions of several witnesses, including that of an old woman, Mutachi his grandmother then an inmate of the house, were taken. She deposed that during the night she heard a noise like a thud, got up, went to where Aiyasami was sleeping, found him sitting on a cot on the right side of the bed and cutting his wife with an aruval that she said to him "Boy, what do you cut ?" and cried out "He has killed, he has killed," that the baby then sleeping in the cot woke up, and that there was blood but no wounds upon it. The magistrate, instead of returning the accused for trial stated he disbelieved the evidence against him, admitted him to bail, and next day the 28th discharged him from custody. In delivering judgment he said, "The defence "theory is not completely before me. It goes to show that the "deceased was obnoxious to the accused Tanga Babu, and she, "Thanga Babu, decoyed her into the cattle shed, or back yard, and "gave her into the hands of the accused's father and satellites, who "brutally killed her, and laid her out in her bed and forcibly put a "bloody cloth on the accused and accused him of murder." According to the defence the murder took place about midnight. The Magistrate wound up by saying that "All these circumstances point "the suspicion against the accused's father, step-sister, step-brother

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"Kalyanam, the servant Kathiresan, and others. This will be further investigated." Aiyasami was the only person who had been charged. There is no proof that the defence to which the Magistrate refers as put forward on his behalf was not put forward at his instigation or with his concurrence. It differs in every particular from the account subsequently deposed to by him. This Magistrate had no doubt jurisdiction to take the course he actually took, but the discharge is not an acquittal. Aiyasami might have been tried again; he, to use the words of the Sessional Judge, "was not safe," at the time of the subsequent trial, and one of the results of his discharge under the circumstances was necessarily this, that he was subjected up to and during the trial to a tremendous temptation to endeavour to put the halter round his father's neck in order to save his own. That circumstance can never be lost sight of in estimating the value to be attached to the evidence he subsequently gave.

On 27th November, the day previous to the delivery of this pronouncement, this same Magistrate had ordered the arrest of Thanga Babu, Kathiresan, the Appellant's servant and Kalyanam, his son.

On the 2nd of December the Appellant's wife, Kanthimati Achi, and Avani Konan were also arrested. Ultimately every inmate of the Appellant's house was arrested, with the consequence that their mouths were closed, since though accused persons may make a statement, and the Judge or Magistrate may put questions to them, they cannot be examined as witnesses on their own behalf. On the 27th October the Second Class Magistrate of Tituraipundi took from Aiyasami a statement not on oath which was ultimately put in evidence by the prosecuting counsel at the trial in corroboration it was said, of the former's evidence, although it is in many respects inconsistent with it. It is printed at page 115 of the Record. In it he states that he, his son (the baby), and his wife, the deceased, had gone to bed, that his wife lay with her head northwards, the child in the middle, and he on the eastern side that Kanthimati Achi, the wife of the accused, Thanga Babu, his sister and Kalyanam, his brother, were pressing down his wife; that his father, the Appellant, cut her with one stroke; that he went near his father and said "Don't cut, leave off," and that the blood spurted on a red cloth he was wearing at the time, and stained it; that his father and brother Kalyanam said: "You catch hold of that fellow, and keep him," that thereupon the two servants Kathiresan and Avani, and one Somu, the son of an employee or agent of the Appellant, caught hold of him and kept him; that ten or fifteen

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minutes after he was caught hold of and thus kept, they all came out to where he was; that while he was kept under restraint the noise continued to be heard, and that at dawn he went and saw that other cuts had been inflicted on his wife. This, having regard to what followed, is in many respects a most important statement. First, it was proved in the case and was admitted in argument before their Lordships that the statement that at the time his wife was murdered he was wearing this red loincloth was untrue. It was proved to be his cloth, but it was also proved that the cloth he wore the night his wife was murdered was a white cloth. Secondly, he does not state that a man Thiagan was present on the occasion of the murder or took any part in the proceedings. Thirdly he made no suggestion that his wife was removed from the room where she lay before she was killed. On the contrary, the fair meaning of his words would rather appear to be that she was murdered where she lay. Well on the 6th of December 1911, this Thiagan was arrested by, as appears from exhibit "G" p. 143, Detective-Inspector D. S. Krishnasami Aiyar, and next day brought before this same Magistrate. He was kept in custody, and on the 28th of that month the Magistrate writes to his superior officer J. T. Gillespie, exhibit 23, p. 170, to announce that Thiagan had made a full confession implicating the Appellant and the other prisoners, corroborating the evidence given by Saminatha Pillai in the previous enquiry, and implicating the informant himself. On the 14th of December following a statement was taken from this man by V. S. Narayan Row, a Second Class Magistrate, and he was subsequently on the 18th of March 1912, examined as a witness at the trial. The story told in the confession is strange and revolting. He brings upon the scene his brother Somu as well as himself, all or almost all of the inmates of the Appellant's household, and two unnamed strangers unknown to him. He represents that he himself, his brother Somu, Kathiresan, and Avani, the two servants, by the orders of the Appellant took away Aiyasami to a second compartment and tied him there Avani being left in charge with directions, given by the Appellant, to hack him if he talked. That Somu, Kathiresan, and himself then returned to where deceased was, that the Appellant's wife Kanthimati pressed down the shoulders of the deceased that Kalyanam, the son, closed her mouth, that by the Appellant's directions Kalyanam and Kathiresan lifted the woman by the head side, he and Somu by the feet, and, conducted by the Appellant, and followed with a light, by Thanga Babu, carried her into the cow-shed, and laid her down at the foot of an orange tree; that the two unknown men were standing there; that the Appellant then said to these men "Do

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your business" that thereupon one of them, coming to the right side cut the deceased between the ear and the right shoulder with an aruval, that the Appellant then addressed these nameless men, saying, " You men despatch the business soon," and thereupon the men proceeded to hack the deceased to death that subsequently the Appellant said to him, "There is a dyed cloth : Take it. Aiyasami is now " wearing on his waist a white cloth ; take it off and dress him with " this dyed cloth" and that he, Thiagan, subsequently did so. This last statement it will be observed, is in direct contradiction to the statement made by Aiyasami on the 27th of October, already referred to who, when asked to explain how bloodstains had got on the red dyed loincloth taken from him replied that when his father (the Appellant) cut the deceased with one stroke her blood spurted out upon it.

This man was on the 18th of March examined as a witness. He stated he did not see the Appellant the night of the murder, that he did not go to his house that night, that Mutachi had told him Aiyasami had cut his wife, and that he did not see anyone cutting her. He was thereupon, by the permission of the Court, cross-examined by the Public Prosecutor.

The cross-examination ran as follows :—

(By permission of Court, cross-examined by Public Prosecutor).

Q. Were you examined by the Nidamangalam Sub-Magistrate ?

A. Yes.

Q. Did he record what you said ?

A. I deposed before him as I was tutored by the police.

Q. Did you tell him that ?

A. I was asked by the police not to say so.

Q. Did you tell the magistrate the truth ?

A. I told him what the police told me.

Q. Was it the truth ?

A. The only truth is what I have said Muthachi told.

Q. Did you tell the sub-magistrate what Muthachi told you ?

A. I did not, as I was asked by the police not to say so.

Q. Everything that you told the sub-magistrate was false ?

A. I told him what I was asked to say. I was asked to speak falsely and I spoke falsely.

These being his replies, his confession (Exhibit " O ") was read over and filed as evidence. Next day, on being brought into Court, still in custody, he volunteered that on the day before, when he saw

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the Court and people, he was afraid, and that he now wished to speak the truth. But he was never asked, either by the Court or Counsel on either side, to name the officer or officers of the police who asked him to give false evidence. The officer who arrested him was not produced, nor was any witness produced by whose cross-examination the defence would have had an opportunity of ascertaining at whose instance he was arrested, or how this confession came to be made, or what inducements, if any, were held out to him to make it. Everything connected with it was, as far as the Appellant was concerned, done in the dark. And Sir Robert Finlay, who opened this Appeal, complained bitterly, and, in their Lordships' view, not without reason, of the great injustice done to the accused by the adoption of such a course of procedure. The Sessions Judge most naturally and rightly came to the conclusion (p. 188) that it would be unsafe to accept any portion of the approver's story without independent corroboration. Mr. Justice *Bakewell* thought that no reliance could be placed upon it. And the third learned Judge who heard the case said (p. 233) that the informer's evidence was not relied upon before him. Sir Erle Richards, quite rightly, in their Lordships' view, early in the argument, stated he did not intend to rely upon it. This evidence may therefore be taken as struck out of the Record, but though struck out, it leaves its taint behind it, and reflects back upon the evidence of Aiyasami, the only other witness who gives direct testimony as to the commission of the crime by the Appellant, for this, amongst other reasons, that on the 18th of January 1912, three weeks after the informer's confession had been taken, Aiyasami had himself made a deposition, evidently designed and intended to corroborate the informer's story. In it he brings upon the scene the informer whom before that he had never mentioned as having been present.

The statement that the informer had tied the red cloth round him after all was over conforms with latter's story though it is in conflict with his own previous account and the further statement that he had been tied to a pillar, never made before, was obviously introduced for the same purpose. The stories told by both these men are thus designedly made to harmonize and fit into each other. When one story is rejected as incredible the reliability of the other is necessarily affected. He (Aiyasami) was examined as a witness at the trial on the 21st March 1912. He then stated that his statement given to the Magistrate G. S. Vaithinatha Aiyar on the 27th of October 1911 was not true; that the Inspector Krishna Aiyar "troubled" him to make it, that he saw this inspector in the gaol

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seven or eight times before he made it. In cross-examination he said that he told the magistrate he lay with his head to the north, because the Sub-inspector told him to say so; that the Sub-inspector said it would be a good thing for him to say that, but what he did not mention why, that it was not true that he was lying on the east side of his wife. He further said it was false that his father cut his wife with one stroke, that the inspector told him to say so, that he told the Sub-magistrate that he had omitted the name of the informer in his statement made on the 27th of October 1911 (Exhibit S.) because the Sub-inspector had asked him to do so, that he had told the magistrate that the Sub-inspector had told him to suppress Thiagan's name, but did not ask him to suppress Somu's name. He further stated that it was the Sub-inspector who told him to say that he saw his father cut his wife, and also to say that the murder was on the cot in the room. He admitted that he had denied to the Sub-magistrate the statement that the Sub-inspector had told him to mention the nam^ of the person who killed his wife, but that he did this at the dictation of the Sub-inspector. Several charges of less importance were made by the witness against this Sub-inspector and this Sub-magistrate. These latter were examined as witnessess and denied them all. If true they show that these officials or at least the Sub-inspector induced the witness to forswear himself, and found in him a pliant instrument ready to give false evidence upon oath to secure the conviction of his own father, and, if false, they show that the witness was ready to commit, and did commit deliberate perjury whenever he was confronted with the inconsistencies in his former statements.

There is no alternative. Forgetfulness is, their Lordships think, out of the question, and no confusion produced by the most skilful cross-examination can account for statements which must either be the witness's own inventions, or the inventions of others repeated by him with knowledge of their character. In either event their Lordships are clearly of opinion that this witness's evidence is wholly unreliable, and should be disregarded as completely as that of the informer.

The learned Sessions Judge appears himself to have taken a similar view of this man's evidence, at least to a large extent. When referring to it, at page 188, he said :—" But though I do not wish " to apply a meticulous standard to his evidence, I do not think it " will bear the test of examination." And so fully does he appear to have been convinced of this that he acquitted and ordered to be discharged three of the persons whom Aiyasami had expressly charged with being active aiders and abettors in the murder.

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Sir Erle Richards urged upon their Lordships the danger of disturbing the verdicts of judges in criminal courts in India, who, having seen and heard the witnesses, had believed them, and founded their decision upon their testimony. Their Lordships are fully alive to those considerations. But this is emphatically not a case of that character. It is precisely the reverse of that. Here the judge who heard and saw the witness did not think his evidence so reliable that he could act upon it alone.

If he had thought it reliable he could not have ordered the discharge of the three prisoners implicated by it. His statement is very explicit (page 200) : "I do not think that there is " sufficient " evidence to establish beyond doubt how or where the murder was " actually committed, or that either Kathiresan or Avani or Thanga " Babu assisted in it, though it is highly probable that the former " were amongst the agents employed by the first accused. I there- " fore acquit them and discharge them."

The learned Sessions Judge based his conviction of the Appellant on five specific findings, as he styles them. These are all stated by him at bottom of page 199, and top of page 200 of the Record, and are as follows: 1. That the murder must have been committed by some of the inmates of the Appellant's house that night. 2. That the clothes, *i.e.*, the two loin cloths which were spotted with blood, afforded conclusive proof that more than one man assisted in the murder. 3. That the account given by the Appellant and his mother-in-law (*i.e.*, Mutachi) were demonstrably inconsistent with facts. 4. That the Appellant's conduct after the murder indicated a guilty conscience. 5. That he was the only one of the inmates of the house who is proved to have had any motive to murder Dhanam.

Their Lordships do not think that this last conclusion necessarily follows from the evidence. As to the first, if the learned Sessions Judge had said that the murder must have been committed either by or with the connivance or assistance of some of the inmates of the Appellant's house, their Lordships would be inclined to concur with him. The second finding is, they think, a *non-sequiter*. It assumes that the two cloths, both of which belonged to Aiyasami, could not have been worn by him at two different stages in this outrage, and must at the time of the murder have been worn by two different men. But Aiyasami never said so ; on the contrary he first stated he had worn the red one at the time of the murder and that his wife's blood spurted on to it when his father cut her with one stroke. Then he swore that he wore the white cloth on

that night, and that the red one was put on him by the approver by his father's directions. This theory is in direct variance with every one of Aiyasami's statements. If the cloth not worn at the time the murder was committed was in the compartment where the deceased and her husband slept it may well have got her blood upon it, much of which must have been shed. If he changed his clothes after the murder the second might well have got stained in this room. There is no evidence where the clothes not in use were kept. If in the room where the murder was committed they might well have been stained with spots of blood as they have been found to be, and besides, spots of blood might have got on one of them from other sources. Moreover the proof, as is usual in such cases, only established that the blood was mammalian blood.

As to the third finding their Lordships would quite concur with the Sessions Judge if it is to be assumed that the story told by the informer and Aiyasami is true, but they fail to find anything in these accounts to show they are demonstrably inconsistent with the facts on any other assumption. The fourth finding opens up a wide field. A large body of inadmissible evidence, hearsay and other, was admitted, some unimportant in bearing and effect, some very prejudicial to the accused. Statements made in the absence of all the accused, such as the conversation between Sami Tevan and Aiyasami in which the latter was urged to say nothing about the murder and to compromise with his father, and statements made in the absence of some of the accused but in the presence of others were lumped together and used, *in globo*, apparently, against all. But this finding is based in the main upon a piece of evidence which was utterly inadmissible, and which, when admitted, was pressed home by the prosecution against the accused with great effect, and, as is evident from the judgments, wrought the greatest injustice. It is this, messengers were sent not by the accused, but by a friend, to announce the death of the deceased to some friends and acquaintances of the family in another village. These messengers told some persons to whom they spoke that the deceased woman had died of cholera. The rumour spread. The person who sent the messengers was sworn and examined. He denied that he had ever instructed them to make such a statement. Not a particle of evidence was adduced to show that the Appellant had himself instructed these messengers to make this statement, or directly or indirectly ever authorized anyone to make it for him or on his behalf or that he knew anything about it. Yet, without the foundation for admitting these statements ever having been laid, they were admitted in evidence, and because the bodies

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of persons who die of Cholera in India are almost immediately cremated to avoid the spread of infection, were relied upon by the prosecution and accepted by some of the judges who considered this case, as clear and convincing proofs of the Appellant's consciousness of guilt, and of his desire (in one instance it is styled an attempt) to destroy the evidence of his crime.

It appears to their Lordships that a grave and substantial injustice was done to the Appellant in admitting and thus using this piece of inadmissible evidence. The two other matters relied upon as proofs of the accused's guilty conscience are first a conversation about the cremation of the remains, the ordinary way of disposing of the bodies of dead Hindus in India, which was perfectly innocent on its face, and may well have had reference to nothing more than the funeral which was to take place in due course. The rumour of the death by cholera was permitted to reflect back, however, on this simple incident, and in the eyes of the Sessions Judge gave to it a guilty complexion. In their Lordships' view this piece of evidence gives no support whatever to the fourth finding. The other incident relied upon to support the finding is this: Sami Thevan, the village Munsif, who entertained no friendly feeling towards the Appellant, was sent for before 6 o'clock in the morning. He arrived at the Appellant's house about 6 a.m. He was shown the body of the deceased, saw Aiyasami and took a statement from the Appellant, and gave it to the police five or six days later, but the police were not communicated with for some hours, and did not arrive on the scene till about 11 o'clock. It was contended that the room in which the deceased slept had by that time been arranged, and the body of the deceased placed in a position it could not have occupied at the time of the murder. This may well be, but many people had access to the room as well as the Appellant.

There is no evidence that he himself did, or procured to be done to the body any of these things. The matter specially pressed against him is the tardiness of the communication with the police. Their Lordships think that in this case that is rather a negative circumstance. Whether the father himself committed the murder or the son committed it, eagerness to communicate with the police could not well be expected from him. The following passage from the judgment of the Sessions Judge deserves attention. It runs thus (p. 200): "On these findings (the five preceding) I convict first "accused (*i.e.*, the Appellant), Vaithinatha Pillai, of abetment of "murder punishable under Section 302 read with either 109 or 114 "I.P.C. since he is said to be physically incapable of having inflicted

"the injuries with his own hand." Lieut. Colonel Wright had deposed that wound No. 4 would probably have rendered the woman unconscious, that it might have been inflicted with a weapon such as the aruval shown to him, but that he had examined the Appellant, that he had a badly united fracture of the bone of the right forearm, and that his hand was more or less deformed, and that, considering the state of his right arm, he could not have inflicted this wound.

What their Lordships presume the learned Sessions Judge meant by this paragraph is this, that the Appellant did not himself inflict the blows, but of course if the case against him has any truth in it, he was a principal.

The facts so found by the Sessions Judge furnish in his view the corroboration of the evidence of Aiyasami which rendered it reliable as against his father, though unreliable against the other three persons accused. In their Lordships' view, the inferences which the Sessions Judge has drawn from the evidence and embodied in these findings cannot reasonably be drawn from it. They think that the evidence reasonably interpreted affords no corroboration at all of Aiyasami's story. The so-called circumstantial evidence in their opinion in no way strengthens the direct evidence, which, as already stated, cannot be relied upon, and for these with the other reasons already mentioned, they think that the conviction of the accused should not be allowed to stand. And they have humbly advised his Majesty accordingly.

Solicitors for appellant :—*T. L. Wilson & Co.*

Solicitor for respondent :—*The Solicitor, India Office.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

Avanchi Lakshmi Narasimha wife of Narasimha Rao and another. ... ... } *(Plaintiffs.) Appellants**

v.

Avanchi Lakshmamma ... ... *Defendant. Respondent.*

Limitation Act (IX of 1908) Sec. 18, art. 62, 120—Hindu Law—Mortgage—Amount collected by a member of family before partition—Claim for share of—Representation that amount had not been collected—Fraud—Interest—Right in actions for money received to the use of the plaintiff to interest—For period when plaintiff is fraudulently kept in ignorance—Remission by one of the payees—Not binding on others.

*S. A. No. 922 of 1912. 25th August 1913.

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A suit to recover the share of the plaintiffs in the mortgage amount due to the family collected by one of the members before the partition and not brought into account at the family partition is governed by art. 62 and not by art. 120.

Representation that the amount had not been collected while as a matter of fact it had been, is fraud within the meaning of S. 18 of the Limitation Act.

Though ordinarily plaintiff in an action for money received to his use is not entitled to interest, yet where he has been fraudulently kept out of the knowledge of his rights, he is entitled to interest for the period during which he has been so kept in ignorance. *Johnson* v. *Rex*[1] followed.

Remission by one of the payees of a debt is not binding on the others.

Second appeal from the Court of the Temporary Subordinate Judge of Vizagapatam in A. S. No. 477 of 1910 preferred against the decree of the Court of the District Munsif of Yellamanchilli in O. S. No. 480 of 1909.

V. Ramesam for Appellants.

S. T. Srinivasagopalachariar for Respondents.

The Court delivered the following

Judgment:—*Sadasiva Aiyar* J:—The plaintiffs and defendant respectively represent two brothers, Narasinga Rao and Ramamurthi who has jointly advanced a sum of Rs.1000 on mortgage. The plaintiffs sued for the recovery of a half share in the mortgage amount, which they seek to recover not from the original mortgagor but from the defendants who represent the other co-mortgagee, Ramamurthi became the plaintiffs allege—and these allegations have been founded by both the courts to be true and there is no reason why we should not accept their findings—that Ramamurthi has released the whole of the mortgage debt (of a little over Rs. 1500 on receipt of Rs. 1000) and not merely the half to which he was entitled. It has also been found that Ramamurthi fraudulently misrepresented to the plaintiffs that the mortgage debt in question was outstanding at a time when Rs. 1000 of the sum had really been collected (see the second issue of the Subordinate Judge's judgment paragraph 1 and the Munsif's judgment paragraph 8).

The first question that is argued before us is whether the suit was barred by limitation. No issue was raised on this point in the Munsif's Court but the point was considered by the Subordinate Judge and decided in favor of the plaintiffs. The Subordinate Judge was of opinion that article 62 of the Limitation Act did not apply to this case and that article 120 applied. In *Sankunni Menon* v. *Govinda Menon*[2], *Benson* J. and myself held that art. 120

1. (1904) A. C. 317.
2. (1910) 22 M. L. J. 485.

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Sadasiva Aiyar J.

should be applied only as a last resort in case no other article is applicable, that article 62, relating to money had and received for the use of the plaintiff was intended to cover all cases where the plaintiff claims money which the defendant has received but which *exacquo et bono* the defendant ought to refuse to plaintiff, and that the action for money had and received is a very extensive and beneficial remedy. (The report in *Sankunni Menon v. Govinda Menon*[1] is incorrect in stating that that reported case was decided by *Benson* J. and *Sundara Aiyar* J.; I have verified that it was decided by *Benson* J. and myself): I think the case of *Segu Chidambaram* v. *Segu Bahayya*[1] decided by *Abdur Rahim* and *Spencer* JJ. also establishes that such a suit as the present will be covered by article 62. The suit in that case was one by the plaintiff for his share of rent realized by the defendant after partition between the parties. See also *Vydhianatha Aiyar* v. *Aiyaswami Aiyar*[2]. No doubt these were cases in which the debt was recovered after partition while the present is a case in which the debt was recovered before partition. In *Tellis* v. *Saldanha*[3], where the plaintiff was entitled jointly with defendants Nos. 1 and 2 to the whole of a rent which was received by defendants Nos. 1 and 2 alone it was held that the plaintiff's right to recover his moiety was governed by article 62. See at p. 73. I am therefore of opinion that article 62 applies to this case. The whole amount of Rs. 1000 was received in this case by defendant in October 1904 and this suit was brought in July 1909. *Prima facie* therefore the suit was barred ; but it appears the defendant misrepresented to the plaintiff in 1906 that the money had not been collected from the debtor. If so S. 18 of the Limitation Act will apply, when the time must be computed from the date when the defendant's fraud became known to the plaintiff and that was in December 1908. Hence though article 62 applies the suit is not barred by limitation. The respondent (defendant) must therefore fail in his contention that, as the plaintiff's (appellant's) claim, was wholly barred, the plaintiff's (appellant's) claim for the interest disallowed by the Lower Appellate Court which claim is the subject of this second appeal cannot be granted. I might further add that the plaintiff had no right till 1905 (when the parties became divided in interest) to sue for their half share of the amount collected by Ramamurthi.

The plaintiffs claimed in the plaint not merely the half share in the Rs. 1000 recovered by the defendant's husband from the

1. (1911) 2 M. W. N. 467. 2. (1908) I. L. R. 32 M. 191.
3. (1886) I. L. R. 10 M. 69.

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common debtor in 1904, but they claimed half of the Rs. 1600 which was really due by the debtor in 1904 when the defendant's husband remitted about Rs. 600 and received only Rs. 1000 in full satisfaction. The plaintiffs also claimed interest on half of the whole of the Rs. 1600 from 1904. The Subordinate Judge allowed the plaintiff's claim only in respect of half of Rs. 1000 or Rs. 500 and did not allow interest even on this Rs. 500 prior to date of suit. The second appeal relates to the difference between half of Rs. 1600 and half of Rs. 1000 *i. e.* half of Rs. 600 and to the interest before suit.

The Subordinate Judge was no doubt wrong in thinking that the defendant's husband was entitled to remit so as to bind the plaintiffs and the amount due to both the plaintiffs and the defendant's husband by the debtor. The Subordinate Judge's disallowance of the plaintiff's claim to the half of the sum so remitted cannot be supported on the ground on which the Subordinate Judge based it. But it can be supported on the ground namely that, if the remission by the defendant's husband in favor of the debtor is not binding on the plaintiff's half share the plaintiffs are still entitled to proceed against the debtor for their half of the sum remitted and hence they have no cause of action against the defendant's husband for such sum.

Act XXXII of 1839 expressly provides that interest shall be payable in all cases in which it is now payable by law. Lord Macnaughten in delivering the judgment of the Privy Council in *Johnson* v. *Rex*[1] expressed himself as follows. " In order to guard against any possible misapprehension of their Lordships' views they desire to say that, in their opinion there is no doubt whatever that money obtained by fraud can be recovered with interest, whether the proceedings were taken in a court of equity or in a court of law, or in a court which has a jurisdiction both equitable and legal." It would therefore seem to be clear that the plaintiffs are entitled to recover their half share in the mortgage debt with interest. In none of the cases on which the Respondent's pleader relies was fraud an ingredient. The first case to which we have been referred is *Kamalammal* v. *Peru Veera Levvai Rowthen*[2] where it was decided that money was due as rent, it would not carry any interest. In *Surendra Kumara Basu* v. *Kunga Behari Singh*[3] it was held that interest was not due on a loan unless it fell within the provisions of the Interest Act. In *Sanadappa* v. *Shiv Besone*[4]

1. (1904) A. C. 317.
2. (1897) I. L. R. 20 M. 481.
3. (1900) I. L. R. 27 C. 814 at 818.
4. (1907) I. L. R. 31 B. 354.

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the High Court of Bombay awarded interest to the plaintiff on a sum of money deposited with the defendant though there was no express agreement to pay interest and no notice in writing to the effect that interest would be charged. Mr. Justice *Chandavarkar* in delivering the judgment of the Court relied upon the fact that the parties were Hindus governed by the Mitakshara Law and that that law required loans to be repaid with interest. Interest was therefore ordered to be paid. That case was dissented from in *Subramania Aiyar* v. *Subramania Aiyar*[1] where interest was claimed on a sum of money paid to the 1st defendant under an agreement which fell through and where there was no agreement to pay interest and no demand in writing on the ground that the Hindu usage to pay interest did not affect the question as the Hindu Law was not binding in such matters as payment of interest. These cases are therefore not wholly applicable to the facts now before us.

If the plaintiffs had not been kept out of the knowledge of their claims by the defendant's husband's fraud they would have been in a position to demand interest on half the amount received by the defendant's husband for the plaintiff's use from the beginning of 1906. That opportunity was delayed by the defendant's husband's fraud from the beginning of 1906 till December 1908.

The plaintiffs are therefore entitled to six per cent. interest on the Rs. 500 from the beginning of 1906 till December 1908 and again from date of suit till recovery. The Lower Appellate Court's decree will be modified to this extent. The appellants will have his proportionate costs throughout. The respondents will bear their costs. The memo of objections is unsustainable and is dismissed.

Tyabji J :—I agree.

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1. (1908) I. L. R. 31 M. 250.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, Kt., Chief Justice and Mr. Justice Oldfield.

Vasudeva Aiyar ... *Petitioner.** (*Petitioner.*)

v.

1. The Devasthanam Committee of Negapatam having its head-quarters at Negapatam.
2. T. A. Balakrishna Odayar.

... *Respondents* (*Respondent and Petitioner in O. P. No. 576 of 1913 on the file of the District Court of Tanjore*).

Religious Endowments Act XX of 1863, S. 10—Scheme of—Vacancy in Committee—Default by Committee to make election within 3 months—Procedure—Election by Committee—Declaration of validity by District Court—Effect of—Not tantamount to appointment by—Judicial order—C. P. C. S. 115—Power of High Court to interfere in revision.

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An order of the District Court under S. 10 of the Religious Endowments Act declaring an election held by the Temple Committee valid, is a judicial order and can be revised under S. 115 C. P. C. *Minakshi* v. *Subrahmanya*[1] distinguished. *Gopala Iyer* v. *Arunachellum*[2] followed.

Cases of orders by District Judge as *persona designata* and as Court distinguished.

Orders passed under Ss. 9, 14, 16 and 18 are also judicial orders similarly revisable.

The scheme of S. 10 of the Act is this, *viz.*, that in the first instance, vacancy is to be filled up by election; if however there is default on the part of the Committee and no election takes place within the prescribed period, the appointment is to be made by the Court if it thinks fit or if it does not think fit to do so, it may order the remaining members of the Committee to make the appointment.

When the remaining members of the Committee make the appointment under direction of the Court, they do so as nominees of the Court and are not required to hold an election.

The rules framed under the Act do not make provision for the holding of an election after the expiry of three months.

An application was made to the District Judge of Tanjore under S. 10 of the Religious Endowments Act with reference to a vacancy in a Temple Committee. At the time, more than three months had expired since the vacancy. The District Judge passed the following order. "It is the duty of the Committee to fill up the vacancy by election * * I therefore order that the vacancy be filled up by the remaining members of the Committee." In the election that was held the 2nd respondent was returned as the successful candidate. On objection being preferred against the election, the District Judge held that the election was good.

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* C. R. P. No. 558 of 1913. 23rd September 1913.

1. (1887) I. L. R. 11 M. 26. 2. (1902) I. L. R. 26 M. 85.

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Held: in the circumstances the order of the District Judge accepting the validity of the election was not tantamount to an appointment by the District Judge or an appointment by the Committee under the direction of the Court as required by S. 10 and as the course laid down in S. 10 had not been followed, the election was invalid.

Ramanuja Aiyangar v. *Anantaratnam Aiyar*[1] dissented from.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Tanjore, dated the 19th July 1913 in O. P. No. 577 of 1913.

The Hon'ble the Advocate General with *R. N. Aiyengar* took a preliminary objection that no revision lies from the order of the District Judge under S. 10 of the Religious Endowments Act. He quoted *Minakshi* v. *Subramanya*[2] and contended that it is not a judicial order but one purely within the discretion of the judge.

T. R. Ramachandra Aiyar with *S. Viswanatha Aiyar* contended that it is a judicial order and revision lies therefrom and referred to *Gopala Iyer* v. *Arunachellum*[3].

The preliminary objection was overruled.

T. R. Ramachandra Aiyar for the petitioner.

S. 10 section is clear. Under the latter portion of the section, the remaining members cannot hold an election. This is confirmed by a reference to the original bill. There no provision is made for election. Subsequently, the power of election was introduced in the Act. If the legislature thought that power of election should be given to the remaining members under the 2nd part of the section, it would have said so expressly.

After 3 months from the date of the vacancy the power of election is gone. *Santhalva* v. *Manjanna Shetty*[4]. The rules framed by the Madras Government for filling up vacancies in committee contemplate only an election held within 3 months from the date of the vacancy.

The use of the word 'Forthwith' in the 2nd part of the section clearly indicates that the remaining members should themselves fill up the vacancy at once and not have recourse to the tardy procedure by election. *In re Land Acquisition Act*[5].

Ramanuja v. *Anantaratnam*[1] is wrongly decided and the facts of that case are clearly distinguishable from the facts of the present case.

1. (1895) 6 M. L. J. 1.
2. (1887) I. L. R. 11 M. 26 (P. C.)
3. (1902) I. L. R. 26 M. 85.
4. (1910) I. L. R. 34 M. 1.
5. (1905) I. L. R. 30 B. 284.

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The Hon'ble the Advocate General contended contra and said that *Ramanuja* v. *Anantaratnam*[1] lays down the law on the point. The present case is concluded by that authority.

The Court delivered the following

Judgments:—*The Chief Justice.*—In this case, a preliminary objection has been taken by the learned Advocate-General that a Revision Petition does not lie.

The order against which the Revision Petition has been presented is an order made by the District Judge of Tanjore under the powers conferred by S 10 of the Religious Endowments Act of 1863. S. 10 provides "Whenever any vacancy shall occur among the members of a committee, a new member shall be elected to fill the vacancy by the persons interested." It goes on to provide " The remaining members of the committee shall...fix a day......for an election of a new member by the persons interested." It then declares, " Whoever shall be then elected, under the said rules, shall be a member of the committee to fill such vacancy." Then the section goes on, " If any vacancy shall not be filled up by such election as aforesaid (within the prescribed period) the Civil Court, on the application of any person whatever, may appoint a person to fill the vacancy, or may order that the vacancy be forthwith filled up by the remaining members of the committee." If that order is not complied with, the Civil Court, under the section, may appoint a member to fill the said vacancy. The circumstances in which the order against which the present Revision Petition has been presented are these. An application was made to the District Judge of Tanjore with reference to a vacancy in a certain temple committee, more than three months having expired since the vacancy occurred, asking the Court to order the committee to hold an election or to make such order as the Court might deem fit. On that, the District Judge on the 6th January 1913, made an order in these terms. " It is clear to me that it is the duty of the committee to fill up the vacancy by election and that there is no obstacle preventing them from doing so. I therefore order that the vacancy be forthwith filled up by the remaining members of the committee." The remaining members of the committee then proceeded to hold an election, and on the 25th January 1913 the managing members of the committee wrote to the District Judge informing him that an election had been held and that one Balakrishna Odayar had been elected, there being no other candidate.

1. (1895) 6M. L. J.

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On the 17th April, the District Judge made an order calling on the managing members to show cause why the election should not be treated as invalid, and restraining Balakrishna Odayar from taking any part in the proceedings of the committee. On the 19th July 1913 two applications were made to the District Judge of Tanjore. One of them was by Balakrishna Odayar. He asked for a declaration that his election was legal and valid. The other application was by a person interested asking that the vacancy among the members of the committee should be filled by nomination by the Court. The order which the learned District Judge made on these two applications was, "I therefore consider the election of M. R. Ry. T. A. Balakrishna Odayar was regular and I accept him as a member of the committee." It may be that these latter words "I accept him as a member of the committee" are surplusage. All that the learned Judge holds is that a good election had been held. It is obvious as it seems to me that the Judge did not intend to appoint Balakrishna Odayar. All he says is "I accept him." As I understand the order, the Judge accepted him, because in the view of the Judge, the election was good and the vacancy was duly filled up. It is sought to impeach this order on the ground that the procedure by election was bad, and that, if so, the Judge had no power either to accept him as a member of the committee in pursuance of the election or to appoint him. The order of the learned Judge seems to me to be an adjudication on the question whether, the procedure having been by election, Balakrishna Odayar was legally appointed. The question we have to decide is: Does a revision petition lie against such an adjudication.

The learned Advocate-General relied on the decision of the Privy Council in *Minakshi* v. *Subramanya*[1]. There, a District Court made an order appointing a certain individual a member of a temple committee. There was an appeal to the High Court, and the ground of appeal was that the person appointed was not a suitable person for the office. The Privy Council held that there was no right of appeal from that order from the District Court to the High Court. The first ground upon which they based their decision was that the act itself conferred no right of appeal. The right of appeal, it is scarcely necessary to say, is a creature of statute. Their Lordships of the Privy Council say; "There is nothing in the Act which would suggest it, unless it is to be found in S. 10." Then their Lordships say: "In the opinion of their Lord-

1. (1887) I. L. R. 11 M. 26.

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ships the tenth section places the right of appointing a member of the committee in the Civil Court not as a matter of Ordinary Civil jurisdiction, but because the officer who constitutes the Civil Court is sure to be one of weight and authority, and with the best means of knowing the movements of local opinion and feeling, and one can hardly imagine a case in which it would be more desirable that the discretion should be exercised by a person acquainted with the district and with all the surroundings." They declined to consider the question whether there might not be a serious mischief without a remedy by reason of the fact that there was no appeal. They say, "There is force in this argument, but whether a person so improperly appointed could, as has been suggested, be removed by proceedings equivalent to proceedings by *quo warranto* in England, or whether, upon a full consideration of the merits, the appellant could be considered as a person improperly appointed, are questions upon which their Lordships are not called upon to express an opinion." They express no opinion on the question whether proceedings by way of revision would lie, although it would appear from the argument of Mr. Doyne, who contended that there was a right of appeal, that reference was made amongst other enactments to S. 622 the revision section of the old Code of Civil Procedure. In the Privy Council case there was no question of jurisdiction or of the powers under the Act and no question of the construction of any section of the Act. As I have said, the ground of Appeal to the High Court was that the man whom the learned District Judge had appointed was unsuitable.

The question as to whether there was a right to proceed by way of Revision from an order made under S. 5 of the Religious Endowments Act, 1863, was raised in *Gopala Aiyar* v. *Arunachellam Chetty*[1] which came before me sitting alone. There the question arose under S. 5 of the Religious Endowments Act, 1863. The Privy Council decision was with reference to S. 10. But for the purpose of the point I had to determine no distinction can be drawn between the two sections. There was a Revision Petition to this court against the order of the District Judge. A preliminary objection was taken that no Revision Petition lay. My attention was called to the Privy Council decision, and it is scarcely necessary for me to say that, if I had been of opinion that the principle of the Privy Council decision applied to the facts of that case. I should have followed it; but the view I took was that the principle did not apply. There I pointed out that the question in the Privy

1. (1902) I. L. R. 26 M. 85.

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Council case was one of appeal, and I cited the passage from the judgment which I have read.

Our attention has been called to the decision of the Bombay High Court in *Balaji Sakharam* v. *Merwanji Nowroji.*[1] There the question arose with reference to a section of the Bombay District Municipal Act Amendment Act of 1884. That enactment contains a section (S. 23) providing that, where the validity of any election of a Municipal Commissioner is brought in question, the District Judge, after such inquiry as he deems necessary, may make an order confirming the election or setting it aside. The *Chief Justice* and Mr. Justice *Parsons* were of opinion that "a District Judge acting under S. 23 of the Bombay District Municipal Act Amendment Act, 1884, is not a court within the meaning of the word in S. 622 of the old Civil Procedure Code." They suggest that he was a *persona designata* apparently for a specific purpose. That seems to be so. It seems to me that under the Act in question the District Judge is a *persona designata* for a specific purpose and not an officer exercising judicial functions under the Act. As regards the Religious Endowments Act, it is clear that for the purpose, of several sections of the Act, the District Court is not a *persona designata* but a Civil Court exercising jurisdiction under the Act. For instance, S. 9 provides that no member shall be removed except by an order of a Civil Court. S. 14 is another section: S. 16 is another under which the District Judge exercises judicial functions as a Civil Court and not as a *persona designata.* It seems to me it would be inconvenient if for certain purposes the District Judge is a Civil Court exercising judicial functions under the Act, and for other purposes under the Act he is a *persona designata* not exercising judicial functions. My learned brother calls my attention to S. 18 which provides, "No suit shall be entertained under this Act without a preliminary application being first made to the court for leave to institute such suit." When an application is made to the court under S. 18, the District Judge who constitutes the court is asked to adjudicate judicially and not to exercise his discretion as a *persona designata*; I am told by my learned brother—he speaks from experience as a District Judge—that it is the practice of the High Court to entertain revision petitions from orders made under S. 18 of the Act. I do not want to say more than is necessary for the purposes of this case. All I desire to say is that the order made in this case seems to me to be an order which might be impeached by way of a revision petition.

1, (1895) I. L. R. 21 B. 279.

The only other point is the argument in connection with S. 115 of the new Civil Procedure Code, which corresponds to S. 622 of the old code. It was suggested by the learned Advocate General that the matter which he has argued was not a case, and that the District Judge was not a Court. It seems to me for the reasons, I have already stated that the Judge in dealing with this matter was a Civil Court and there the matter was "a case." I think the preliminary objection fails and that the petition should be disposed of on the merits.

Oldfield J:—I concur.

This petition coming on again for hearing on the merits on Monday the 8th day of September 1913.

The court delivered the following

Judgments.—*Chief Justice*:—I have set out the facts of this case in dealing with the preliminary objection.

The question whether the learned Judge's order can be supported depends on the construction of S. 10 of the Act of 1863.

The order of the learned Judge made on July 19, 1913 was a decision to the effect that by virtue of the fact that Balakrishna Odayar had been elected the vacancy in the committee had been legally filled up.

The scheme of S. 10 appears to me to be this. In the first instance a vacancy is to be filled up by election, and provision is made for the time within which, and the manner in which, the election is to be held. Then the section lays down what is to be done if the vacancy has not been filled up by election within the prescribed period. In that event the Court may appoint a person to fill the vacancy, or the Court may order that the vacancy be forthwith filled up by the remaining members of the committee. Lastly, if the Court makes the order that the vacancy be filled up by the remaining members of the committee, and the order is not complied with, the Court may appoint a person to fill the vacancy. The object of the section would seem to be to prevent a dead lock when the committee do not do their duty and arrange for an election, by providing that where an election has not been held within the prescribed time, the Court may make the appointment if it thinks fit, or if it does not think fit to do so, may order the remaining members of the committee to appoint. The section does not say either expressly, or, as it seems to me, by implication, that the remaining

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members of the committee are to hold an election before they appoint. No provision is made as to the time within which an election is to be held, the word "forthwith" indicates that what is to be done should be done at once. The holding of an election would involve further delay, which, I think, is what the legislature desired to obviate. If the construction adopted by the learned Judge is right, the mode of dealing with the situation created by the remaining members of the committee not doing their duty in the first instance by holding an election, is that the Court, if it does not think fit to make an appointment, should order the committee to do what the section required them to do. I should not be disposed to adopt this construction unless the language of the section was clear. It is not necessary to empower the Court to make such an order as a condition precedent, if it is not complied with, to the Court appointing, as the Court already has the power to appoint, if it thinks fit to exercise it, without reference to the committee.

It is to be observed that the rules made by the Madras Government for the election of Temple Committee members make no provision for the holding of an election after three months have elapsed since the vacancy occurred. The procedure prescribed by the rules would seem to apply only to an election held under paragraphs Nos. 1 and 2 of the section.

I should have had little difficulty as regards this question of construction, if it had not been for the decision of this Court in *Ramanuja Aiyangar* v. *Anantaratnam Aiyar*[1]. I am not sure whether the facts are fully set out in the report, but the learned Judges no doubt held that where there has not been an election within three months of the vacancy, and the remaining members of the committee are ordered by the Court to fill up the vacancy, an appointment by a majority of the remaining members, without holding an election, is bad.

For the reasons I have stated I find myself unable to agree with the learned Judges as regards the construction of the section. In their judgment they observe that the construction which appears to me to be the right construction, which would give the committee the power of taking advantage of their own default in not giving the notice and taking the action which under the section they are bound to take, and that it is reasonable enough to say that, if the committee abstain from acting, the appointment may be made by the Judge, but that it is quite another thing to confer this power on the

1. (1895) 6 M. L. J. 1.

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committee as a result of their omission to comply with the law. With all respect, I cannot follow this reasoning.

No power is conferred upon the committee as a result of their omission to comply with the law. If they fail to comply with the law the court can make the appointment without reference to the committee. If the court is not prepared to do this it may direct the remaining members of the committee to fill up the vacancy. In that case the power of the committee is derived from the order of the Court, and the Court is not bound to give them this power unless it thinks fit to do so.

I do not think this question of construction was discussed in *Santhalva* v. *Manjanna Shetty*[1] but in my judgment in that case I made an observation to the effect that the surviving members of the committee must act so that the date of the election should be fixed not later than three months from the date of the vacancy and that, if they did not so act, their powers of election were gone.

The case in the Madras Law Journal to which I have referred has not been reported in the authorised reports and I observe that in Mr. Ganapathi Aiyar's book on the Law relating to Hindu and Mahomedan Religious Endowments the correctness of the decision is doubted. I am not prepared to follow it.

It occurred to us that, if we were satisfied that the remaining members of the committee would appoint Balakrishna Odayar if they were given an opportunity of doing so, it might not be necessary for us to interfere with the order of the District Court. The case was adjourned in order that the views of the remaining members might be ascertained. It would seem that they are not prepared to intimate what action they would take.

The order of the District Court must be set aside and the case sent back in order that the Court may deal with it by the light of this Judgment.

We make no order as to the costs of the petitions to the District Court or of the revision petition to this Court. We direct that the costs of the remaining members of the committee be paid personally.

Oldfield, J :—I agree.

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1. (1910) I. L. R. 34 M. 1.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyer.

Ponnusami Chetti ... ... *Petitioner (Appellant).**

v.

Narasimma Chetti and others ... *Respondents—Counter Petitioners.*

Provincial Insolvency Act (Act III of 1907) S. 11—"Unable to pay"—Meaning of—Assets exceeding liabilities—Abuse of process—Right to apply for adjudication—Difference between creditor's application and debtor's—C. P. C. Order 21 r. 40.

An undivided member of a Hindu family applied to be declared an insolvent, alleging that his assets were much larger than his debts but that as his brother would not give him his share and a suit had to be filed, he was unable to pay his debts. The District Judge dismissed the petition.

Ponnusami Chetti *v.* Narasimma Chetti

Held, on appeal, that on the allegations in the petition the appellant could not be declared an insolvent.

A debtor is not entitled to an adjudication when his petition itself shows that his assets greatly exceed his liabilities.

What is meant by the expression "unable to pay his debts" in Sec. 11 is that the debtor has less realisable assets than the amount of his indebtedness.

A person cannot be regarded as unable to pay his debts merely because his assets are of such a nature that he cannot get hold of them easily for discharging his debts.

Acts of Bankruptcy are of three kinds, *viz.*, those which arise from dealings by a debtor with his property, those which consist of personal acts or defaults committed by him and those which arise from the condition of affairs showing him to be an insolvent. The essence of the first two classes of acts lies in the intention to avoid or evade the payment of debts. Neither of them affords ground for an application by the debtor.

If a debtor declares himself unable to pay his debts, that is an act which would justify a creditor in seeking to get an order of adjudication against him. It would not entitle the debtor to apply.

Ordinarily a debtor is entitled to apply only when his liabilities exceed his assets. But when he makes a statement to that effect, the court will accept it and will not decide by anticipation whether it is or it is not so. Even where he values his assets higher than his liabilities, the Court will not refuse to adjudicate him an insolvent when he says he is unable to pay his debts, if it appears from the petition or the evidence before the court that the assets are of a doubtful value or would take a long time to realise and in consequence have no appreciable present value.

The use of Bankruptcy laws by a debtor for his own convenience to get the property administered through Court is an abuse of the process of the Court and will not be tolerated.

The mere fact of arrest in execution of a decree does not entitle a debtor to an adjudication if he is not otherwise entitled to apply.

*C. M. A. No. 84 of 1912. 30th February 1913.

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Where the Judgment debtor cannot get in his assets readily and is on that account unable to escape arrest, the proper procedure is to apply to the Court under Order 21 r. 40 C. P. C. under which the Court has a discretion to postpone arrest.

The object and policy of the Bankruptcy laws discussed.

Appeal from the order of the District Court of Salem in Insolvency Petition No. 3 of 1911.

T. R. Venkatrama Sastri and A. Visvanadha Aiyar for Appellant.

T. R. Ramachendra Aiyar, T. R. Krishnaswami Aiyar and *K. B. Ranganadha Aiyar* for Respondents.

The Court delivered the following

Judgment :—This is an appeal against an order of the District Court of Salem refusing to adjudge the petitioner an insolvent on a petition put in by himself. He stated in his petition presented under S. 11 of the Provincial Insolvency Act III of 1907 that he was unable to pay his debts. His debts, according to him amount to Rs, 5,948-4-0. According to his statement of assets, besides a trifling sum of money in hand he admitted that as an undivided member of a Hindu family consisting of himself and his brother he had considerable other property. He estimated his share in family lands at Rs. 4485, of jewels at Rs. 4516 and of monies at Rs. 20,000. He also stated that he had debts due to him to the extent of Rs. 1,475, of which Rs. 1,000 is alleged to be barred by limitation. On this statement the District Judge dismissed his petition, holding that he could not be called an insolvent. The petitioner's reason for seeking to be adjudged an insolvent, notwithstanding the fact that his assets were much larger than his liabilities, was that his brother would not give him his share of the family properties and that he and his brother had been quarrelling for the last 5 or 6 years. In his deposition he stated that his brother alleged that a division had already taken place and that the petitioner was not entitled to receive any thing from him.

On appeal it is contended that the judge was bound to adjudge the petitioner an insolvent as he had stated that he was unable to pay his debts as required by S. 11, sub-section (1) clause (a). Reliance is also placed in support of this argument on S. 4 cl. (b) which provides that " a petition by a debtor to be adjudged an insolvent is itself an act of insolvency. " It is admitted that the Court is not bound to adjudge a debtor an insolvent on his own petition, if to do so would result in an abuse of the process of the Court. But it is

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urged that the petition in this case was an honest one put in with the object of obtaining relief from undue pressure by creditors. The petitioner was arrested by the District Munsif's Court of Salem in execution of the decree in O. S. No. 719 of 1911 for Rs. 1733-9-0. This Court has held in *Bava Jeer Chetti* v *Bava Rangasami Chetti*[1] that a Court should not refuse to adjudicate a debtor an insolvent on the ground that the statement in his petition that he was unable to pay his debts was untrue because some of the debts put forward were fictitious. See also *Kalikumandas* v. *Gopa Krishna Roy*[2] *Girwardhari* v. *Jai Narain*[3]. But the question in this case is whether the Court is bound to pass an order of adjudication when the debtor's petition itself shews that his assets are more than his liabilities, and the statement that he is unable to pay his debts is therefore obviously incorrect. Mr. Venkatarama Sastri, the learned vakil for the appellant does not contend that, if the allegation of inability to pay debts is the result of a mere arithmetical error in the calculating of the assets and liabilities, the Court is bound to pass an order of adjudication. His contention is that the expression " unable to pay his debts " does not necessarily mean that the debtor should have less realizable assets than the amount of his indebtedness that, if his assets are of such a nature that he cannot get hold of them easily for discharging his debts, and must be regarded as unable to pay his debts, and that such is the case here, as the debtor said that his brother would not give him his share of the family properties. We have therefore to decide what the proper connotation of the expression 'unable to pay debts' is, as used in S. 11 of the Act. No decision on the point has been brought to our notice. A person is ordinarily said to be insolvent when his liabilities exceed his assets, but this of course is not necessary to enable a creditor to get an order of adjudication against a debtor. He is entitled to get such an order if the debtor has committed an act of insolvency as defined in S. 4, one of such acts being the debtor's petitioning to be adjudged an insolvent. There can be no doubt however, that everything which would be a ground entitling a creditor to get an adjudication order against his debtor would not justify an application by the debtor himself to be declared an insolvent. A voluntary petition by the debtor for an order of adjudication would certainly entitle a creditor to apply for an adjudication order against the debtor. One important object of the law of bankruptcy is to protect creditors against debtors who do not discharge their debts as far as possible out of the debtor's estate. Acts of Bankrupt-

1. (1911) 22 M. L. J. 52. s. c I. L. R. 36 M. 402.
2. (1911) 15 C. W. N. 990.
3. (1910) I. L. R. 32 A. 645.

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cy are of three kinds, namely those which arise from dealings by a debtor with his property, those which consist of personal acts or defaults committed by him, and those which arise from the condition of his affairs showing him to be an insolvent. The essence of the first two classes of acts lies in the intention of the debtor to avoid or evade the payment of his debts. See Halsbury's Laws of England Vol. II p. 13. If a debtor declares himself unable to pay his debts that is an act which would justify a creditor in seeking to get an order of adjudication against him. But it does not follow that the debtor himself would be entitled to compel the Court to adjudge him an insolvent by making a declaration of inability to pay his debts. "Bankruptcy is entirely the creation of statute Law. There is no such thing as a common Law of Bankruptcy." See page 4, Halsbury's Laws of England Vol. II. One object of the law is no doubt to enable a debtor unable to pay his debts to obtain protection from legal proceedings by the persons of whom he has incurred debts or liabilities. Bankruptcy was at one time looked upon as a crime and even now it is considered to involve a change of status and to carry with it certain *quasi-penal* consequences. In Roman law a defaulting debtor was subject not only to imprisonment but to harsh corporal punishment. See 5 Cyclopœdia of American Law and Procedure, 248. The germ of modern bankruptcy statutes is found by writers on the subject in the Roman *cessio bonoram* under which the debtor by surrendering all his goods to creditors obtained exemption from the penalties to which he was subjected under the law. To relieve the debtor from the oppression of his creditors is one of the object of bankruptcy law. In *exparte Painter : In re Painter*[1] *Vaughan Williams* J. observed. "But from an early period the legislature recognised the necessity that the state had in a debtor being relieved from the overwhelming pressure of his debts and that it was undesirable that a citizen should be so weighed down by his debts as to be incapacitated from performing the ordinary duties of citizenship." That was the reason why, as pointed out by the learned judge, the law of England which in earlier times did not allow a debtor himself to present a bankruptcy petition, allowed him to do so by the Bankruptcy Act of 1849. But under what circumstances a debtor may do so? Undoubtedly he may, if his liabilities exceed his assets. But the Court is not bound to, and will not, decide by anticipation whether the assets as they appear from the debtor's petition would, when they are realized, be necessarily less than the liabilities. The debtor is liable under the statute for any false statement he may make in his petition, but the

1. (1895) 1 Q. B. 85.

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order of adjudication will not be refused if on the statements contained in his petition he is entitled to the relief. But in our opinion he cannot claim it if the inability to pay his debts does not appear even on the allegations in his own petition. It may be that from what appears in the petition and the evidence before the Court, some of the assets admitted in the petition are of such a doubtful nature that the Court will accept the statement that the debtor is unable to pay his debts. According to the provisions of Act III of 1907, S. 15 the Court has to be satisfied, with the proof of the right to present the petition before it can pass an order of adjudication under S. 16; if it is not so satisfied the petition should be dismissed. There may be cases, besides those where the assets are of a doubtful value, where relief will not be refused if the judgment debtor states that he is unable to pay his debts. For instance, it may appear that some of the assets must take a long time before they could be realized and that in consequence they may have no appreciable marketable value; and in the meanwhile the debtor may be liable to be harassed and oppressed by his own creditors. It may be right in such cases that the Court should not refuse to pass an order of adjudication on the ground that the Petition does not show the debtor's inability to pay his debts. But at the same time it is in our opinion, impossible to hold that a debtor is entitled to be declared an insolvent on the mere ground that the property he actually has an hand is less than the amount of his debts. To hold otherwise would be to enable a man to appoint the Court as his administrator. Merely because he is unwilling to take the trouble to manage his own affairs and call in his assets or because, it may be, he is not thoroughly efficient in the administration of his own affairs. There are cases no doubt, where the law of the country entitles a person to get himself declared an incapable man and to place himself under the protection of a public officer. The Court of Wards Act makes provision for this in the case of certain landed proprietors. But the law of this country does not enable every person to do this. It is, in our opinion clearly not the object of the bankruptcy law to do so. The petitioner's prayer to be adjudicated an insolvent cannot be acceded to, because the statements in his petition do not, in the eye of the law contain an affirmation that he is unable to pay his debts; secondly it would be an abuse of the process of the bankruptcy law to enable the petitioner to use it for the purpose of getting the Court to realize his share of his family property from his brother. It does not appear either from his petition or from his evidence that there are such serious impediments in the way of utilising his assests for the payment of his debts either by realising them himself or by raising

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money by means of the credit that those assets must give him. It is contended that there has been no case in which it has been held that the petitioner's act amounts to an abuse of the powers of the Court, but on the other hand no case has been cited, and we are not aware of any, which has adopted the view that the law of bankruptcy may be used by any debtor merely for his own convenience to get his property administered and without any reason for inducing the Court to believe that it is necessary to give him relief for protecting him from oppression by his evidence. In England the Bankruptcy Act of 1883, S. 8 enacted that " A debtor's petition shall allege that a debtor is unable to pay his debts and the court *shall* thereupon make a receiving order ". Notwithstanding the use of the word 'shall' it has been repeatedly held that the Court is not bound to pass such an order where to do so would amount to an abuse of the Court's process. See *In re Bond*[1] where the Court rescinded a receiving order passed on a joint petition by two debtors who were neither partners nor joint traders. The Court has no doubt to see whether the application in any particular case amounts to an abuse of its process. See *Exparte Painter : In re Painter*[2] where it was held that an application by a debtor possessed only of an inalienable pension, made with the intention of evading a judgment summons against him for payment of his debt by instalments did not amount to an abuse of the bankruptcy law; also *In re Hancock*[3] in which it has been held that the fact of the debtor's intention being to avoid a committal order would not amount to an abuse of process where his property would still be liable for the debt in the bankruptcy proceeding. In *re Betts*[1] on the other hand where a debtor, with the intention of evading the committal orders made against him upon judgment summonses, presented a bankruptcy petition after having previously at short intervals and with the same object presented two other petitions upon which receiving orders had been made, the Court refused relief on the ground of the petition being an abuse of its process. We feel quite satisfied that the use of the bankuptcy law for a purpose foreign to its object must be held to amount to an abuse of the Court's process.

It is contended that in all cases where a debtor is arrested in execution of a decree he must be held entitled to be adjudged an insolvent. This argument is based upon certain provisions of the Civil Procedure Code. S. 55 clause 4 enacts as follows. " Where a judgment debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall in-

1. (1888) 21 Q. B. 17. 2. (1895) 1. Q. B. 85.
3. (1904) 1 K. B. 585.

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form him that he may apply to be declared an insolvent; and that he will be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force." This provision does not entitle the debtor to be declared an insolvent when the application does not comply with the provisions of the insolvency law. Clause 4, no doubt entitles him to be released from arrest if he expresses his intention to be declared an insolvent, but if he is unable to comply with the provisions of the bankurptcy law, the Court would certainly have power to arrest him again as shewn by the same clause which provides that besides expressing his intention to apply to be adjudicated an insolvent he must furnish security to the satisfaction of the Court that he will appear when called upon in any proceeding upon the decree in execution of which he was arrested. We do not think that S. 54 shows that the mere fact of arrest in execution of a decree entitles the debtor to an adjudication in insolvency whether he is in reality, able to bring himself within the provisions of S. 11 of the Insolvency Act or not. It may no doubt be urged that the result of this view might be that a judgment debtor who is not able to get in his assests readily might be unable to escape arrest and imprisonment at the instance of any creditor who has a decree against him. But the Court is, in our opinion, armed with sufficient power by Rule 40 of Order XXI to prevent such a judgment debtor being improperly harassed. It enacts that when "it appears to the Court that the judgment debtor is unable, from poverty or other sufficient cause, to pay the amount of the decree the Court may, upon such terms as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be". There is no reason why the petitioner in this case should not resort to the provisions of this rule for avoiding detention in jail if his conduct is such as to deserve protection from Court.

We see no reason for holding that the order of the District Judge dismissing the petition in this case is wrong. We dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Sabapathi Pillai and others ... ... *Appellants.**

v.

Chockalinga Pillai ... ... *Respondent.*

Mortgage decree—Order 34 r. 12, 13—Proceeds of sale—Order of appropriation—Costs, interest and principal—Presumption that Court did its duty—Right of third party interested to insist on appropriation according to law.

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Though the rule contained in O. 34 r. 13 in terms applies only to cases covered by r. 12, the principle of the rule applies to all sales held in execution of mortgage decrees and the order in which payment is to be made out of the sale proceeds is, costs first, interest next and lastly the principal.

The benefit of the rule can be taken advantage of also by a person who along with the mortgagor has been made liable for the costs of the mortgagee.

Where the Court made an order directing payment out to the mortgagee without indicating the order in which appropriation should take place,

Held:—The duty of applying the proceeds being in the Court, the Court must be presumed to have done its duty in the matter and followed the rule of law applicable to the case.

Appeal from the order of the Court of the Subordinate Judge of Mayavaram in E. P. R. No. 38 of 1911 (O. S. No. 66 of 1905 on the file of the Court of the Subordinate Judge of Kumbakonam.)

K. Ramachandra Aiyar for Appellants.

K. Srinivasa Aiyangar and *S. Muthia Mudaliar* for Respondents.

The Court delivered the following

Judgment:—This is an appeal against the order of the Subordinate Judge of Mayavaram in execution of a decree for sale in a mortgage suit. The appellant in this court was the 2nd defendant in the suit. He was a co-parcener of the 1st defendant, the mortgagor, and was consequently impleaded as a party. The decree directed the 1st defendant to pay a sum of Rs. 39291-15-0 with interest from the date of plaint and Rs. 1844-6-0 for the plaintiff's costs, and it directed the 1st defendant's half share in the mortgaged property to be sold in case of default in payment. It also provided that if the net proceeds of the sale were found insufficient to pay the amount due to the plaintiff the balance should be recovered from him personally. So far as the 2nd defendant was concerned the

*C. M. A. No. 231 of 1911. 26th February 1913.

decree stated "It is further ordered that the 2nd defendant also be liable for the plaintiff's costs of the suit (1844-6-0)." The respondent got the 1st defendant's share of the property sold in execution. The sale proceeds which amounted to Rs. 41,500 were insufficient to discharge the whole of the mortgage debt and interest and costs. The plaintiff then put in the present application for execution against the 2nd defendant to recover the costs of the suit. He stated that he credited the amount of Rs. 41,500 realised by the sale of the hypotheca towards the decree amount and interest and that he was entitled to recover the costs from the 2nd defendant under the terms of the decree. The 2nd defendant contended, first, that the execution of the decree as against him was barred by limitation, and secondly, that the sale proceeds should be first applied towards the interest on the mortgage amount and the costs of the suit, and the balance alone towards the principal amount and that the plaintiff was not entitled to any relief against him as the amount realized by the sale had discharged the costs of the suit due to the plaintiff. The Subordinate Judge disallowed the latter contention. No reference is made in his judgment to the plea of limitation. It appears that the decree of the Original Court was confirmed in appeal within less than three years before the present application for execution. Apparently, the objection as to limitation was not pressed. It has been urged before us by the learned vakil for the appellant, apparently, in ignorance of the date on which the appellate decree was passed. We disallow the contention.

The principal question for decision in this appeal is whether, as contended by the appellant, the costs due to the plaintiff must be held to have been discharged by the proceeds of the sale of the hypotheca. Mr. K. Srinivasa Aiyangar the learned Vakil for the respondent, contends that the decree-holder was not under any obligation towards the appellant to appropriate the sale-proceeds towards the costs, and that, as the decree expressly held the appellant liable for the costs, he is entitled to recover them from him. The appellant refers to O. 34 R. 13 C. P. C., and contends that, even if the rule is not in terms applicable to the case, the principle embodied in it should be applied. The respondent contends that rule 13 is applicable only to cases when a sale is directed under the preceding rule 12.

That rule provides that "where any property the sale of which is directed under this order is subject to a prior mortgage, the Court may with the consent of the prior mortgagee, direct that the pro-

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perty be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold." Rule 13 enacts "Such proceeds shall be brought into Court and applied as follows." The question is whether the expression "such proceeds" means the proceeds of any sale which is directed under O. 34, or the proceeds of a sale directed under Rule 12 of that order only to be held free of a prior mortgage. The language of Rule 13 favors the latter contention, for the application of the sale proceeds is directed to be as follows.

"First, in payment of all expenses incident to the sale or property incurred in any attempted sale; secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith; thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made; fourthly, in payment of the principal money due on account of that mortgage; and lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt." The second clause directing the application of the proceeds, in the second place, towards the payment of whatever is due to the prior mortgagee, apparently refers to a prior mortgage free of which the property is ordered to be sold under Rule 12. It is, therefore, reasonable to construe Rule 13 as in terms applicable only to cases where a sale is ordered under Rule 12 free of a prior mortgage. There is no other rule laid down in the C. P. C. or elsewhere as to whether the proceeds of a sale held for the discharge of a mortgage, should be first appropriated in payment of interest and the costs of the suit, and only afterwards to the principal. S. 73 of the code, in laying down the rule applicable to the application of the proceeds of a sale directed by a decree for the discharge of an incumbrance, provides that the proceeds should be applied first in defraying the expenses of the sale, secondly in discharging the amounts due under the decree; thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any) &c.

It does not contain a provision that the costs and interests on the circumstances due under the decree should be discharged out of the sale proceeds before the principal amount. The reason evidently is that the section is concerned only with the priorities as between different mortgages on the property sold and decree for

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money executable by attachment and sale of property. Now, what was the object of Rule 13 in giving priority to interest and the costs of the suit in a sale in execution of a mortgage decree over the principal amount due under the mortgage? First, the legislature wanted to give the mortgagee a charge on the proceeds for the costs of the suit which he would not have by virtue of his mortgage alone.

Secondly, it also wanted to enact as between the mortgagor and the mortgagee that the interest should be discharged first, wrongly made.

This provision was also enacted for the benefit of the mortgagee. It would, probably, not necessarily follow that no one else would be entitled to the benefit of the provision. For instance, a person liable as surety for interest alone due under a mortgage decree may be entitled to claim the enforcement of the rule. A party impleaded on the ground of his having an interest in the mortgaged property would not ordinarily be liable for the costs of the suit, and a direction making him liable therefore would generally proceed on some conduct of his justifying his being made responsible for the costs. Mr. Srinivasa Aiyangar contends that such a person cannot claim the application of the rule and that, in any case, the rule being not applicable to the present case in which no sale was directed under rule 12 we should not apply the principle of the rule. We are unable to accept the argument that the principle of the rule should not be applied in cases, where sale is not directed under rule 12. There is no apparent reason and none was suggested by Mr. Srinivasa Aiyangar for a different principle being applied with respect to the matter in question so far as the mortgage for which the sale is held is concerned, according as it is held free of a prior mortgage or subject to it. We are of opinion that we must apply the same rule in both cases. Such being the case, if the proceeds are wrongly applied by the Court towards the principal amount of the mortgage before the discharge of the costs, is any other person also made liable by the decree for those costs entitled to object?

We do not consider it necessary to decide the question in this case. The duty of applying the proceeds according to law is laid on the court and not on the decree holder. He has not the right to make the appropriation according to his desire. The court in this case, did not, when the proceeds were brought before it and paid over to the decree-holder direct the appropriation of the money towards the principal amount and interest. It is the decree-holder that now wishes in his present application to do so. The court had

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to deal with the proceeds not only as between the latter and the 1st defendant. In the absence of any distinct order to the contrary, it must be taken to have followed the rule of law applicable to the case in handing over the proceeds to the decree-holder, and to have directed, therefore, that the amount should be applied towards the costs of the suit and the interest first and then the balance towards the principal. The result admittedly would be that the costs must be taken to have been discharged, and the plaintiff is not entitled to take out execution against the 2nd defendant.

We, therefore reverse the order of the Lower Court and dismiss the plaintiff's application with costs here and in the Lower Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arnold White, Kt., Chief Justice and Mr. Justice Oldfield.

V. Lakshmamma ... *Appellant*—(Defendant.)*

v.

V. Ratnamma ... *Respondent—((Plaintiff.)*

Will—Legacy—Disclaimer—Effect of—Indian Succession Act Ss. 91, 106 and 292—Legatee's right—Inchoate will—Executor's consent—S. 187—Bars pleading of right as jus tertii—Practice—Judge's finding different from plaintiff's and defendant's cases—Remand for trial on altered footing—Hindu Law —Dancing girls—Two of three sisters, not branch—Joint acquisition—Character of—Survivorship.

Lakshmamma v. Ratnamma

In the Indian law, as under the English, disclaimer by the legatee prevents the legacy vesting in him.

The vesting contemplated by S. 19, Indian Succession Act is not such a complete vesting as to render the legacy incapable of being divested by a mere disclaimer.

The right of a legatee is only an inchoate right till the executor's assent is given.

S. 187, Succession Act bars not only the legatee or some person claiming under him but also a stranger who pleads the right conferred by the will as a *jus tertii* for the purpose of defence.

The fact that plaintiffs admitted the existence of the will and its contents does not prevent the operation of the section when that admission is coupled with a denial of the validity of the will. The fact that their denial was based on one ground which has been held to be mistaken cannot alter the scope of the admission or disable them from taking other available objections.

When the court accepts neither the case of the plaintiff nor that of the defendant and on its findings, other questions than those forming the subject matter of the issues arise, the appellate court will remand for the determination of the rights of the parties on the altered footing.

*O. S. A. No. 108 of 1912. 12th August 1913.

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Two of three (dancing girl) sisters forming a joint family cannot be said to constitute a branch so as to give their joint acquisitions the character of joint family property with the right of survivorship.

Appeal from the decree of the Hon'ble Mr. Justice Wallis dated 2-12-12 in the exercise of the Ordinary Original Civil Jurisdiction of the High Court and made in C. S. No. 77 of 1911.

M. O. Parthasarathi Aiyangar and *R. Kuppusami Aiyar* for Appellant.

N. Chandra Sekhara Aiyar for *C. P. Ramaswami Aiyar* for Respondent.

The Court delivered the following

Judgment:—The relationship between the persons concerned is given in the genealogical tree attached to the plaint and is not disputed. There is no reason for doubting the correctness of the learned judge's conclusions that the suit house was the separate acquisition of the deceased Ramamma and the 1st defendant and that the suit land was the separate acquisition of the former. It is argued with reference to *Sudarsana Maistri* v. *Narasimhula Maistri*[1] that those two members of the family, one of dancing girls, comprised all the members of a sub-branch and could hold property jointly, as a distinct corporate unit within the larger corporate unit. There is no foundation for that argument, since there is no reason for regarding these two members as a sub-branch to the exclusion of the 1st plaintiff, their sister. The learned judge was, therefore, right in holding that the house was the common property of Ramamma and the 1st defendant and that the former's half share in it and the suit land passed to her mother, Seethamma, by inheritance on her death.

The learned judge's decision as to the suit jewels follows that regarding the house. The first plaintiff claimed both on the same basis. The 1st defendant who was alone concerned with the former no doubt claimed some of them as her separate acquisition in her written statement. But there was no distinct issue regarding them. The learned judge refers in his judgment to her case as being that they were acquired jointly. It is alleged and it is to be presumed in these circumstances that this was the case actually put forward at the trial. That it was so, is consistent with the 1st defendant's failure to give evidence and with the evidence of the defendant's 1st witness who alone was examined by her on the point. The claims to the jewels and the house were therefore dealt with rightly on the same footing.

1. (1901) I, L. R. 25 M. 149 at p. 155.

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These conclusions of the learned judge did not correspond either with the plaintiff's case, that the house, land and jewels were the joint property of the whole family or with the 1st defendant's that the two first were the joint property of Ramamma and herself and that some of the jewels were her own separate acquisitions. The argument to be dealt with next arises from these conclusions and therefore has been attempted first in this court. In plaint paragraphs 7 and 8 there is a reference to a will executed by Seethamma, mother of the 1st plaintiff and the 1st defendant whereby she bequeathed all property to which she was entitled, to the 2nd and 3rd plaintiffs and nominated them executrixes. The plaintiffs submitted that Seethamma had no power to deal with the property by will, since (in accordance with their case) it belonged to the joint family; and the 2nd and 3rd plaintiffs therefore did not claim under the will. The 1st defendant has however argued here that this reference to a will must have effect that the property must be taken to have vested in accordance with its terms in the 2nd and 3rd plaintiffs and that in the absence of a conveyance by them to the 1st plaintiff, the latter has no title, on which she can sue in ejectment, as she in effect is doing.

It has been pointed out that the defendant's contention could not have been raised in their pleadings since it arises from the findings by the learned judge which are not in accordance with either party's case. The plaintiffs no doubt must not be prejudiced by the stage, at which that contention has been advanced; and it might have been necessary to grant a remand for a further trial after amendment of the plaint with reference to the will and filing of an additional written statement but that the 1st defendant's arguments must be held untenable for two reasons.

Firstly it is admitted that up to the date of the learned judge's decision the will had not been proved. It was made in Madras and under S. 2 Hindu Will Act, is subject to S. 187 Succession Act. No right therefore as legatee can be established under it.

It has been urged that S. 187 affects only the establishment of a right by the legatee himself or some persons claiming under him and does not debar the 1st defendant who desires to establish the legatee's right, merely as a *jus tertii* for the purpose of her defence. No authority has been cited and no reason suggested for such a distinction. It is said further that S. 187 is further irrelevant, when the plaintiffs have admitted the existence of the will and its terms. The answer is that, though they admitted the existence of the document they denied its validity on the validity of rights under it, and the fact that their denial was based on one ground which has been held to

be mistaken cannot alter the scope of their admission or disable them from taking other available objections.

Then as to the merits of the 1st defendant's arguments. They depend on the assumption that Seetamma's will is effective. The 1st defendant's case is that the property bequeathed to the 2nd and 3rd plaintiffs vested in them ; and, in our opinion, that is not sustainable. S. 91 Succession Act no doubt provides for the vesting of the estate in the legatee from the date of the testator's death. But the estate thus vested is not full or absolute, the reference is only to an interest in the legacy, not the legacy itself; and the distinction between a vesting in interest and in possession is implied in S. 106 and the illustration to S. 292 in which the effect of the executor's assent is dealt with. (Vide also *Bachman v. Bachman*[1] and *Doe* v. *Guy*[2]). Until that assent has been given, the legatee has in any case only an inchoate right to the legacy. Williams on Executors 10th Edn. p. 1101, so far no account has been taken of the effect of the legatee's disclaimer. There is very little English and no Indian authority regarding it. But in *In re Hotchkys–Freeke* v. *Calmady*[3] there are references to the acceptance of the legacy as essential, which are inconsistent with its vesting in the legatee against his will. And at p. 84, Williams Law of Real Property 20th Edn. *Nicholson* v. *Wordsworth*[4] is referred to, and it is said " an heir at law is the only person in whom the Law of England vested property whether he would or not. . If I make a conveyance of land to a person in my life time or leave him any property by my will, he may, if he pleases, disclaim taking it, and in such case it will not vest in him against his will ". Though this principle is not formally stated in the Indian Law it is reasonable and there is nothing repugnant to it therein or in Indian decisions. It may, therefore legitimately be adopted. The result is that the 2nd and 3rd plaintiffs' legacy did not vest in them completely or indefeasibly and that, as far as it vested at all, it would be divested by their disclaimer. Being undisposed of Seethammal's interest must go as the plaintiffs contend that it should, to the 1st plaintiff and to the 1st defendant in equal shares. *Morarji Culliangi* v. *Nenbai.*[5]

The 1st defendant objects to the application of the partition Acts for which the decree provides, The 1st plaintiff consents to its amendment by the removal of this provision. The appeal is therefore allowed to this extent, It is dismissed in other respects. The 1st defendant will pay the 1st plaintiff's costs.

1. (1884) I. L. R. 6. A. 583. 2. (1802) 3 East 120 s. c. 102 E. R. 543.
3. (1886) 32 Ch. 408. 4. (1818) 2 Swanston 365 s. c. 31 E.R. 655.
5. (1893) I. L. R. 17 B. 351.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar.

Hajee Aboobuckor Rahimtulla Saib ... *Appellant** (*1st Deft.*)

v.

The Official Assignee of Madras and another. } *Respondents* (*Plaintiff and 2nd Defendant.*)

Rahimtulla Saib *v.* The Official Assignee of Madras

Limitation Act (Act V of 1908) art. 161 Or. XX r. 7—High Court—Original side—Decree of—Date of, the date of judgment and not the date of signature by Registrar—Starting point of limitation for appeal.

Decrees of the High Court on the Original side also, like decrees of other Courts, bear the date of the judgment.

Consequently limitation for appeal should be calculated from that date and not from the date on which the decree is signed by the Registrar.

Ramey v. *Broughton*[1] followed.

Appeal from the decree and judgment of the Hon'ble Mr. Justice Sankaran Nair dated the 17th March 1913 in the Ordinary Original Civil jurisdiction of this Court in C. S. No. 356 of 1908.

Messrs. Short and Bewes for Appellants.

Order:—I do not accept the validity of the contention of the appellant's learned counsel that the decree of the High Court on its original side should not bear the same date as the date of its judgment or that the appellant is entitled to calculate the limitation period from when the decree was signed by the Registrar. I agree with *Ramey* v. *Broughton*[1] the practice of the Court being the law of the court even if the Civil Procedure Code does not apply and differ from the rulings *contra*. As regards the affidavit in support of the application to excuse the delay, let notice go to the other side to show cause why the delay should not be excused. Post that matter before two judges.

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* S. R. No. 11769 of 1913. 8th August 1913.

1. (1884) I. L. R. 10 C. 652.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Parasurama Pattar ... ... *Appellant*)* (*2nd Deft.*)

v.

Venkatachalam Pattar and others ... *Respondents* (*Plffs.* 1 *to* 4 *and Defts.* 1, 13 *and* 15.)

Mortgage—Payments to be made by mortgagee annually—Duty to give credit at the time of redemption—Limitation—Continuing liability during the mortgage.

Parasurama Pattar *v.* Venkatachalam Pattar

So long as the relationship of mortgagor and mortgagee continues, the obligation of the mortgagee to make all payments provided in the mortgage deed subsists and at the time of redemption, the mortgagor is entitled to insist on credit being given for all arrears in respect of them.

The fact that the payments were to be made at the end of every year and more than six years have elapsed from the due dates does not take away this right,

Second appeal from the decree of the District Court of South Malabar in A. S. No. 941 of 1909 preferred against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in O. S. No 20 of 1908.

C. V. Ananthakrishna Aiyar for Appellant.

J. Rozario for Respondent.

The Court delivered the following

Judgment:—We accept the finding of the Lower Appellate Court that Exhibit II is not binding on the plaintiffs, nor do we see any reason for differing from its conclusion that the defendants have not proved any circumstances which could be held to estop the plaintiffs from setting up the invalidity of Exhibit III as against them. One further contention remains to be dealt with, namely, that the plaintiffs are not entitled to *purapad* or rent for more than six years before the date of the suit. The facts which lead to this contention are that the Karipanayam deed Exhibit I dated 1867) as modified by the documents of further charge (Exhibit II dated the 1st May 1876 and Exhibit III dated the 14th July 1881) provides that the mortgagee should deliver the 200 paras of paddy a year to the plaintiffs, that no paddy was delivered subsequent to the *Karar* (Exhibit XII dated the 4th March 1889) and that the plain-

*S. A. No. 1982 of 1911. 5th March 1913.

Parasurama Pattar v. Venkatachellam Pattar

tiffs, in consequence, claim to be entitled to have credit for all the rent due under the mortgages at the taking of account for the purposes of redemption. The Lower Courts have awarded the plaintiffs rent due after the death of Rama Pattar, the executant of Exhibit XII who was authorised to receive the rents during his lifetime. It is contended that the rent due for more than six years before the date of the suit is barred by limitation. We are of opinion that the contention should not be upheld. There can be no doubt that 200 paras of paddy a year was to be delivered by the mortgagee in his character as mortgagee, although a separate *kychit* was executed at the time of the mortgage. The lease cannot be regarded as a transaction distinct from the mortgage. The position is, therefore, the same as if the defendant's who are mortgagees in possession had agreed to deliver the plaintiffs 400 paras of paddy a year out of the total usufruct of the mortgaged property, retaining the remainder of it towards the interest due to them on the mortgage money. According to the mortgage deed therefore, the mortgagor was bound to pay the principal amount of the mortgage to the mortgagee at the time of redemption and the latter was bound to deliver to the former 200 paras of paddy every year out of the usufruct. Both are obligations arising under the mortgage. The fact that the mortgagee was to pay the *purapad* every year does not exempt him from liability to pay it at the time of the redemption if he fails to pay at the stipulated time. There are several cases where although a person may be entitled to require payment at a particular time, he is not bound to insist on enforcing payment then, and limitation would not run against him if he does not do so. Thus an agent may promise to make remittances to his principal at stated times, and a partner may be entitled to receive certain payments from time to time. But stipulations of this sort would not prevent the principal from receiving all the amounts that might have accrued due to him when the agent is called upon to account or the partner from claiming everything which has not been paid to him, at the time of the winding up of the partnership. Similarly, so long as the relationship of mortgagor and mortgagee continues, the obligation of the mortgagee to make all payments provided in the mortgage deed also subsists. At the time of redemption, when the mortgagor is required to pay the amount due by him under the mortgage, the mortgagee is also bound to give him credit for all payments which he is bound to make under it. The rule, of course, will not apply to any payments that the mortgagee is liable to make to the mortgagor otherwise than under the contract of mortgage. But as already observed, the agreement to pay *purapad*

Parasurama Pattar v Venkatachalam Pattar

in this case is part of the mortgage transaction. This view has been adopted by the Calcutta High Court in several cases (*Narasingh Narayansingh* v. *Babu Lakputty Singh*[1], *Nanda Sahu* v. *Ram Lakhar Singh*[2] and *Sheo Saran Singh* v. *Mahabir Pershad Singh*[3] and see also *Ramanath Mukopadhyaya* v. *Brahmamoyi Debi*[4] and *Doolee chand* v. *Omda khanum*[5]. In this case there is no obligation on the mortgagee to render an account of the profits of the mortgaged property as the parties have expressly dispensed with this by providing that the mortgagee should be entitled to appropriate them towards interest with the exception of 200 paras of paddy which he is to deliver to the mortgagor. But he is liable to be debited with the payments he was bound to make to the mortgagor in the same manner as he would be debitable with the surplus proceeds after making all proper deductions if he was bound to account for the profits. We therefore disallow the contention. The Lower Courts have allowed interest on the arrears of *purapad* at 10 per cent. per annum. The mortgage deed and kychit contain no provision for the payment of interest. The mortgagors have allowed a long time to elapse without enforcing their right to receive the purapad every year. In the circumstances, they should not have been allowed a higher rate than 6 per cent. per annum. With this modification we dismiss the second appeal with costs. Time for redemption is extended up to the end of July 1913.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Sadasiva Aiyar.

Subramania Nadan, minor by his maternal uncle and next friend Kuthalalinga Nadan. } *Appellants.** (*Plaintiffs*)

v.

Ramasami Nadan and others ... ... (*Defendants.*) *Respondents.*

Subramania Nadan v. Ramasami Nadan

Hindu Law—Mortgage of immoveable property by manager for purchase of lands—Not binding.

The manager of a joint Hindu family has no power to mortgage immoveable properties for the purpose of purchasing more lands for the family.

Second appeal from the decree of the District Court of Tinnevelly in Appeal Suit Nos. 176 and 191 of 1911, preferred against the decree of the Court of the District Munsif of Ambasamudram in Original Suit No. 93 of 1910.

*S. A. No. 1041 of 1912. 4th August 1913.

1. (1879) I. L. R. 5 C. 333.
2. (1907) 9 C. L. J. 633.
3. (1905) I. L. R. 32 C. 576.
4. (1905) 1 C. L. J. 531.
5. (1880) I. L. R. 6 C. 377.

Subramania Nadan v. Ramasami Nadan.

S. Ramasami Aiyar for Appellant.

E. S. Chidambaram Pillai for 2 and 4 Respondents.

The Court delivered the following

Judgment:—The first point raised by the Appellant is as to whether the mortgage deed executed by the 1st defendant to the 17th defendant Exhibit III is binding on the plaintiff. Two of the three items of consideration for this transaction aggregating Rs. 677 were admittedly devoted or intended to be devoted to paying the sale price of certain other lands purchased by the 1st defendant, the family manager by Exhibit X. The Munsif found these items of consideration not binding on the plaintiff.

The District Judge has reversed this decision on the ground that it has not been shown that the purchase under Exhibit 10 was disadvantageous to the family or contrary to the interests of the plaintiff (who was a minor at the time). This is in our opinion not the true test, the mortgage affected by the manager included the share of a minor co-parcener the purchaser must show that it was effected for family necessity or at any rate that he (the purchaser) believed bona fide that it was for family necessity (Vide *Krishnaram Keshav* v. *Sakharam Keshav*[1]. No necessity has been shown or even alleged; and it is clear from the evidence of the purchaser (as 4th witness for defendants) that he made no enquiries at all. In our opinion the mortgage in so far as it relates to these items must be held not binding on the plaintiff.

As regards the third item of consideration for Exhibit VIII and also as regards the sales by Exhibits I and II we see no reason to differ from the District Judge.

In the result the mortgage deed, Exhibit VIII will be held binding on the plaintiff's share of the mortgaged properties only to the extent of half of Rs. 723, and interest thereon. The order of the District Judge directing the plaintiff to bear the costs of the 17th and 19th defendants must also be set aside. In other respects the judge's decree is confirmed.

The plaintiff will bear the costs of the 13th defendant in this court, the plaintiff and the 17th and 16th defendants will bear their own.

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1. (1901) 3 Bom. L. R. 243.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

R. Nataraja Aiyar ... Petitioner in both* (accused).

Letters Patent art. 39—Appeal to Privy Council—Criminal Procedure Code S. 476—Income Tax Officer—Order of—Writ of certiorari—Refusal to quash by—Order passed in the exercise of Criminal jurisdiction—On appeal or in the exercise of original jurisdiction.

In re Nataraja Aiyar

An order passed by the High Court refusing to quash by means of a *writ* of *certiorari* the proceedings of an Income Tax officer directing the prosecution of a person under S. 193 I. P. C. is an order passed in a matter of criminal jurisdiction within the meaning of art. 39 of the Letters Patent and as such no appeal lies to His Majesty in Council.

Difference between sanction proceedings and proceedings under S. 176 pointed out.

Held, per *Sadasiva Aiyar J.*—As the order is not one passed on appeal or in the exercise of original jurisdiction, on that ground also, no appeal lies under art. 39.

Petitions for leave to Appeal to His Majesty in Council against the order passed in return of a *Writ of certiorari* issued to the Revenue Divisional Officer of Ariyalur and for stay of all further proceedings in C. S. No. 119 of 1910 on the file of the Sub Divisional First class Magistrate of Trichinopoly in pursuance of the order of the High Court dated the 30th August 1912 in Cr. R. C. 509 of 1912.

For the report of Cr. R. C. 509 of 1912 see 23 M. L. J. 393.

Dr. Swaminadhan Counsel for Petitioner.

The Court made the following

Order :—*Sundara Aiyar J.*—This is an application asking us to declare under Cl. 39 of the Letters Patent that an order passed by us refusing to set aside an order made by a Deputy Collector as an Income Tax Officer directing that the petitioner be prosecuted for an offence under S. 193 of the Indian Penal Code is a fit one for appeal to His Majesty in Council. Against the order of the Deputy Collector two proceedings were taken in this Court one to set it aside under Ss. 435 and 439 Cr. P. C. and the other to quash the proceedings of the Deputy Collector by a *writ of certiorari.*

We dismissed both the petitions.

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*C. M. P. Nos. 2264 and 2265 of 1912. 25th April 1913.

In re Nataraja Aiyar — Sundara Aiyar J.

The present application for leave to appeal to His Majesty is made in the application to quash the Deputy Collector's order by a writ of *certiorari*. The application is made under S. 39 of the Letters Patent. According to that section an appeal lies to His Majesty in Council only when the matter to which the judgment or order of this Court relates is not one of criminal jurisdiction. No authority has been cited to show that the Deputy Collector in directing the prosecution of the petitioner was not exercising criminal jurisdiction. It is no doubt true as observed by Dr. S. Swaminadhan that the main function of the Deputy Collector was to collect Income Tax, but it does not follow that he was not exercising criminal jurisdiction when he directed the prosecution of the petitioner. Our order also must of course be taken to be of the same character as that of the Deputy Collector whose proceedings were called up by a writ of *certiorari*. It conceded that when an order under S. 476 is made by a court, the Criminal Court to which the accused is sent would be bound to investigate the question whether the accused is guilty or not guilty of the offence for which he has been directed to be prosecuted. No further complaint of any one is required, the order itself standing in the place of a complaint which the Criminal Court is bound to inquire into and thus constituting the beginning of the criminal proceedings. It follows from this that the Deputy Collector exercised criminal jurisdiction in passing the order and we in refusing to set aside his order also exercised criminal jurisdiction. Cases deciding that an order granting sanction to prosecute a person does not fall within the purview of S. 15 of the Letters Patent are not in point, for that section refers to a judgment or order in a criminal trial. This Court has held that an order granting sanction is not part of a criminal trial but one antecedent to and necessary for the commencement of a criminal trial; an order under S. 476 however starts the criminal trial itself and it seems clear that the order must be taken as one relating to criminal jurisdiction. The petitioner is not therefore entitled to appeal to the Privy Council under Cl. 39 of the Letters Patent. This petition must be dismissed.

Sadasiva Aiyar J:—I agree that this petition must be dismissed on the ground that our order was passed in a matter which appertains to criminal jurisdiction but I wish to add that even if the matter was not one relating to criminal jurisdiction S. 39 of the Letters Patent would not apply. The first part of S. 39 relates to appeals from final judgments, decrees or orders made on appeal and from final judgments decrees or orders made in the exercise of

original jurisdiction no appeal lies to two or more judges under the provisions of the 15th section of the Letters Patent. Then the latter portion of S. 39 says that from any final judgment decree or order involving property of the value of not less than Rs. 10,000 or from any other final judgment, decree or order made either on appeal *or otherwise as aforesaid* if the High Court shall declare that the case is a fit one for appeal to the Privy Council, the appeal may lie. It seems to me that the words "or otherwise" relate to final judgments, decrees or orders made in the exercise of the original jurisdiction from which appeals do not lie to the High Court itself under the provisions contained in the 15th clause. S. 40 therefore does not, it seems to me, apply to orders passed by us on an application to exercise our high prerogative of issuing a *writ of certiorari.* It is not an order passed on appeal, though the order may be said to have been passed under our appellate jurisdiction. It is not an order passed in the exercise of original jurisdiction as clauses 11, 12 and 13 of the Letters Patent show, what is meant by the original civil jurisdiction of the High Court. On this ground also I think that this application cannot stand and I therefore dismiss it.

In re Nataraja Aiyar — Sadasiva Aiyar J.

For the same reason C. M. P. 2265 is also dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller.

M. R. Srinivasa Row... ... *Petitioner* Respondent.*

v

Pichai Pillai ... ... *Respondent Petitioner.*

Civil Rules of Practice Rule 277—Pleader—Appearance in proceedings under S. 145 Cr. P. C.—Whether bar to appearing in civil suit arising out of it for opposite party—Power to District Munsif to act on it—Professional conduct—" connected "—Not necessarily civil proceeding.

Where a pleader who had appeared for the successful party in proceedings under Sec. 145 Cr. Pr. Code appeared for the other side in the suit to establish title to the property forming the subject matter of those proceedings.

Srinivasa Row *v.* Pichai Pillai.

Held :—Rule 277 of the Civil Rules of Practice applied to the case and the pleader was wrong in appearing against his former client without giving him an option to retain his services or obtaining the permission of the Courts as required by that rule.

The word "proceeding" in the earlier part of that rule is not restricted to proceedings in Civil Court and is wide enough to include proceedings in a Criminal Court,

*C. R. P. No. 663 of 1913. 29th October 1913.

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Proceedings under S. 145 Cr. Pr. Code and the suit instituted to establish the title of the unsuccessful party are sufficiently connected to attract the operation of the rule.

No rule is necessary to enable a District Munsif (subject to correction by the High Court) to refuse audience to a pleader in a case in which that pleader by his very appearance is guilty of what will be viewed as professional misconduct.

The order of the District Munsiff prohibiting a pleader from continuing to appear in a suit is not an injuction order.

Apart from any question of the High Court's power to frame a rule like rule 277, the lower Courts are entitled to act on it as embodying the view of the High Court on a point of professional conduct.

Little v. *Kingswood Collieries Company*[1] referred to.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Mannargudi in Original Petition No. 42 of 1913.

T. R. Ramachandra Aiyar for Petitioner.

T. R. Venkatrama Sastri for Respondent.

T. R. Ramachandra Aiyar : Rule 277 Civil Rules of Practice did not preclude the petitioner from taking up an engagement in a Civil suit merely because he appeared for the defendant in a possession case relating to the property. The rule refers only to different stages of the same civil proceeding. The Civil Rules of practice do not and cannot have any reference to the pleader's act in a criminal proceeding. He referred to rules 11 and 12 at page 2 of Mr. Chandrashekhara Aiyar's Rules and orders. He referred to *Reg* v. *Bezonji*[2] *Damodar* v. *Bawani Shankar*[3].

If any confidential communications had been made, the pleader is precluded by law from disclosing it and using it. An order prohibiting him from such use is the only order if at all that is called for, but that is a superfluity. At any rate he submitted there was no jurisdiction in the Court to issue an injunction.

T. R. Venkatrama Sastri.— Submitted that there was nothing to preclude the Civil Rules of Practice providing that appearance in a criminal proceeding shall be a bar to appearance in a connected civil proceeding. *Damodar* v. *Bawani Shankar*[3] thought the rule in *Reg* v. *Bezonji*[2] was not sufficiently stringent. The rule as it stands works no hardship in as much as it does not absolutely prohibit appearing for the other side. It gives an option to the party for whom one appeared to engage his services; if he did not, that was a proof positive of there being no confidential communica-

1. (1882) 20 Ch. D. 733. 2. (1887) I. L. R. 12 B. at p. 91 footnote.
3. (1902) I. L. R. 26 B. 423.

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tions. The object of the rule is not to place a pleader in a delicate position with conflicting duties to two clients. Once use is made of the confidential communication the mischief is done and it is no consolation to the party that he can proceed against the pleader or even ask the Court not to act upon it. Whether an injunction is justified or not, the Court must have power to enforce discipline among its pleaders or the rule would be useless.

The Court delivered the following

Judgment :—In this case the District Munsif has made an order prohibiting a second grade pleader from appearing for the plaintiffs in O. S. No. 32 of 1913 on his file.

The pleader had appeared and acted in a proceeding in the Magistrate's Court under S. 145 Cr. P. C. and had there obtained an order for his client maintaining his possession until he should be disturbed by a Civil Court. O. S. No. 32 of 1913 was instituted nearly three years after the date of this order, by the unsuccessful party in the Magisterial proceedings, and the pleader filed the plaint on their behalf and appeared for the purpose of conducting the case but on the defendant's (his former client's) objection has been prohibited from doing so.

The District Munsif relies on Rule 277 of the Civil Rules of Practice as justifying his order, and in my opinion, he is, in substance, right. Mr. Ramachandra Aiyar contends that this rule being in the Civil Rules of Practice has no application when one of the proceedings in question is a proceeding in a Magistrate's Court. These rules of practice, as is seen by their preamble, are to be applied only in Civil Courts, but here the matter which gives rise to the question is O. S. No. 32 of 1913 a proceeding in a Civil Court, and I am not inclined to restrict the word ' proceeding ' in the earlier part of the rule to proceedings in a Civil Court when neither the language of the rule nor the preamble requires that limitation. It was further contended that the suit is not a ' matter connected with the proceeding" before the Magistrate. I have had some doubt on this point, but I agree with Mr Venkatrama Sastri's argument that the rule is not to be given too narrow a scope, and should be interpreted as liberally as its language will allow and I do not think it is very difficult to hold that O. S. No. 32 of 1913 is a matter which, to use the words of Hall V. C in *Little* v. *Kingswood Collieries Company*[1] "flows out of the former proceedings" and "may be considered as something in the nature of a continuance of, or supplemental to " that proceeding. No doubt the title and not the

1. (1882) 20 Ch. D. 733.

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possession is to be decided in the suit, but that does not affect the present question, for the mere fact that the questions to be decided are different will not necessarily involve the conclusion that the two proceedings are unconnected. The suit is that which was indicated in the Magistrate's order and so flows out of it, it was necessitated by that order, and it relates to the property with which that order was concerned and it is between the parties to that order.

In spite therefore of the lapse of three years between the one proceeding and the other, I am of opinion that the later is a matter connected with the earlier.

It was suggested at the end of his argument, though not taken as a ground in his petition, by Mr. Ramachandra Aiyar that Rule 277 is *ultra vires* of the High Court, in the sense that it is not founded on any section of the Legal Practitioners Act which gives power to make it. It may be that this is so, but I do not think it necessary to search the statutes for enabling powers in this case. I may take it for my present purpose that the rule merely defines the view of the High Court as to what will amount to a sufficient reason for punishing a pleader in the particular matter, that if a practitioner does not infringe the rule he will not lay himself open to punishment or reprimand, even though he may not attain to that standard of fidelity which may seem desirable in persons professing to deserve the degree of confidence which must of necessity be placed in a legal practitioner by his client. Of course if a pleader be found as a matter of fact to have disclosed to one client secrets confided to him in his capacity of legal adviser by another, that would give rise to different considerations which would not depend on the existence of a rule like rule 277 of the Civil Rules of Practice. Whether the two clients were ranged as opponents or not, such conduct would necessarily be grossly improper. Taking this view of the rule, I have to consider the further objection that the District Munsif had no jurisdiction to make the order. The rule however clearly empowers the Court, *i.e.*, the Court in which the 'connected matter' is under consideration to authorise or refuse to authorize the pleader to act, and I take the Munsif's order simply to amount to a refusal to give the necessary authority. If in spite of the refusal the pleader were to continue to act it might be necessary to consider in what manner the District Munsif's authority is to be vindicated but it is not necessary to go into that question here. I do not suppose that any rule is necessary to enable a District Munsif, subject to correction by this Court, to refuse audience to a pleader in a case in which that pleader by his very appearance is guilty of what

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will be viewed as professional misconduct, and that is all, as I understand the matter, that has been really done by the District Munsif here, though the District Munsif does not take exactly that view of it.

Then remains the question whether the District Munsif ought to have authorised the pleader to act for the plaintiffs in O. S. No. 32 of 1913.

Considering that a large number of documents of title were produced in the proceedings in the Magistrate's Court, it seems to me that it lay on the pleader to satisfy the District Munsif that in acting in that proceeding he did not as a fact obtain from his then client any knowledge which would be of use to his present clients, or that, if he did obtain any such knowledge then, such knowledge is now, so to speak, public property available to any pleader who can obtain inspection of the record of the proceediug in the Magistrate's Court. The pleader did not satisfy the District Munsif on these points, and Mr. Ramachandra Aiyar did not satisfy me on them. As then in my opinion, the pleader has brought himself within the rule, I cannot say that the District Munsif has wrongly exercised his discretion in refusing him audience.

In declining to interfere on behalf of the pleader, I think I ought to observe that the District Munsif is probably right in holding that he is not guilty of misconduct involving any moral turpitude. It is not shewn, that is to say, nor do I see any reason to suspect, that he accepted the plaintiff's vakalat in order to make use of knowledge formerly derived from the defendant nor with any idea of making use of such knowledge. But the District Munsif is right in saying that he ought to have offered his services to the defendant before acting for the plaintiffs, and if it be objected that an unscrupulous defendant might easily in the circumstances have undertaken to employ him and then have refused after the plaintiffs had engaged someone else,one answer seems to be that the practitioners must, even at some risk or sacrifice, refrain from taking up positions calculated to impair the confidence reposed in them by their clients; on grounds of policy if on no other ground this suggests itself as the better course.

The District Munsif made the pleader pay the costs of the argument before him, and I think he was right. In this Court too, as the pleader has persisted in his contention that the rule does not apply to him and so has necessitated argument in this case, he must pay the costs of the respondent.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arnold White Kt., Chief Justice and Mr. Justice Oldfield.

Lakshmammal ... ... *Appellant** (*Plaintiff.*)

v.

Narasimharaghava Aiyangar and others. *Respondents* (*Defendants*).

Material alteration—Conversion of negotiable into non-negotiable instrument—Alteration with the object of enabling a party to sue upon it—Change of circumstances—Institution of suit in Court where suit could have been brought on document in original condition—Effect of—Negotiable Instruments Act (XXVI of 1881) S. 87.

Lakshmammal *v.* Narasimharaghava Aiyangar.

Defendants' father, a resident of Mysore executed in Mysore two instruments in favour of plaintiff, also a resident of that place. The parties having subsequently come to reside in Madras a suit was instituted upon those documents on the original side of the High Court. At the time the documents were let in evidence, they were found torn and mutilated, the effect of the mutilation being that the words " or order " disappeared from the documents. The alterations were made with the obvious purpose of enabling the plaintiff to sue upon the documents in Mysore which she could not have done in their original condition as they were insufficiently stamped. *Wallis* J. dismissed the suit holding that the documents were materially altered and therefore the defendants were not liable on them. On appeal, it was contended that a suit could have been brought upon the documents even in their original condition in Madras and therefore the alteration was not a material alteration.

Held, overruling the contention, that the alteration was material and the documents could not be sued upon.

An alteration which has the effect of converting a negotiable instrument into a non-negotiable one is a material alteration.

An alteration made with the purpose of enabling a party to sue upon the document in the Court in which it was expected at the time the alteration was made that the suit would have to be brought does not cease to be material because in the events that subsequently happened. the party came to be entitled to institute the suit in another Court where a suit could have been maintained upon the document even in its original condition.

The rule and the policy of the rule with regard to material alteration of documents stated and discussed.

Gourchandra Das v. *Prasanna Kumarchandra*[1] followed.

On appeal from the judgment of the Hon'ble Mr. Justice Wallis dated the 29th July 1912 made in the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 184 of 1910.

S. Srinivasa Aiyangar and *K. Bashyam* for Appellant.

R. Sadagopachariar and *C. Narasimha Chariar* for Respondents.

* O. S. A. No. 52 of 1912. 27th August 1913.

1. (1906) I. L. R. 33 C. 812.

Laksh-
mammal
v.
Narasimha-
raghava
Aiyangar.

White C. J.

The Court delivered the following

Judgments :—*The Chief Justice* :—This is an appeal from a decree given by Mr. Justice Wallis dismissing the plaintiff's suit on the ground that the two documents on which he relied had been materially altered and that for that reason the defendants were not liable thereon. The suit was brought on two instruments executed in Mysore by the father of the defendants the father being a resident in Mysore, in favour of the plaintiff who with her husband was also an inhabitant of Mysore. When the documents were put in evidence it was found that they had been torn and mutilated. The learned Judge declined to believe the story put forward by the plaintiff to account for the mutilation of the documents. I agree with the learned judge that this story could not be accepted. The effect of the mutilation was to cause the words " or order " to disappear from the two documents. There is very little direct evidence on this point, but the learned judge holds in effect that the missing words were " or order " or words to that effect and I take the same view. This was not in fact seriously contested by the plaintiff, and Mr. S. Srinivasa Aiyangar's argument proceeded on the assumption that the words " or order " were contained in the two documents, as they were originally executed. Mr. Justice *Wallis* held that the alterations were made with the obvious purpose of enabling these documents, which could not be sued upon, to be sued upon where it was expected that they would have to be sued upon, namely in Mysore. There was some discussion as to whether the documents in their original form were bonds or promissory notes. In the plaint they are described as bonds ; but in the documents themselves they are described as promissory notes. As promissory notes they are insufficiently stamped ; and whether or not in this state of things they could be sued upon in their original form in Madras, it seems clear that the insufficiency of a stamp would have been a fatal obstacle to their being sued on in Mysore.

I should be prepared to take the same view as the learned judge and to hold that the alterations were made in order that these documents could be sued upon in Mysore. If this is so, it seems to me absolutely clear that the alterations were material alterations, since they were made for the purpose of enabling the plaintiff to sue in a Court in which, if the alterations had not been made, she would not have been able to sue. They appear to me to be none the less material alterations because, the defendants at the time the suit was instituted being, as events turned out, residents in Madras for educational purposes, the plaintiff was able to institute her suit in this

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Court. In this view that alterations were made with the object of enabling the plaintiff to institute her suit in this Court, I am of opinion that the alterations are material and that the defendants are not liable on the documents.

In connection with this part of the case Mr. Srinivasa Aiyangar relied on a decision of this Court in *Mahomed Rowthan* v. *Mahomed Husain Rowthan*[1] in which it was held that there was no provision of law which required a promissory note executed out of British India to be stamped before it was sued on or sued in a Court where the holder of the note had not done any of the acts referred to in sections 5 and 18 of the Stamp Act, and in consequence the obligation to stamp had not arisen. Mr. Srinivasa Aiyangar's argument was that in as much as the defendants could be sued on the original documents in this Court without being met by the stamp objection the alteration made in the document for the purpose of enabling the plaintiff to sue in this Court was unnecessary, was made under a misapprehension, and that therefore the alteration of the documents was immaterial since a suit could have been brought in this Court either under the documents as they originally stood or in their altered form.

It seems to me that alterations made in these circumstances clearly come within the " mischief " of the rule of law with reference to the alteration of instruments.

The cases are discussed in the notes to the case *Master* v. *Miller*[2]. I do not propose to refer to those cases because I find what appears to me to be an accurate position of the law in the case, *Gourchandra Das* v. *Prasanna Kumarchandra*[3]. "Any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument either in its terms or the relation of the parties to it, is a material change, or technically, an alteration and such a change will invalidate the instrument against all parties not consenting to the change. This is a wholesome rule founded on sound policy and may be defended on two grounds, namely, *first* that no man shall be permitted on grounds of public policy, to take the chance of committing a fraud without running any risk of loss by the event *when* it is detected, and, *secondly* that by the alteration, identity of the instrument is destroyed, and to hold one of the parties liable under such circumstances would be to make for him

1. (1899) I. L. R. 22 M. 337.
2. (1791) 1 Smiths L. C. 767.
3. (1906) I. L. R. 33 C. 812.

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a contract, to which he never agreed (See *Lee* v. *Butler*)[1]. The question to what extent the identity of an instrument must be changed in order that its legal effect will be altered so as to bring the case within the terms of a material alteration vitiating the instrument must depend upon the nature of the alteration in each particular case. The test is not necessarily however, whether the pecuniary liability of one of the parties has been increased by the change; it is of no consequence, whether the alteration would be beneficial or detrimental to the party sought to be charged on the contract. The important question is whether the integrity and identity of the contract have been changed. It is to prevent and punish such tampering as changes the identity of the contract, that the law does not permit the plaintiff to fall back upon the contract as it was originally, " or in the language of *Swayne* J. "in pursuance of a stern but wise policy, the law annuls the instrument as to the party sought to be wronged."

The decision upon which Mr. Srinivasa Aiyangar relied as an authority for his proposition that on findings of fact, to which I have referred the alteration of the document in this case was immaterial was the judgment of the Court of Appeal in the case of *Decroix Verley et Cie* v. *Meyer* & *Co.*[2] That case, it seems to me has really no bearing on the question we are now considering. In that case a Bill of exchange being drawn by one L. D. Flipo payable "to order Mr. L.D. Flipo" the drawers struck through the word "order" and accepted the bill " in favour of L. D. Flipo only payable at the Alliance Bank, London". In an action upon the bill by indorsees for value against the acceptors it was held that the acceptance did not vary the effect of the bill as drawn, and that it was therefore a general acceptance of negotiable bill, and the action was maintainable. The ground of decision in that case was that although the drawers intended to restrict the negotiability of the bill and struck out the word " order " for that purpose, their acceptance was in law a general acceptance and the suit by the indorsees as against them as acceptors was maintainable. Notwithstanding what the acceptors did in that case the bill continued to be a negotiable instrument by virtue of section 8 sub-section 4 of the Bills of Exchange Act 1882 as *Bowen* L. J. put it in his judgment on page 350.

" The bill itself was originally payable to order. The word "order" was, it is true, struck through; but the effect of the 4th sub-

1. (1897) 167 Mass. 426, s. c. 57 Am. St. Rep. 466.
2. (1890) 25 Q. B. D. 343.

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section of the 8th section of the Bills of Exchange Act 'is to put it in again'." In Bills of Exchange cases where the question of material alteration has arisen there is no case so far as I know in which it has been suggested that an alteration which gave a man a right of action which he would not otherwise have, is not a material alteration.

Mr. Srinivasa Iyengar did not argue that, if the plaintiff could not have sued in this Court on the original document the alteration was not material. I am of opinion that, assuming he could have sued in this Court on the original documents, the alterations made in the circumstances in which in this case they were made, were material alterations. This being my view, I do not think it necessary to discuss the question whether the plaintiff could have sued in this Court on the documents as they stood in the form in which they were drawn in the first instance. I do not see how Mr. Srinivasa Aiyangar could well rely on any case with reference to what is a material alteration within the meaning of S. 87 of the Indian Negotiable Instruments Act since on the finding of fact in this case the object of the alteration was to convert the two documents which were originally negotiable instruments into non-negotiable instruments. But even if it is open to him to rely on any decision in connection with this branch of the law of bills of exchange, he certainly has not called my attention to any case, as it seems to me, which supports his proposition. I am of opinion that the alterations made in these two documents in the circumstances in which they were made would be material alterations for the purposes of S. 87 of the Negotiable Instruments Act if we had to consider the question in connection with that enactment and they are material alterations within the general rule of law to which I have referred. I am therefore of opinion that Mr. Justice *Wallis* was right and I would dismiss this appeal with costs.

Oldfield J:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

P. Lakshmi Narasayya ... ... *Accused in Miscellaneous Application No. 2885 of 13 on the file of the Chief Presidency Magistrate, Egmore.*

v

S. P. Narasimhachari ... ... *Complainant in do.*

Presidency Towns Insolvency Act (III of 1909) Ss. 103, 104—Offences under S. 103—Triable only by the Insolvency Court—Not cognisable by the Presidency Magistrate.

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The Presidency Magistrate has no jurisdiction to try offences under S. 103 of the Presidency Towns Insolvency Act. They are the creatures of the Act and can only be tried by the Insolvency Court which is constituted into a special tribunal for the purpose with a special procedure of its own.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code of the Chief Presidency Magistrate, Egmore in his letter of the 31st March 1913.

C. Krishnamachariar, for complainant.

C. Kunhiraman, for accused.

The Court made the following

Order :—The accused, who has been adjudged an insolvent, is charged by one of the creditors with having committed an offence under S. 103 of Act III of 1909, Presidency Towns Insolvency Act The complaint is filed before the Presidency Magistrate, who refers to us for decision the question whether he is entitled to try the accused for this offence.

Under S. 104 of the Act, when the Insolvency Court is satisfied that there is ground to believe that the insolvent has been guilty of any offence under S. 103, notice may be issued to him to show cause why a charge or charges should not be framed against him, the Court may after hearing him, frame such charges as it thinks fit, and may proceed to try him and convict him if the offence is proved. The ordinary procedure for the trial of offences is made inapplicable by the same section to such trials. There is thus no doubt that proceedings against the insolvent are set in motion only if the Insolvency Court is satisfied that there is ground to believe that the accused is guilty of any offence under S. 103. This shows that it is not open to any creditor to initiate proceed-

*Cr.R.C. No. 497 of 1913 & C.R. No. 73 of 1913. 21st October 1913.

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ings by a complaint before another Court. The offence is created by the Act, and the Insolvency Court is constituted into a special tribunal to try that offence and the procedure also is different.

For these reasons we agree with the Presidency Magistrate that he has no jurisdiction to try the accused for an offence under S. 103 of the Act. He will be informed accordingly.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

Maharajah Sri Raja Velugoti Sreeraja Gopala Krishna Yachendra Bahadur Varu K. C. I. E. Rajah of Venkatagiri. ... (*Plaintiff.*) *Appellant**

v.

Jayampu Ayyappa Reddi and others ... (*Defendants.*) *Respondents.*

Estates Land Act Ss. 189, 3, cl. 1, 11, 15 and 16—Suit to eject tenant of pasture land and for rent—Jurisdiction—Cognisable by Civil Courts—"Agriculture"—"Ryoti land"—"Cultivable"—"Ryot"—Meaning of—"Cultivation"—"Pasturage fees"—Jurisdiction of Civil Courts—Remains unless specially conferred on Revenue Courts.

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The definition of ryoti land requires that the land should be cultivable, that is, permanently cultivable and therefore land fit usually only for pasturing, though under extraordinary circumstances capable of some cultivation cannot be ryoti land.

The ordinary meaning of "agriculture" is the raising of annual or periodical grain crops. By a special definition, it is made to include horticulture in the Estates Land Act but it does not include pasturing.

A person therefore, who takes up land for pasture does not take it up for agriculture and is not a ryot and the money he pays for the use of the land, is not rent within the meaning of the Act.

Accordingly, where the Raja of Venkatagiri sued to eject a person who had taken up waste land in the estate for the purpose of pasture on a certain annual rent and for the recovery of arrears of rent and mesne profits ;

Held: the suit not being one to eject a ryot or for rent, was not cognisable by Revenue Courts and could only be instituted in Civil Courts.

The pasturage fees referred to in S. 3 cl. (11) can only relate to sums payable by agricultural tenants for the use of communal pasture lands.

In all cases in which jurisdiction is not specially conferred on the Revenue Courts, jurisdiction of the Civil courts remains.

Per *Tyabji* J. :—Cultivation implies some kind of labour on the land generally consisting of a breaking up of the land whereas pasturage has reference to a particular mode of using the land without its being cultivated.

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* S. A. No. 1487 of 1911. 12th August 1913.

Second appeal from the decree of the District Court of Nellore in A. S. No. 163 of 10 preferred against the decision of the Court of the Special Deputy Collector of Nellore in R. S. No. 886 of 1910 transferred from the Court of the District Munsif of Nellore where the suit was filed as O. S. No. 285 of 1909.

S. Subramania Aiyar for Appellant.

P. Nagabhushanam for Respondent.

The court delivered the following

Judgment:—*Sadasiva Aiyar J.*—The plaintiff, the Rajah of Venkatagiri, is the appellant in this second appeal. The defendants are the tenants of certain lands in the Venkatagiri Estate. The said lands according to the 3rd paragraph of the plaint are waste lands which have been always used for the pasturing of cattle. Pasture rent is alleged to have been collected from the defendants for the use of these lands till Fusli 1317 at the rate of five annas one pie per acre for about 40 years. In the Muchilikas for 1317 and 1318, however, the defendants agreed to pay rent for the lands at a higher rate if any person applied for the grant of lands on Dharkast for purposes of cultivation. They further agreed by these Muchilikas to quit possession of the lands on demand if they refused to take up the lands at the higher rate. The suit was brought, claiming 3 reliefs:—

(*a*) Ejectment of the defendants, because on the 3rd August 1907 the defendants, when notice was issued to them to take up the lands themselves at the higher rate, failed to take them up.

(*b*) For recovery of rent for Fuslies 1317 and 1318 at the rates offered by a person who applied for grant of the lands on Dharkast in April 1907.

(*c*) For mesne profits subsequent to date of suit till delivery, that is mesne profits for Fasli 1319 &c.

There was first the question, whether this suit, which was originally filed in the Munsif's Court, was cognizable by the said Court. The Munsif returned the plaint to be presented to the Revenue Court. The Revenue Court again returned it to be presented to the Munsif's Court. There was an appeal against this order of the Revenue Court to the District Court, which set aside the Revenue Court's order and directed it to try the suit. The question as to which Court has jurisdiction to try this case depends it need hardly be said upon the allegations in the plaint and upon the case set up by the plaintiff in the plaint. Assuming for this purpose that the allegations in the plaint, supplemented by the plaintiff's documents

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are correct, it seems to us clear that the lands in dispute fall within the definition of 'old waste' in S. 3 Cl. 7 of the Madras Estates Land Act. Old waste includes according to that definition, any land which, *not being private land,* has continuously remained uncultivated and in the possession of the Zemindar for 10 years or has at the time of any letting by the landholder after the passing of the Act remained without any occupancy rights being held therein within a continuous period of not less than 10 years immediately prior to such letting. The plaint lands are therefore old waste lands. But old waste lands might be of two kinds. They might be old waste lands which are also ryoti lands or they might be old waste lands which are not ryoti lands. But a ryoti land in order to come under the definition of old waste should be land in respect of which before the passing of the Act "the landlord had obtained the final decree of a competent Civil Court establishing that the ryot has no occupancy right." See the last paragraph of clause 7 S. 3. Ryoti land is described in S. 3 Cl. 16 as cultivable land other than private land, communal land or service tenure land. It is clear from the Muchilika filed in this case that the plaint land is pasture waste and it is not permanently cultivable. When ryoti land is defined as cultivable land, we think it means land permanantly cultivable for all practical purposes and not land which might be occasionally cultivated. This is made clear by S. 6 Cl. 4 of the Act, which says that waste land let under a contract for the pasturage of cattle and reserve forest land let under a contract for the temporary cultivation of agricultural crops shall not by reason only of such letting for pasturage or for temporary cultivation, become ryoti land. Hence land fit usually only for pasturing cattle and not for ploughing and raising agricultural crops is not ryoti land. The land in dispute in this case according to the allegations in the plaint and according to the terms of Muchilikas is not cultivable land, though it might be occasionally capable of cultivation under extraordinary and unusual circumstances and hence it is not ryoti land. No doubt the usual presumption under S. 23 of the Act is that a land is ryoti land other than old waste, but in this case such presumption has no place as the land is clearly ordinary old waste which is not ryoti land.

Then the next question is whether the tenant of such old waste let for pasture is a ryot. A ryot is defined in S. 3 cl. 15 as a person who holds (*a*) for the purpose of agriculture (*b*) ryoti land. The tenant of an old waste which is not ryoti land does not therefore come under the definition of ryot. On another ground also, the

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tenants of the plaint land are not ryots, because they do not hold land for the purpose of agriculture. Agriculture is defined in the Act as including horticulture. See S. 3 cl. 1. The ordinary meaning of agriculture is the raising of annual or periodical grain crops through the operations of ploughing, sowing etc. In *Soman Gope* v. *Raghubir Ojha*[1] it was held under the Bengal Tenancy Act that to turn land let for agricultural purpose into an orchard was to render it unfit for the purchase of the tenancy. In *Lakshmana* v. *Ramachandra*[2] the same principle was laid down. See also *Murugesa Chetti* v. *Chinnathumbi Goundan*[3]. While agriculture is by a special definition made to include horticulture in the Estates Land Act it has not been made to include Silviculture and pasturing. This clearly shows that the Legislature did not intend pasturage of cattle to be included within the meaning of the term agriculture. The matter seems to be finally clinched by the Select Committee's Report, (See Doraisami Aiyangar's book Appendix (IV page XCII) where the Select Committee make the following statements.

(1), "Agriculture"—From the definition we have omitted 'Silviculture' and 'pasturing.' The general right of a ryot to use the land in his holding in any manner which does not materially impair its value for agriculture purposes is declared in clauses 10 and 11; and ordinarily, neither Silviculture nor pasturing would be inconsistent with such use, but we recognise that the former cannot always be exercised as an unrestricted right, and that both silviculture and pasturing may be undertaken in circumstances which do not give a person admitted to use public cultivable land for those purposes alone any claim to the status of ryot clause 6 (6). For "pasturing" we have made special provision in clause 6 (6). As to "silviculture," the limitation of a ryot's right to plant trees has been declared in clause 22 (2)."

It being thus clear that the defendants in this case according to the plaintiff's allegations do not come under the designation of ryots the next question is whether a suit for ejectment of these tenants of old waste who are not ryots is cognisable by the Revenue Court or by the Civil Court. S. 199 clause 1 is the section which bars the jurisdiction of Civil Courts in certain specified cases, and it is unnecessary to state that, where the general jurisdiction of the Civil Courts is specially taken away only in particular classes of cases, the civil courts retain their jurisdiction as regards all other classes

1. (1896) I. L. R. 24 C. 160. 2. (1887) I. L. R. 10 M. 351.
3. (1901) I. L. R. 24 M. 421.

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of cases not so excluded. Now S. 189 (1) excludes the civil court's jurisdiction (investing the Collector or other Revenue officer with that jurisdiction) only in respect of suits and applications of the nature specified in parts (A) and (B) of the schedule, to the Act. Turning to parts A and B of the schedule, suits triable by a Collector, so far as this question of ejectment is concerned, are suits coming under Ss. 153, 48 (ii) and 158 of the Act. S. 153 relates to the ejectment of a non-occupancy *ryot*. But, as the defendants in this case are not ryots, that section does not apply. S. 48 (ii) also relates to the ejectment of a *ryot* who fails to make a certain declaration. S. 158 relates to a tenant of *private land*. It is thus clear that the present suit so far as it prays for ejectment of a tenant *not being a ryot* of old waste not being *ryoti land*, let for pasture purposes and *not agriculture*, is not cognisable by a Collector but only by a Civil Court. The Munsif's original order returning the plaint to be presented to the Revenue Court and the District Court's order on appeal from the Revenue Court deciding that the Revenue Court alone had jurisdiction are erroneous so far as the claim relates to the ejectment of the defendants and the recovery of mesne profits from fasli 1319 downwards is concerned. As regards the rent claimed for faslis 1317 and 1318, the plaintiff, if his allegations are true, is entitled on the Muchilikas for faslis 1317 and 1318 to recover under the 4th paragraph of the Muchilika rent at the Sagubadi dry rate of the nearest piece of land in the village though he may not be entitled to the higher wet cultivation rent at the rate offered by the alleged darkhastdar. The Lower Courts have not gone into the question whether there was an application by a darkhastdar in April 1907, whether defendants were asked to take up the land for temporary cultivation as provided in the muchilika for faslis 1316 to 1318 and to what rate of rent the plaintiff is entitled in faslis 1317 and 1318.

Even as regards the suit for what is called Pasturage rent for fuslis 1317 and 1318, the suit cannot lie in the Revenue Court because S. 77 of the Act relates to arrears of *rent* as defined in the Act and the definition of *rent* in the Act confines the expression to whatever is payable for the use of land for the purposes of *agriculture* (with its appurtenances like cesses, water rate etc. and sums payable by a *ryot* as such, on account of pasturage fees and fishery rent. Sums payable by a ryot as such on account of pasturage fees can only refer to sums payable by *agricultural* tenants for the use of communal pasture lands. It was ingeniously argued that even a tenant who holds waste lands (which are *not ryoti lands*)

for purposes of pasture under S. 6 cl. 4 is a ryot, because such a tenant is treated as a non-occupancy ryot in S. 46 of the Act, though the benefit of the provisions of that section given 'to non-occupancy ryots as a class is withheld from such a tenant. We think that this ingenious argument cannot prevail against the clear definition of 'ryot' found in S. 3 clause 15 and that the involved grammatical implications derived from the language of 46 should not be allowed to override the express declaration and definition found in S. 3.

It therefore follows that even as regards the pasturage rent due by tenants who are not ryots, the jurisdiction of the ordinary courts is not taken away. We accordingly set aside the original order of the Munsif dated the 10th January 1910 and the original order of the District Court passed in appeal against the Revenue Court's original order returning the plaint to be presented to the District Munsif and we direct the plaint to be received by the Munsif if presented to him within two weeks of the return of the same by this Court to the plaintiff and we direct the Munsif to dispose of the suit according to law. Costs hitherto incurred will abide the result.

Tyabji J :—I agree in the judgment of my learned brother which I have had the benefit of reading.

The question involved in this appeal is whether the Special Deputy Collector of Nellore presiding in the Revenue Courts had jurisdiction to try the suit out of which the appeal arises in which the plaintiff claims to be put into possession of the property referred to in the plaint removing the defendants therefrom; the plaintiff also claims " mesne profits" and other incidental reliefs. The plaint was in the first instance presented in the Munsif's Court but the Munsif held that he had no jurisdiction to try the suit. The Special Deputy Collector also held that he had no power to order the defendants to be ejected from the land and dismissed the suit.

The jurisdiction of the Revenue Courts so far as is material for the present case is derived from S. 189 of the Madras Estates Land Act (Madras Act I of 1908) and the jurisdiction of Civil Courts is by the same section taken away to the same extent to which it is granted to Revenue Courts. It would therefore seem clear that in regard to any matter in which Civil Courts ordinarily have jurisdiction they retain that jurisdiction unless it is acquired by the Revenue Courts and that the ordinary jurisdiction of the Civil Courts is now apportioned between the Civil and the Revenue Courts. It

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seems necessary to make this remark as in the course of the arguments before us it was suggested on the one hand and apprehended on the other that it may happen that neither the Civil Court nor the Revenue Courts might have jurisdiction to eject the defendants.

The question that arises before us now is whether the Revenue Courts have the jurisdiction to try a suit in which the above-referred to reliefs are sought.

S. 189 of the Estates Land Act gives jurisdiction to the Revenue Courts over all suits and applications of a nature specified in parts A and B of the schedule. Hence in order to determine whether the Revenue Courts have jurisdiction to try a suit of this nature we have to turn to the various items in the Schedule. The schedule refers to ejectment suits in items 17 and 19 of Part A corresponding to Ss. 151 (1) and 153 and items 9 and 27 of Part B corresponding to Ss. 43 (2) and 158 respectively. These sections refer to the nature of the land itself and to the tenant's rights therein. Ss. 151 and 153 and 48 refer respectively to suits for ejecting occupancy and non-occupancy ryots and S. 158 refers to a suit against a tenant of private land. It follows therefore that unless the plaintiff can make out that the defendant is either a ryot or a tenant of private land, he cannot establish his right to sue for ejectment in a Revenue Court.

It was argued before us that the use of the land for pasturage purposes itself makes it ryoti land. Ryoti land is defined in S. (3), so far as is at present material, as "cultivable land in an estate other than private land." Therefore, land must be cultivable before it can be termed ryoti land. It was argued that pasturage must be taken to be included in the term cultivation as used in the Madras Estates Land Act; but pasturage is something different from cultivation. Cultivation implies some kind of labour on the land generally consisting of breaking up the soil; whereas pasturage has reference to a particular mode of using the natural growth on the land without its being cultivated. Land used for pasture therefore cannot ord'narily be styled as cultivated land, and on the facts of this case it is clear that the land as a matter of fact is not cultivable. That the Legislature did not intend pasturage to be included in the term 'cultivation' as it is employed in the Madras Estates Land Act seems also to be indicated by a consideration of S. 6 clauses 1 and 4; the latter clause expressly provides that "admission to waste land under a contract for the pasturage of cattle........... shall not by itself confer upon the person so admitted a permanent

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Tyabji J.

right of occupancy." At the same time it is provided in S. 6 (1) that "every ryot in possession............of ryoti land not being old waste........... shall have a permanent right of occupancy in his holding." As the 4th sub-section of the same section provides that admission to waste land under contract for the pasturage of cattle ....does not by itself confer upon the person so admitted a permanent right of occupancy," it would appear that the legislature did not contemplate pasture land as being ryoti land. The tenant of such land equally does not come under the definition of a ryot in S. 3 (15) which requires the land to be ryoti land and to be held for the purpose of agriculture in order that the tenant may be termed a ryot. It was argued before us that this land falls within the definition of 'old waste' in S. 3 (7) and that therefore it must fall under the category of ryoti land. It is true that the expression "ryoti land not being old waste' in S. 6 and in other portions of the Act shows that 'old waste' may be ryoti land but there is nothing to show that all 'old waste' is ryoti land. 'Old waste' which is not cultivable and which consequently does not fall within S. 3 (16) cannot be styled ryoti land.

Finally it was not contended before us that this land was private land so as to make S. 153 applicable.

The question still remains to be considered whether the Revenue Courts have jurisdiction to try the suit so far as it relates to the recovery of mesne profits for Fasli years 1317 and 1318. What is described as mesne profits in the plaint is nothing else than the rent due under the Muchilikas which are now on the record before us. The section which gives to the Revenue Courts jurisdiction to order the recovery of arrears of rent by the landlord is S. 77—See schedule Part A, item 8. The word 'rent' in the section must be understood in the sense in which it is defined in S. 3 (11). It must therefore refer only to what is lawfully payable to a landlord for the use or occupation of the land in the estate for the purpose of agriculture. The land in this case, as already stated, has been used not for agriculture, but for pasturage. S. 77 therefore does not give the Revenue Courts jurisdiction to decree the recovery of arrears of rent claimed in the plaint.

For these reasons I agree in the order proposed by my learned brother.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Vakkiyil Puthan Veettil Kelu Nair and others. } *Appellants** (*Respondents Nos.* 1, 2 *and* 4 *to* 10.)

v.

Vakkiyil Puthan Veetil Meenakshi *alias* Ammu Amma and others. } *Respondents* (*Petitioners and Respondents Nos. 3 and 11 to 13.*)

C. P. C. Order XXI r. 2.—Certificate of satisfaction or adjustment—To be made to the Court whose duty it is to execute the decree—Court of the first instance and not the appellate Court—Relief of possession of immoveable property—Not within rule—Decree for possession on furnishing security—Possession given without security—Void—Compromise in appellate court—Decree not passed in terms of appeal but dismissed as withdrawn—Effect of.

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According to the Old Civil Procedure Code S. 258 and also according to Order 21 r. 2 of the new Civil Procedure Code, the certificate of payment or adjustment should be filed in the Court whose duty it is to execute the decree and as such Court is the Court of the first instance, a compromise petition reciting satisfaction of the decree filed in the appellate Court cannot be regarded as a sufficient compliance with the requirements of the section.

Birod Gosain v. Jainwati Koer[1] dissented from.

Where instead of a decree being passed in terms of a compromise, entered into pending an appeal the court records the petition and dismisses the appeal as withdrawn, the decree of the Lower court against which the appeal has been filed is left intact and can be executed.

Order XXI r. 2 (O.C.S. 258) does not apply to the relief of possession of immoveables given by a decree and therefore, evidence of delivery of possession can be given even after 90 days provided by art. 174 of the Limitation Act.

Where a decree directed that the adult plaintiffs should take possession only on furnishing security for the due protection of minor plaintiff's interests, the latter are entitled to treat possession delivered to the former without such security being furnished as altogether void against them and claim delivery of possession and mesne profits as if there was no such delivery.

A finding of fact by the appellate court in respect of the factum or validity of a compromise alleged to have been entered into pending the appeal is binding on the second appellate court and cannot be interfered with.

Appeal from the order of the District Court of South Malabar in A. S. No. 891 of 1910, preferred against the order of the Court of the Subordinate Judge of Palghat in E. P. No. 41 of 1910 in O. S. No. 25 of 1906; A. S. No. 82 of 1908.

*C. M. S. A. No. 47 of 1912. 30th October 1913.

1. (1912) 16 C. L. J. 174.

C. V. Ananthakrishna Aiyar for Appellants.

K. P. M. Menon for Respondents.

The court delivered the following

Judgment:—*Sadasiva Aiyar J.*—This is an appeal against an appellate order passed in execution proceedings. The appellants are defendants Nos 1, 2 and 4 to 9 and 11. The respondents are plaintiffs Nos. 4 and 5, the 3rd defendant and plaintiffs Nos. 1 to 3.

Plaintiffs Nos. 4 and 5 applied for execution on behalf of themselves and of plaintiffs Nos. 1 to 3 of a decree passed by the Subordinate Judge of Palghat in O. S. No. 25 of 1906. Plaintiffs Nos. 4 and 5 were minors when that suit was decreed in favor of themselves and in favor of plaintiffs Nos. 1 to 3. The plaintiffs Nos. 1 to 5 formed a Thavazhi having separate Thavazhi property but not divided from the common Tarwad of which the 1st defendant is the Karnavan. Plaintiffs Nos. 1 to 3 are senior in age to plaintiffs Nos. 4 and 5 who are females, plaintiffs Nos. 1 to 2 being male members of the Thavazhi. The objections taken by the defendants to the execution of the decree at the instance of the 4th and 5th plaintiffs may be summarised thus:—

(*a*) The Subordinate Judge's decree in O.S. No. 25 of 1906 now sought to be executed was set aside by a compromise petition, *exhibit* IV filed under S. 375 of the old Civil Procedure Code in the District Court of South Malabar, in which court Appeal No. 82 of 08 had been filed by the 1st Defendant against the decree of the Subordinate Judge of Palghat in O.S. No. 25 of 1906;

(*b*) Even if the Subordinate Judge's decree in O.S. No. 25 of 1905 was not set aside in appeal in the appeal Suit No. 82 of 1908 the decree was satisfied by the terms of the compromise petition, the said compromise having been sanctioned by the District Court on behalf of the minors under S. 462 of the old C.P.C.;

(*c*) The registered karars, Exhibits, I and II dated the 8th May 08, are also binding upon the plaintiffs including the minor plaintiffs.

These were the three contentions raised before the Subordinate Judge of Palghat in the present execution proceedings. The learned subordinate Judge accepted these contentions and dismissed the execution application with costs.

Plaintiffs Nos. 4 and 5 appealed to the District Court in A.S. No. 891 of 1910 against the Subordinate judge's above order dismissing their execution application. During the pendency of that

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appeal, the defendants put in a petition, No. 454 of 1911 in the District Court, alleging that the execution appeal No. 891 of 1910 had been compromised by a registered Sammatha pathram executed by the plaintiffs Nos. 4 and 5 on the 27th September 1911 (See Exhibit A. and M. P. No. 454 of 1911) and that in accordance with that Sammatha pathram, the execution appeal No. 891 of 1910 ought to be dismissed. The plaintiffs Nos. 4 and 5 contended in the District Court that the registered Sammatha pathram, Ex. A. was forced from them by the 2nd defendant, that the 5th plaintiff who was still a minor, was fraudulently mentioned in it as a major and that Ex. A. therefore was invalid.

The learned District Judge upheld the contention of plaintiffs Nos. 4 and 5 that the Sammatha pathram Ex. A. was not binding upon plaintiffs Nos. 4 and 5, both on the ground that Ex. A. was not voluntarily executed by plaintiffs Nos. 4 and 5 and also on the ground that the 5th plaintiff was a minor when she executed the document. Now it has been held in *Appasami Nayakan* v. *Varadachari*[1] that when a compromise under S. 375 is alleged by one party to have taken place and it is denied by the opposite party an issue should be framed by the court on that question and preliminarily decided. We might take it that in the petition No. 454 of 1911 filed by the defendants, such an issue was framed and that it was decided against the defendants by the District Court on its finding that Ex. A. was not voluntarily executed and that the 5th plaintiff was a minor when she executed it. Though I cannot say that the District Judge's findings are quite statisfactory, the learned Judge was entitled to come to those findings of fact on the evidence before him and we cannot interfere with those findings of fact in second appeal. On three other questions arising in the execution appeal No. 891 of 1910 before him the learned District Judge held in favour of plaintiffs Nos. 4 and 5. His conclusions on those questions are (a) that the compromise petition Exhibit IV filed in A.S. No. 83 of 08 did not nullify the decree in O.S. No. 25 of 1906 as the District Court did not sanction the compromise on behalf of the minors (plaintiffs Nos. 4 and 5), (b) that the decree in O.S. No. 25 of 06 was, on the other hand, affirmed by the District court by the decision in A. S. No. 82 of 08 in the appeal connected with which (A. S. No. 83 of 08.) the compromise petition, exhibit IV, was filed and that, therefore, the decree in O.S. No. 25 of 06 has remained in full force even after that compromise petition, and (c) that the decree of the Subordinate Judge which was so affirmed could not be treated as satisfied as there

1 (1896) I. L. R. 19 M. 419.

was ' no petition recorded satisfying the decree" and no " satisfaction certified within ninety days " of the Karar, Exhibit I, under article 174 of the Limitation Act and Order 21 Rule 2 of the Civil Procedure Code (old S. 258). See paragraph .No. 2 of the learned District Judge's decision in (A.S. No. 891 of 1910). As regards still another fourth question whether the Karar, Exhibit I, was beneficial to the minors or was entered into in fraud of the minors, the learned District Judge held that it was unnecessary to give any finding. Having thus decided the 1st three questions in favour of the plaintiffs and also decided on the preliminary question that the Sammatha pathram, Exhibit A. was not binding on plaintiffs Nos. 4 and 5, the learned District Judge reversed the order of the Subordinate Judge which dismissed the execution application of the plaintiffs Nos. 4 and 5 and the learned District Judge allowed execution as prayed for. Before us, the appellants contended (1) that the petition Exhibit IV, filed in the District court in A.S. No. 83 of 08 should be taken as a certificate of satisfaction filed in O.S. No. 25 of 06 by the plaintiffs. (2) that the decree in O.S. No, 25 of 06 was set aside by the compromise petition Exhibit IV and a new decree in terms of the compromise was substituted for that decree in appeal,(3) that the compromise under Karars Exhibits I and II was binding on the plaintiffs even without the Court's sanction, (8) that order 21 Rule 2 (O.C.S. 258) did not apply to the relief of possession of immoveables given by a decree and no certificate of satisfaction under that section was therefore required as regards that relief, and (5) that therefore in any event, so far as regards the appellants' contention that the plaintift's Thavazhi had been given possession of the lands at the time of Ex. I, II and IV, the lower court ought to have given a finding after allowing the appellants to give evidence therein, that question being one under S. 244 old code (47 of the New Code) and not one falling under. S. 258 (old code) (O. XXI N.C).

I shall take these 5 contentions in order. The first contention is that Exhibit IV should be taken as a certificate of satisfaction filed in O. S. No. 25 of 1906. It is to be remarked that according to the old Civil Procedure Code section 258 and also, according to O. 21 R. 2 of the new Civil Procedure Code, the certificate of payment of adjustment should be filed *in the court whose duty it is to execute the decree.* Exhibit IV in this case was filed, not in the subordinate Judge's Court of Palghat whose duty it was to execute the decree in O.S. No. 25 of 1906, but it was filed in the District Court of South Malabar at Calicut. Further, it was not filed

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even in the District Court of South Malabar in the A. S. No. 82 of 08, which was the appeal filed against the decree in O.S. No. 25 of 1906 but in a connected appeal No. 83 of 1908. Again, t is difficult to hold that the filing of a compromise petition under S. 375 (old Civil Procedure Code) might be treated as the filing of the certificate of satisfaction under S. 258. Even if it could be so held and even if the filing of the petition in A.S. No. 83 of 1908 be treated as equivalent to its being filed in A.S. No. 82 of 1908, it seems to me impossible to hold that the filing of a certificate of satisfaction in the wrong court and the getting of an order "Recorded" from the wrong court could be treated as legally valid. The Court whose duty it was to execute the decree in O.S. No. 25 of 1906 was the subordinate Judge's Court of Palghat and not the District Court of South Malabar at Calicut. I express no opinion as to whether the District Court of Calicut has the power to execute that decree, but I am clear that it was not the court *whose duty* it was to execute the decree. Reliance is placed by the appellant's learned Vakil on the case of *Birod Gosain* v. *Jainwati Koer*[1] where it was held that the filing of a compromise petition in the appellate Court might be treated as the filing of a certificate of satisfaction in the Court of first instance. With the greatest respect I find myself unable to follow that decision.

The second contention is that, though the District Court of Calicut, when the compromise petition, Exhibit IV, was filed before it merely recorded it and did not pass a decree in accordance with its terms, still it should be held to have passed such a decree superseding the decree passed by the Palghat Subordinate Judge in O. S. No. 25 of 1906. I think that this contention also must be rejected. Exhibit IV does not pray the District Court to pass a new decree in terms of the compromise superseding the decree of the Palghat Sub Court; on the other hand, it prays for an order that the appeal No. 82 of 1908 be struck off the file of the District Court as withdrawn. The District Court dismissed the appeal accordingly by a separate order, separate from the order which recorded the petition. It seems to me impossible to hold that by the mere filing of a compromise petition Exhibit IV, the Subordinate Judge's decree in O.S. No. 25 of 1906 was superseded by a fresh decree or was set aside by the compromise petition itself.

The third contention is that the family Karars Exhibit 1 dated the 8th May 1908 and Exhibit II, which were entered into between the members of the Tarwad, are binding on the Plaintiff's Nos. 4

1. (1912) 16. C. L. J. 174.

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and 5 even without the Court's sanction and that by those karars the decree in O.S. No. 25 of 1906 was satisfied. Before considering the question as to whether the terms of these alleged family arrangements could be treated as a legal satisfaction of the reliefs awarded by the decree, the court has to decide first whether the compromise was a *bona fide* compromise. That question has not been gone into by the Lower Courts. If it is found on evidence that Exhibits I and II are *bona fide* compromises binding on all the members of the tarwad including plaintiffs Nos. 4 and 5, the next question will be whether they could legally operate as a satisfaction of all the reliefs or only of some of the reliefs given by the decree in O.S. No. 25 of 06. Reserving then this third contention, I shall pass on to the fourth.

The fourth contention is that order XXI Rule 2 (O.C.S. 258) did not apply to the relief of possession of immoveables given by the decree and no certificate of satisfaction under that section was required and that therefore the lower Court ought to have taken evidence as to whether possession was really given to the plaintiff's Thavazhi of the plaint lands in 1908. If the decree in O.S.No. 25 of 06 does not prohibit the major plaintiffs from taking possession from the defendants and does not prohibit the defendants from giving possession of the decreed lands to the major plaintiffs on behalf of the plaintiff's Thavazhi, except under certain conditions, there can be no doubt that the above contention must be given effect to. In *Sankaran Nambiar* v. *Kanara Kurup*[1] it was held that S. 258 of the Civil Procedure Code refers only to the execution of the decrees under which money is payable and is not applicable to decrees for possession of immoveable property and that under S. 244 the Court has general authority to make orders determining the questions which arise between the parties to the suit and relating to the satisfaction of the decree. Though, as regards mortgage decrees, there was a conflict of decisions as to whether payments in satisfaction should be certified or not before the executing court could recognise them (even that question was set at rest for Madras by *Vaidya Nadhaswami* v. *Somasundaram Pillai*[2]) that question was also set at rest for the whole of India by the change of language introduced by O. XXI R. 2. The decision in I. L. R 22 M. 182, in which it was held that so far as the decree was one for possession of immoveables, the question whether satisfaction of the decreed relief had been given out of court to the decree holder can be gone into under S. 244 notwithstanding the absence of a certificate of satisfaction,

1. (1898) I. L. R. 22 M. 182. 2. (1904) I. L. R. 28 M. 473.

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has not been dissented from in any later case. As the defendants in this case have raised the. plea that they did give possession to plaintiff's Thavazhi of the lands in the year 1908 itself and as if they could be allowed to prove such delivery of possesion, the plaintiffs Nos. 4 and 5 cannot claim mesne profits under the decree for the years from the date of such delivery of possession, it would have been necessary before disposing of this appeal to obtain a finding from theLower appellate Court on the question whether and when the property, possession of which was decreed to the plaintiff's Thavazhi by the decree in O.S. No. 25 of 06, was given to the plaintiff's Thavazhi if (as I said before) the decree in O.S.No. 25 of 06 permitted the major plaintiffs to obtain possession of the decreed lands without the sanction or intervention of the Court. We are asked by the appellant's learned Vakil to ask the lower Courts to submit findings on the question above referred to and on the other question whether the Karars I and II are binding on the plaintiffs' Thavazhi and on plaintiffs Nos. 4 and 5, but I think that such findings are unnecessary for the disposal of this execution appeal. As regards the family Karars I and II, those Karars, if valid as an adjustment of the decree, are not binding *in execution* as an adjustment of that portion of the decree which directs payments of moneys, as such adjustment was not certified under S. 258 (O.C.) and cannot by the *executing Court* be recognised so far as the payment of money due under the decree is concerned.

Even as regards the relief for delivery of possession of lands given by the decree I find on a perusal of the decree in O. S. No. 25 of 06, that the Subordinate Judge's court of Palghat gave the following express direction in that decree. "It is further ordered and decreed that plaintiffs 1, 2 and 6 *shall not take out execution unless they furnish good security to protect the interest of the minors*" i.e. (plaintiffs Nos. 3,4 and 5 in the case). This direction in the decree must also be held to have remained in force as the District Court of Calicut dismissed the appeal No. 82 of 08 wholly. If plaintiffs Nos. 1, 2 and 6 are not entitled to take out execution even for delivery of possession of immoveable property without furnishing good security to protect the interest of the minor plaintiff, (and this direction given in the interest of the minor plaintiff must have been known to the defendants and is clearly on them also), I think that any possession given to the major plaintiff on behalf of the plaintiff's. Thavazhi without their having so furnished security must be deemed by the executing Court to be wholly invalid as contravening the express directions of the decree and as a fraud on the

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minor plaintiff. In the result, I think we must dismiss this appeal. I may be permitted to express my surprise at the very slipshod manner in which the parties and their several legal advisers in the lower Courts have acted from May 08 in the several proceedings which took place in the lower Courts. In view of that circumstance which has introduced almost hopeless complications and perplexities in the execution proceedings, I would make no order as to costs of this appeal.

Spencer J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS..

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer

Ponnuswami Pillai died and others ... *Petitioners** *Respondents.*

v.

Chokkalingam ... ... *Respondent.* *Plaintiff.*

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lingam

Criminal Procedure Code S. 476—Judicial proceeding—Execution proceedings—Action taken long after termination.

Execution proceedings are judicial proceedings within the meaning of S. 476. Cr. Pr. Code. *Haracharan Mukherji v. King Emperor* [1] dissented from), and therefore, action taken under the section in respect of an offence under S. 186 I. P. C brought to the notice of the Court in the course of an execution proceeding long after the termination of that proceeding is illegal. *Ayakannu Pillai v. King Emperor*[2] followed.

In the particular case the Munsiff having taken action under S. 476 on the application of the decree-holder for sanction. their Lordships while setting aside proceedings under S. 476 granted sanction to the decree holder to prosecute the accused.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the procedings of the Court of the District Munsif of Shiyali in E. A No. 594 of 1911.

R. Kuppusami Aiyar for Petitioners.

A. Venkatrayaliah for Respondent.

The Court delivered the following

Judgment :—The District Munsif had the alleged offence under S. 186, Indian Penal Code, brought to his notice in the Course of the execution case No. 166 of 1911. He got such notice on the 18th July 1911.

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*C. R. P. No. 38 of 1912. 23rd October 1913.

1. (1905) I. L. R. 32 C. 367 2. (1908) I. L. R. 32 M. 149.

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Execution proceedings are Judicial Proceedings; see *Sheik Bahadur* v. *Eradatill Mellich* [1]. We do not agree with the ruling in *Hara Charan Mukerjee* v. *King Emperor*[2] to the contrary. Execution case No. 166 came to an end on the 27th July 1911 when it was dismissed. The learned District Munsif took action under S. 476 of the Crl. P. Code on the 25th November 1911 in the course of a different judicial proceeding, namely, on an application (C. P. No. 594 of 1911) by the decree holder for grant of sanction to prosecute Counter-Petioners.. We think that under the Full Bench ruling in *Aiyakannu Pillai* v. *Emperor*[3], the District Munsif's order under S. 476. Crl. Procedure Code is illegal and should be set aside.

We think that, as a Court of Revision, we have power to pass the order—the proper order which the District Munsif ought to have made. We therefore pass the proper order, namely, granting sanction to the decree-holder to prosecute the 2nd and 3rd petitioners (the first petitioner having died) for the offence under S. 186 of the Indian Penal Code alleged to have been committed by them.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH]

Present:—Sir Charles Arnold White, Kt., Chief Justice and Mr. Justice Ayling and Mr. Justice Oldfield.

John Howe ... ... *Petitioner.**

v.

Charlotte Howe... ... ... *Respondent.*

Evidence—Legitimacy—Divorce proceedings—Adultery—Alleged adulterer not joined—Court has no power to add co-respondent without directing amendment of petition—Evidence of husband to prove non-access—Evidence Act, Ss. 118 and 120—English Common Law—Child born in wedlock 11 months after marital intercourse ceased—Whether child legitimate—Evidence Act, S. 112—Evidence relevant under.

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Where in proceedings for divorce on the ground of adultery, the petitioner (husband) did not make any person a party to the proceedings as co-respondent but the judge on his own initiative made one A a co-respondent: *Held* that the Judge was wrong in adding the party without directing amendment of the petition, so that the allegation against the co-respondent might be stated therein.

Under the English Common Law neither the husband nor the wife could give evidence of non-access during marriage..

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* R. C. No. 14 of 1912. 7th August 1913.

1. (1910) 12 J. L. C. 45. 2. (1905) I. L. R. 32 C. 367.

3. (1908) I. L. R. 32 M. 49.

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In India on the other hand Ss. 118 and 120 of the Evidence Act make them competent witnesses in all civil proceedings and for all purposes.

In this case it was found that there was no marital intercourse between the petitioner and the respondent for 11 months prior to the birth of the child—Held that the child was illegitimate.

Courts can act upon the opinion of experts contained in treatises as regards the question whether the child could or could not be begotten immediately before the date when the marital intercourse between the parties ceased.

Quaere if evidence as to the relations between the parties or evidence which pointed to immorality on the part of the mother, or evidence of a long interval since the birth of a previous child would be relevant under Sec. 112 Evidence Act, under which the only question would seem to be whether the child could or could not have been begotten immediately before the marital intercourse which the law presumes, in fact ceased.

T. Alexander—Co-Respondent (in the District Court, name struck out as per order contained in the judgment herein).

Case stated under S. 14 Act IV of 1869 by the District Judge of South Malabar in C. M. P. No. 206 of 1911.

J. C. Adam, amicus curiae for Petitioner.

C. Pattabhirama Aiyangar for Respondent.

The Court delivered the following

Judgment:—This case comes before us, under S. 17 of the Indian Divorce Act for confirmation of a decree for a dissolution of marriage made by a District Judge.

The petitioner alleged in his petition to the District Judge that the respondent had been living in adultery in his (the petitioner's) house and that she admitted that she was living the life of a prostitute. He also alleged that he did not know any of the persons with whom adultery had been committed and asked to be excused from making the alleged adulterors, co-respondents.

In the course of the proceedings the learned judge on his own initiative made an order making one Alexander a co-respondent. In view of the terms of the petition, and in the absence of any application by the petitioner we do not think the learned judge was called on to do this. In our opinion he was certainly in error in not directing the amendment of the petition so that the allegations against the co-respondent might be stated therein. As the petition stands it contains no allegations against the co-respondent. An order for substituted service of "notice" on Alexander was made, but he did not appear.

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In this state of things we think the best course to adopt is that suggested by Mr. J. C. Adam who at our request, appeared to support the decree *i.e.* to strike out Alexander's name and deal with the case as if he had not been made a co-respondent.

In paragraph 8 of his petition, the petitioner with reference to his allegation that the respondent had been leading the life of a prostitute, asked to be excused from making any of the alleged adulterors co-respondents. He did not make any special application under S. 11 of the Act, and no order under the section was made by the court. The effect of the absence of any formal order does not seem to us, in the circumstances of this case, to be a matter which we need consider, since we are unable to agree with the learned judge in his findings with reference to the allegations in paragraphs 6 and 7 of the petition.

During the pendency of the proceedings the respondent gave birth to a child. The case for the petitioner was that this child was born some 11 months after he had ceased to have marital intercourse with the respondent. He relied on the birth of this child as evidence of adultery. Here again the petition ought to have been amended. It is quite clear, however, that the respondent was in no way prejudiced or embarassed in her defence by the fact that there was no amendment. The child was born on February 8th, 1912. The petitioner and his witnesses were examined on April 18th, 1912. They were not cross-examined on behalf of the respondent till September 24th 1912. The respondent's witnesses were examined and cross-examined on that date. The explanation of the delay would seem to be (in part at any rate,) that when the suit came on for hearing in the first instance in April 1912 the respondent did not appear. On March 21st 1912 she had applied for a fortnight's adjournment and produced a medical certificate. She stated that she desired to defend the case. The case would seem to have been adjourned till April 18th. On that day the respondent did not appear and made an application for a further adjournment. The suit proceeded on April 18th as an undefended suit and, after the the evidence of the petitioner and of 5 witnesses called on his behalf had been heard, was adjourned. Subsequently an order was made (we are told with the consent of the petitioner) that the respondent should be allowed to defend the suit. One thing is clear and that is that the respondent had ample notice of the case made against her in connection with the birth of the child. Her case was that marital intercourse took place between the petitioner and

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herself during March, April and May 1911 and that the petitioner was the father of the child.

Their Lordships then considered the evidence as to adultery and concluded as follows:—

Although the evidence called on behalf of the petitioner in our opinion does not establish adultery by the respondent prior to March 1911, it shows that she was a woman of loose habits and that her house was visited by men in the absence of her husband and against his wishes.

As regards the birth of the child, two questions arise—first, are the petitioner and respondent competent witnesses; secondly, if they are, are we warranted in holding, on the evidence taken as a whole, that the child is illegitimate?. The general rule of the English Common Law that evidence of non-access by the husband is inadmissible for the purpose of proving illegitimacy is quite clear. In England the Evidence Act of 1851 and the Evidence Amendment Act of 1853 left the parties to suits for divorce incompetent to give evidence. In 1857, when the English Divorce Act was passed, doubts were caused as to how far the old doctrines of the common law in relation to the competency of witnesses were to be recognised in the Divorce Court. It was accordingly enacted by the Evidence Further Amendment Acts of 1869 that the parties to any proceeding instituted in consequence of adultery and the husbands and wives of such parties should be competent to give evidence in such proceeding (Taylor on Evidence, Edition 10 Vol. II paragraph 962, 963). The effect of this enactment is to make the parties to divorce proceedings competent to give evidence. It does not in terms abrogate so far as divorce proceedings are concerned, the rule of the common law that "Neither husband nor wife can be examined for the purpose of proving non-access during marriage." See *R v. Inhabitants of Souerton*[1]. The judgment in *Guardian of Nottingham* v. *Tomkinson*[2] would seem to proceed on the assumption that in divorce proceedings instituted in consequence of adultery the evidence of the husband is admissible to prove non-access. In *Burnaby* v. *Baillie*[3] *North* J. declining to follow *In re Yearwoods Trust*[4] held that evidence of the husband *after the dissolution of the marriage* was not admissible to prove the illegitimacy of a child born in wedlock. In *Pryor* v. *Pryor*[5] on a petition for variation of settlements after a decree for dissolution of marriage by

1. (1836) 5 Ad. and E. 180 s.c. 111 E.R. 1134. 2. (1879) 4 C. P. D. 343.
3. (1889) 42 Ch. D. 282. 4. (1877) 5 Ch. D. 545.
5. (1887) 12 Pro. 165.

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reason of the wife's adultery, where a child had been born between the date of the decree nisi and decree absolute, and fourteen months after the wife had eloped from her husband the Court refused to transfer funds in settlement to the parties free from the trusts of the settlement and also refused to order an inquiry into the legitimacy of the child. I would however observe that the decree was founded on the petitioner's evidence, which it was not admissible to bastardize the child. We have not been able to find any English case where in a suit to divorce in which the husband relied on the birth of a child, which he alleged to be not his, as proof of adultery, the evidence of the husband as to non-access was tendered and extended.

We do not propose to discuss further the law of England, since we are of opinion that under the law of this country the evidence of the petitioner as to non-access is admissible. We do not think it has ever been suggested that, at any rate, since the passing of the Indian Evidence Act, 1872, parties to proceedings under the Indian Divorce Act 1869 are not competent witnesses. In England the disabilities of parties as witnesses have been removed piecemeal by a series of legislative enactments. In India we have the enabling enactment in S. 118 of the Evidence Act, that all persons are competent to testify, unless the Court considers they are prevented from understanding the questions put to them or from giving rational answers. We have the further enactment in S. 120 that in all Civil proceedings the parties to the suit, and the husband or wife of any party shall be competent witnesses.

It does not of course follow that, because the husband is a competent witness in divorce proceedings, his competency is not subject to the rule of the English common law as to evidence by him of non-access; assuming the rule would in England be held applicable in a case like the present. We think, however, the effect of S. 118 is to make the husband a witness for all purposes. In Ameer Ali and Woodroffe on the Law of Evidence the learned authors observe (Ed. 2 p. 771), after stating the English rule, that no such rule is to be found in or implied from the Evidence Act and in *Rozario* v. *Ingles*[1] the Bombay High Court took the view that the question was governed by S. 118 of the Evidence Act.

There remains the question what should be our finding of fact on the question whether the child born to the respondent in February 8, 1912 was the child of the petitioner or the result of some adulterous connection.

1. (1893) I. L. R. 18 B. 468.

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The petitioner would seem to have given his evidence candidly and honestly and without any desire to exaggerate. We believe his statement that there was no marital intercourse between him and the respondent after March 11, 1911. The respondent stated that there was marital intercourse between her and the petitioner at Malaparamba from March 4th 1911. (She appears to have meant March 11th. That is the date given in her letter (Exhibit N) which agrees with the petitioner's evidence after the petitioner had left her and gone to Malaparamba until the end of May). Her evidence is quite inconsistent with her letter of May 7th written to the petitioner's Vakil (Ex. N) and with her letter of May 30th 1911 to the petitioner's employers (Ex. L). The learned judge observed that the evidence of the respondent compared very unfavourably with the straightforward evidence of the petitioner. The petitioner's evidence is corroborated by the evidence as to the relations between the parties when he left the house at Calicut on March 11th and also by the evidence of a witness Muhammad Ghose, called by the respondent, who stated that the respondent was in bed for 3 or 4 weeks after the petitioner left for Malaparamba, and that when the respondent went to Malaparamba she was pushed by the petitioner and not allowed to go inside the bungalow. We disbelieve the respondent's evidence on this question.

We hold it proved by admissible evidence that no matrimonial intercourse took place after March 11th 1911 between the petitioner and the respondent. The case for the respondent was that the child was begotten by the petitioner after he left her and went to live at the Malaparamba house. As we disbelieve this evidence, it seems at least doubtful whether we are called upon to consider whether the child could have been begotten by the petitioner before March 11th. Having regard however, to the language of S. 112 of the Evidence Act, it may be that it is necessary to deal with this question.

If the petitioner was the father of the child, the period of gestation must have been 333 or 334 days. In the print of the judgment the period is stated to be 344 days. If the learned Judge said this, it would appear to be inaccurate.

A period of 333 days would be altogether abnormal. The opinions of the judicial authorities are cited in the judgment of the

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Allahabad High Court in *Tikam Singh* v. *Dhan Kunwar*[1]. It would seem that it may be regarded as proved that the period may be 296 days and that most authorities agree that the interval may be as long as 308 days. The period fixed by the Legislature for the purposes of S. 112 of the Evidenee Act is 280 days.

There may be some doubt whether in view of the language of S. 112, evidence as to the relations between the parties or evidence which pointed to immorality on the part of the mother, or evidence of a long interval since the birth of a previous child is relevant to the question we are now dealing with, though these matters were taken into consideration in the Allahabad case to which we have referred. Under the law of England the matter is one of presumption which may be rebutted (See *Morris* v. *Davies*[2]). Under the Evidence Act the fact that a child was born during the continuance of a valid marriage is conclusive proof of legitimacy, unless it can be shown that the parties had no access to each other at any time *when the child* could have been begotten. It may be said that the considerations to which we have referred are irrelevant as regards the question whether the child could or could not have been begotten prior to March 11th. Under the section it would seem that we have to decide whether the child could or could not have been begotten immediately before the date when the marital intercourse, which the law presumes, between the petitioner and the respondent, in fact ceased. With regard to this we are of opinion that, although there was no expert evidence in the court below, we are entitled under S. 60 of the Evidence Act to consider and act upon the opinions of experts contained in the treatises to which we have referred. We are prepared to hold that it has been shown in this case that there was no access by the petitioner at any time during which the child could have been begotten. The decree is confirmed.

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1. (1902) I. L. R. 24 A. 445.   2. 5 Cl. and F. 163.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Tyabji.

Chella Narasiah ... ... *Petitioner (Decree holder in O. S. No 464 of 1910.*

v.

Sontan Obbayya ... ... *Respondent (Petitioner).*

Civil Procedure Code (Act V of 1908) S. 73—Rateable Distribution—Conditions of—Application for execution, before receipt of assets and to the Court in receipt of assets—Court of District Munsif—Small Cause side, not same court as Original.

Narasiah v. Obbayya

In order to entitle a party to rateable distribution

(i) There must be an application for execution at his instance pending.

(ii) The application must have been made before the receipt of assets.

(iii) The decree of the applicant must either have been passed by the same court which has received the assets or there must have been a transfer of the decree to that Court.

The Court of the District Munsif in the exercise of his Small Cause jurisdiction is not the same Court as his Court in his Ordinary jurisdiction.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the order of Court of the District Munsif of Cuddappah in E. P. No. 1 of 1911 dated the 24th February 1911.

V. C. Seshachariar for Petitioners.

Respondent unrepresented.

The Court delivered the following

Judgment :—I will assume that the District Munsif was right in holding that the respondent's application before him, dated 18th January 1911 was an execution petition, satisfying the requirements of Order XXI rule 11 Cl. (1).

It seems to me however that the District Munsif could not in that case make an order for rateable distribution under S. 73 of the Civil Procedure Code.

He has omitted to notice that an order for rateable distribution under that section can be made only in favour of one ' who prior to the receipt of the assets in Court has applied to the Court for execution of his decree. In this case the assets were received in Court (at the instance of the present petitioners), on the 9th January 1911. The application for rateable distribution by the present respondent

* C. R. P. No. 568 of 1911. 29th October 1913.

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was not made till the 18th January 1911. See *Krishnasankar* v. *Chandrasankhar*[1], *Bejoy Singh Dhuduria* v. *Hukum Chand*[2], *Durga Churn Rai Chowdhury* v. *Manomani Dasi*[3]. These decisions were given under the Act of 1882 but the Act of 1908 has made no material alteration on this point.

Again an application for rateable distribution cannot be made unless the assets are received by the same Court as that to which the application is made. *Krishna Sankhar* v. *Chandrasankhar*[4]. The decree of the applicant for rateable distribution must either have been passed by the same Court which has received the assets sought to be rateably distributed or if that Court has not initially passed the decree then there must be a transfer of the decree to that Court; *Muttaligiri* v. *Muttayyar*[5], *Nimbaji Tulariram* v. *Vadia Venkati*[6]. In this case the assets were held by the Court of the District Munsif in his ordinary jurisdiction; and the applicant for rateable distribution had a decree in his favour passed by the District Munsif in exercise of his jurisdiction as a Small Cause Court. In such a case the two decrees have been considered to be passed by two distinct Courts. The Small Cause Court Judge in his more limited jurisdiction on the one hand, and in his larger jurisdiction (of Munsif) on the other fills two distinctly different judicial characters." *Himalaya Bank* v. *Hurst*[7].

The order of the Lower Court is reversed and the petition is allowed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Tyabji.

Adityam Iyer ... ... *Appellant** (*1st Deft.*)

v.

Ramakrishna Aiyar and others ... *Respondents* (*Plaintiff and Defendants Nos. 2 to 4.*

Evidence Act S. 92—Sale—Price—One of the terms—Evidence to show, price higher or lower, inadmissible.

Provision as to price is one of the terms of a sale and evidence cannot be given to show that the price agreed upon is higher or lower than that stated in the sale deed.

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*S. A. No. 1385 of 1912. 19th September 1913.

1. (1880) I. L. R. 5 B. 198.
2. (1902) I. L. R. 29 C. 548, 553.
3. (1888) I. L. R. 15 C. 771.
4. (1880) I. L. R. 5 B. 198.
5. (1883) I. L. R. 6 M. 357.
6. (1892) I. L. R. 16 B. 683.
7. (1881) I. L. R. 3 A. 710 at 712.

Adityam Iyer v. Ramakrishna Aiyar

Second appeal from the decree of the District Court of Trichinopoly in A. S. No. 101 of 1911 preferred against the decree of the Court of the Subordinate Judge, Trichinopoly in O. S. No. 37 of 1910.

T. R. Ramachandra Aiyar for Appellant.

T. V. Seshagiri Aiyar for Respondent.

T. R. Ramachandra Aiyar.—The sole question is whether the Defendant appellant could or could not prove the agreement between himself and the plaintiff in that the plaintiff agreed to return the plaint mortgage deed for Rs. 1000 cancelled on his getting possession of the lands sold by the defendant to him which were in the possession of a mortgagee from the defendant. No doubt the sale deeds recited the consideration only as Rs. 35,000 and not as Rs. 36,000. Sec. 92 of the Evidence Act only says that the terms of the contract grant disposition etc., cannot be added to, varied or contradicted by oral agreement. The agreement set up by the defendant is not obnoxious to the provisions of S. 92. "Consideration" is not a term of the contract grant or other disposition; See *Probat Chandra Gangupadhya* v. *Chirag Ali*[1]; also Ameer Ali on Evidence Act at p. 563 (5th Edn.) Decided cases have gone to the length of saying that Sec. 92 cannot prevent a party from showing that either there was no consideration or that the consideration was different from that stated in the deed. *Hukumchund* v. *Hira Lal*[2] and *Vasudeva* v. *Narasamma*[3] are quoted with approval in *Kumara* v. *Srinivasa*[4]. All the High Courts are agreed on this point. See *Gopal Singh* v. *Laloo Lal*[5] per *Mukerjee* J. and the several cases cited therein. Evidence regarding the exact nature or amount of consideration relates only to matters of detail. Cf. S. 89 of the Contract Act. As to the scope of S. 92 of the Evidence Act, see *Sah Lalchand* v. *Indarjit*[6] which went on appeal from *Indargit* v. *Laljit*[7]. *Ram Baksh* v. *Durgadu*[8] cited in the latter case is a very strong case. *Clifford* v. *Turrel*[9] clearly lays down this, where the deed was stated to be for valuable consideration, proof was admitted that the pecuniary consideration was larger than that stated in the deed." This case is cited with approval by the Judicial Committee of the Privy Council in *Frith* v. *Frith*[10]. See also Halsbury's Laws of England Vol. XIII p. 567 where 50

1. (1906) I. L. R. 33 C. 607 at 611.
2. (1876) I. L. R. 3 B. 159.
3. (1889) I. L. R. 5 M. 6.
4. (1887) I. L. R. 11 M. 213 at 215.
5. (1909) 10 C. L. J. 27 at 29.
6. (1900) I. L. R. 22 A. 370 P. C.
7. (1895) I. L. R. 18 A. 169.
8. (1887) I. L. R. 9 A. 392.
9. (1841) 1 Y. and C. 138 on appeal (1845) 9 Jurist 633.
10. (1906) A. C. p. 254 at 258 & 259.

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L. T. 424 is also cited as laying down the same law. See also L. P. A. 139 of 1913 of this Court where the actual decision is that consideration may be proved to be larger. See also Norton on Deeds p. 203. Further S. 92 does not prevent a party from proving that a sale is really a gift and that no consideration was intended to pass between the parties *Hanif-unnissa* v. *Faiz-unnissa*[1] Ameer Ali's Evidence Act p. 580.

T. V. Seshagiri Aiyar contended that the agreement is inadmissible under S. 92 unless the case comes under any of the provisos. The section clearly prevents the proof of such agreement. The observations of *Mukerji* J. in *Gopal Singh* v. *Laloo Lal*[2] really support respondent's contention. See also *Balkishen Das* v. *Legge*[3]. The cases cited were not really against the provisions of S. 92. Some cases dealt with mere matters of detail as to consideration such as the mode in which it was paid etc., and others were cases where there was want of consideration. See also 1913 M. W. N. 650 at 652. The English law may be different from the Indian law. See *Balkishen Das* v. *Legge*[3]. The only Indian case approaching the point is *Cowesjee* v. *Burjorjee*[4].

T. R. Ramachandra Aiyar replied.

The Court delivered the following

Judgment:—The suit out of which this second appeal arises was brought by the 1st Respondent (Plaintiff) on a hypothecation bond for Rs. 1000 (Exhibit III) executed in his favor by the appellant (1st defendant) on the 27th September 1905. The defence set up was discharge. It was contended that the discharge of the suit bond was part consideration for the sale of certain other lands by the appellant to the 1st respondent on the 4th September 1907, which is evidenced by two registered sale deeds (Exhibits I and II) for Rs. 29,000 and Rs. 6,000 respectively. The discharge of Exhibit III is not mentioned in Exhibits I and II, but it is stated that there was a contemporaneous oral agreement that the sale price was to be Rs. 36,000 and not Rs. 35,000 as stated therein, the difference being found in the discharge of Exhibit III. This is how the 1st defendant himself expresses it in his statement.

"The bond (Exhibit III) has been discharged. I have executed to this very plaintiff, a sale deed for Rs. 36,000—on one and the same date, I executed a sale deed for Rs. 29,000—and another sale deed for Rs. 6,000—I executed on 4th September 1907. Without

1. (1911) I. L. R. 33 A. 340 (P. C.)
2. (1909) 10 C. L. J. 27.
3. (1899) I. L. R. 22 A. 149 (P. C.)
4. (1888) I. L. R. 12 B. 335, 340.

including the amount of the plaint bond, I executed for Rs. 35,000. In the aforesaid sale deeds the plaint Rs. 1,000—debt was not included settling Rs. 36,000—(as price) the sale deeds were executed for Rs. 35,000—Even at the time of the execution of these two sale-deeds, the understanding was that this amount of Rs. 1,000 should not be included, and that subsequent to his coming into possession of the lands sold, endorsement of payment of this sum of Rs. 1,000 should be made in the plaint bond and (the bond) should be returned to me." Both the Lower Courts have held that evidence of this oral agreement regarding the discharge of Exhibit III is excluded by S. 92 of the Indian Evidence Act. The only question for disposal is whether they are right.

In our opinion, the agreement set up cannot be brought under any of the provisos to S. 92 of the Indian Evidence Act. At a late stage of the argument the learned Vakil for the appellant suggested that it might be covered by proviso 2 : but a careful consideration of the appellant's own statement above quoted will show that this cannot be so. The appellant admits that the alleged agreement was one affecting the sale price of the lands. It provided that the price should be fixed at Rs, 36,000—although only Rs. 35,000—was to be shown in the sale deeds. Therefore the separate oral agreement was not "as to a matter on which the document was silent," but as to the sale price, which is specifically provided for in the document. It is also clearly inconsistent with the provisions in the document regarding the sale price.

The main contention however, which Mr. Ramachandra Aiyar argued at great length, is that the case does not fall within the scope of S. 92 of the Indian Evidence Act. His argument really amounts to this—that the sale price is not one of the terms of a sale deed and that there is nothing in S. 92 to exclude oral evidence to show that the price really agreed upon was higher or lower than is stated therein. This is a somewhat startling proposition and one which we should not accept without the strongest and most convincing authority. *Prima facie* it would seem that if anything is an essential term of a sale, it is the price agreed to be paid. We are, of course, not concerned with sales for a price not determined which stand on a different footing altogether.

The first case relied upon in the appellant's favor is that of *Vasudeva* v. *Narasamma*[1]. The plaintiff in that case sued on a sale deed reciting cash consideration ; the defendant pleaded that no cash was paid, but that the document was originally executed in

1. (1882) I. L. R. 5 M. 6.

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consideration of the plaintiff's acting as guardian to his minor son (defendant's grandson). This boy died; the defendant subsequently registered the document on the plaintiff's promise to marry another daughter of the defendant—which promise he apparently failed to keep. The defendant's plea in effect was "want or failure of consideration," though the learned judges speak of it as a plea "that the consideration was of a kind other than that stated in the deed of sale." The first proviso to the section specifically enacts that "want or failure of consideration" may be proved. It is doubtful, therefore, whether their Lordships intended to lay down any rule of law other than that contained in the proviso, although the appellant's Vakil is no doubt entitled to lay stress on the passage in which they say.

"The provisions of the Evidence Act, S. 92 to which the District Judge refers, do not prohibit the disproof of a recital in a contract as to the consideration that has passed by showing that the actual consideration was something different to that alleged."

The ruling that the vendor may prove not only failure of consideration, but also that the consideration was of a kind other than (or something different to) that alleged in the sale deed has no doubt been followed in a later case of this Court, *Kumara* v. *Srinivasa*[1] and a similar view is expressed in *Hukumchund* v. *Hira Lal*[2] and *Gopal Singh* v. *Laloo Lal*[3]. In neither of the latter two cases was there any attempt to vary the amount of the consideration set forth in the document. In Bombay cases the learned judges distinctly stated that they found no real variance between the statement in the deed and the statement of the plaintiff. It was merely sought to prove as is customary in this country, the statement in the deed that the full consideration passed in cash was incorrect and that part of the consideration was the discharge of an antecedent debt. In the Calcutta case, the only variance was as to whether a portion of the sale price was left with the vendor as recited in the conveyance deed, or was taken by a creditor.

None of these cases is any authority for the proposition that evidence may be admitted to vary the provisions of a sale deed as to the amount of consideration fixed for the sale. Nor can it be said in the present case that the addition of Rs. 1000 in the shape of discharge of another antecedent debt constitutes the consideration of another kind from or something different to that set forth in the

1. (1887) I. L. R. 11 M. 213. 2. (1876) I. L. R. 3 B. 159.
3. (1909) 10 C. L. J. 27.

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deed within the meaning of the learned judges in the first Madras case. Two other cases quoted *Ram Buksh* v. *Durgadu*[1] and *Indragit* v. *Lalchand*[2] have no bearing whatever, inasmuch as they deal simply with arrangements as to mode of payment, without any attempt to vary the terms of the contract as to the consideration itself.

The only other Indian case to which we need refer is that of *Probot Chandra Gangapadhya* v. *Chirag Ali*[3] which is relied on by the appellant's Vakil in consequence of the single passage in the judgment—" the consideration of the contract is different from the terms of the contract itself." That was a case of a *Kabuliyat* executed by a tenant agreeing to pay an enhanced rent; and it was simply held that the consideration for enhancement was not a term of the *Kabuliyat*. It is a very different case from that of a sale deed and the sale price: and we see no reason to suppose that the learned judges would have taken the same view in the latter. That the recital in a sale deed as to the amount of the sale price is a term of the contract is clearly laid down in one of the very cases relied on in the appellant's favor *Indragit* v. *Lalchand*[2] and we may add that to hold otherwise would go far to nullify the provisions of S. 92 altogether.

We need not refer to the English cases quoted by the learned Vakil for the appellant in view of the opinion expressed by their Lordships of the Privy Council as to their inapplicability in *Balakisher Das* v. *W. F. Legge*[4].

In support of our view we may refer to the judgment of *Scott* J. in *Cowasjee* v. *Burjorjee*[5] and for a general view of the scope of S. 92 of the Indian Evidence Act to a recent judgment of this Court in *Mottayappan* alias *Selamba Goundan* v. *Palani Goundan*[6].

We are of opinion that the evidence of the oral contract was rightly excluded and we dismiss this second appeal with costs.

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1. (1887) I. L. R. 9 A. 392.
2. (1895) I. L. R. 18 A. 168 at 171
3. (1906) I. L. R. 33 C. 607.
4. (1899) I. L. R. 22 A. 149.
5. (1888) I. L. R. 12 B. 335.
6. (1913) 25 M. L. J. 290.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Spencer.

Ramalinga Naryana Rama Pundia Chinna Thambiar, Zemindar of Sivagiri } *Appellant in all**

v.

Michael *alias* Sankaralingam and others. } *Respondents.*

Estates Land Act S. 54 and 78 (2) "May"—Choice only between modes prescribed in S. 54—Offer to tenant and refusal by him—Affixture to house—Insufficient—"Delivery" meaning of.

Zemindar of Sivagiri *v.* Michael

Sec. 54, of the Estates Land Act does not permit the landlord to select a mode of tender which is not one of those prescribed by the section itself and to treat the provisions of S. 78(2) as merely affording him a way of proving that he has made a tender.

The word "may" in the section only indicates that the landlord can choose between the modes prescribed in the section i. e., between private service and service through Collector or other public officer.

Mere offer of patta to the tenant which he does not accept is not delivery.

Held:—Accordingly when the tenant refuses to accept the patta tendered to him the only course open to the landlord is to affix a copy of it on some conspicuous part of the land to which it relates. Affixing of the patta to the house of the tenant is not sufficient compliance with S. 54.

Meaning of "tender" and "delivery" considered.

Second appeal from the decrees of the District Judge of Tinnevelly in A. S. Nos. 156, 158, 160, 159, 157 of 1912 respectively preferred against the decree of the Revenue Divisional Officer of Koilpatti in S. S. Nos. 112, 114, 116, 115 and 113 of 1911 respectively.

C. P. Ramasawmi Ayiar, A. Duraisami Ayiar and *M. Subbaraya Aiyar* for Appellants.

V. Visvanatha Sastri for Respondents.

The Court delivered the following

Judgments:—*Miller J.*—I cannot accede to the contention that S. 54 permits the landlord to select a method of tender which is not one of those prescribed by the section itself and to treat the provisions of S. 78 (2) as merely affording him a way of proving that he has made a tender. That might have been possible under S. 7 of the Act of 1865, which enacted what should be deemed sufficient proof of tender, but is not possible under the present Act

*S. A. Nos. 2280 to 2284 of 1912. 10th October 1913.

which enacts how tender may be effected. The word 'may' indicates that the landlord can choose between the methods provided but not that he is at liberty to select some other method. It would require clearer language to warrant the construction, contended for by the appellant.

Reading Ss. 54 and 78 (2) of the Act together, tender of patta may be made by delivery to the ryot. The Civil Procedure Code Order V 16 seems to draw a distinction between tender and delivery but no doubt the legislature is entitled to prescribe delivery if it so pleases, as necessary to complete a tender.

The question is, whether when a pattah is offered and refused it has been sufficiently tendered.

The pattah here was offered and refused and was then affixed to the ryot's house: S. 78. (2) does not provide for affixing a patta to a house but only to the land—when service by delivery cannot be effected. If then this offer and refusal is not a sufficient tender within the meaning of the Act, the affixing of the patta to the house does not seem to be of any use to the landlord though it is not improbable that the omission from the present Act of that method of tender was intended to be for his benefit.

So if the patta was validly tendered in this case, it can be only on the ground that it was delivered to the ryot. It is not said that it was delivered to any one on his behalf.

Now the landlord has not merely to deliver himself of the patta he has to deliver it to the ryot and giving the widest meaning I can to the word deliver, I do not see that it is possible to hold that an offer of the patta to the ryot is delivery to him.

The Code of Civil Procedure has, wisely, I venture to think, provided expressly for this case of tender and refusal of a summons (O. V R. 17). In the Estates Land Act, there is no express provision in S. 78 (2) and I agree with the District Judge that it is necessary to hold that when once offer is made and refused, the tender by delivery cannot be effected and it then becomes necessary to affix the patta to the land. If this is not done there is no valid tender of the patta.

The appeals fail in my opinion and must be dismissed with costs.

S. A. 2280 of 1912.

Spencer J.—S. A. 2280 is a suit brought under S. 112 of the Madras Estates Land Act objecting to the attachment by a landlord of the lands of his tenant.

Zemindar of Sivagiri v. Michael

Spencer J.

The plaintiff alleged *interalia* that no patta was tendered. An objection was taken at the trial that, because the patta was affixed to the house of the plaintiff instead of the land as required by S. 54 and 78 cl. (2) of the Estates Land Act, the tender was illegal. The Deputy Collector found that, when the estate servants went to the pattadar's house with patta, he was present in his house and he refused to receive it and consequently it was affixed to his house. He observed that, in his opinion there was no necessity for affixing the pattah to the land as that was "a course evidently meant to be adopted only in the case of absentee pattadars." He found this issue in favor of the defendants and the plaintiff failing in the other issue, the suit was dismissed with costs.

In appeal, the District Judge held that a tender or service under S. 78 (2) was "not completed by mere physical offering of the patta or notice to the tenant." He held it to be essential that the tenant should either receive it, or if for any reason he did not receive it, that the requirements of the law as to affixture should be complied with. He agreed with the Lower Court in finding that it had been proved that the patta was tendered to the tenant and affixed to his house as he refused to receive it; but as the patta has been affixed to the plaintiff's house instead of being posted upon the land, he reversed the Lower Court's finding on this issue and cancelled the attachment. Both Courts agreed in finding the remaining issue in favor of the defendant.

S. 53 of the Madras Estates Land Act declares "No landholder shall have power to proceed against a ryot for the recovery of rent by distraint and sale of his moveable party or by sale of his holding under Chapter VI unless he shall have exchanged a patta and Muchilika with such ryot or tendered him such a putta as he was bound to accept or unless a valid patta or muchilika continues in force" S. 54 provides for the tender of patta. It declares. "The tender of a patta may be made to the ryot in the manner provided for the service of notice under sub-section (2) of S. 78, or if the Collector on the application of the landholder shall so permit, in respect of any estate or any portion of estate, by filing it in the office of the Collector or such other officer as the Local Government may by general or.........special order direct." S. 78 which deals with the service of written demand on defaulters at the time when destraints are made, provides in sub-section 2 as follows. "The demand and account shall be dated and signed by the destrainer and shall within one year from the date on which the arrears became due be served upon the defaulter by delivering a copy to him or to

some adult male number of his family at his usual place of abode provided that it is in the neighbourhood of the land to which the distress refers or to his authorized agent or when such services cannot be effected, by affixing a copy of the notice on some conspicuous part of the land to which it refers." S. 112 which deals with the sale of ryot's holdings provides that a notice of the intention to sell may be served "by delivering a copy to the defaulter or to his authorised agent, or to some adult male member of his family at his usual place of abode, or, if such service cannot be effected, by affixing a copy thereof on some conspicuous part of his last known residence, if he has any within ten miles of the holding, or on some conspicuous part of the holding." That these are ampler provisions than those under S. 78 may be seen by the fact that S. 78 does not provide for affixing a copy of the notice to the defaulter's residence as S. 112 does, and S. 112 defines when the place of abode is in the neighbourhood by limiting neighbourhood to a distance within ten miles of the holding. We are here concerned in considering, not whether the process for distraint and sale were properly effected, but whether there was a proper preliminary tender of patta. In Ss. 54 and 78 of the present Act the provisions of Ss. 7 and 39 of Act VIII of 1865 have been to some extent repeated; for S. 7 declares a tender of patta "shall be sufficiently evidenced by such proof of service as is provided for by S. 39 in the case of notice" and S. 39 provides for service of notice by "delivering a copy to the defaulter or to some adult male member of his family at his usual place of abode, or to his authorised agent, or when such service cannot be effected, by affixing a copy of the notice on some conspicuous part of his last known residence or on some conspicuous part the land to which it refers." The only apparent differences are the use of the word 'shall' instead of 'may' in S. 7, the insertion of the words in S. 39 which allow a copy of the notice to be affixed to the defaulter's residence and the treatment in S. 7 of the prescribed formalities as evidentiary rather than directory. Under Regulation XXX of 1802 which was the law until Act VIII of 1865 was passed, it was necessary for the land-holder to offer the patta itself in the presence of witnesses before he could bring a suit to compel its acceptance.

The principal questions for decision here are what meaning is to be attached to the word 'delivery' in S. 78 and when it may be said to be effected, and when it may be said that "such service cannot be effected." In O. 5 R. 16 of the Civil Procedure Code, corresponding to S. 79 of the Act of 1882, the words 'deliver' and

Zemindar of Sivagiri v. Michael — Spencer J.

'tender' occur together. O. 5 R. 17 throws a side light on what is meant in S. 78. cl. 2 of the Estates Land Act by the words "when such service cannot be effected." It mentions the two contingencies (1) if the defendant refuses to sign the acknowledgment (2) if he cannot be found. In both events it becomes necessary to affix a copy of the summons. Now the Estates Land Act contains no provision for the serving officer obtaining the signature of a ryot who refuses the tender of patta; but if we take a refusal to sign as meaning all that a refusal to accept 'tender' means and something more, viewed in this light S. 78 seems to indicate that something else remains to be done by the serving officer beyond merely offering the patta for acceptance.

Next as regards the word 'deliver,' does it necessarily involve any reciprocal action on the part of another? In the American Cyclopœdia of Law and Procedure Vol. 13 p. 773 I find "The word 'deliver' has perhaps as many shades of meaning ascertained by judicial interpretation as any other term known to the law." In some connections it "does not imply an act of the will on the part of some one else, nor an acceptance of anything." In Webster's Dictionary the synonym of 'deliver' was stated to be 'give forth, discharge, liberate, pronounce, utter' and as an example, one who 'delivers' a package" gives it forth."

Ss. 54 and 78 read together show that a tender of patta may be made by 'delivering a copy to the defaulter. Although the serving officer may be said to "give forth" a putta when he delivered it, the section requires that he should deliver it *to the defaulter* and this in my opinion denotes a transfer of possession of the document. The action of delivering here cannot be completed by one present who delivers without involving a reciprocal action of another who receives.

I therefore concur in thinking that this second appeal must be dismissed with costs. Though the strictly legal view which the District Judge has taken of the provisions of the Act as they stand has resulted in this case in the landholder losing his remedy by attachment in spite of the finding of two Courts that the ryot was well aware of the tender of putta, hard cases like this will become rare when the provisions of the Act become better understood for parties will take care to comply with the exact wording of the sections even if the formality of affixing the puttas to the land may entail a journey of some miles from the place of tender. The other appeals follow the result in this appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Full Bench].

Present: —Sir Charles Arnold White Kt., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

The Secretary to the Commissioner of Salt, Abkari and Separate Revenue, Revenue Board Madras. } *Referring officer.*

v.

Mrs. E. W. Orr ... ... } *Executant of the document in question.*

The Bank of Madras ... } *Executee of the document in question.*

Stamp Act—Sec. 2(17)—Mortgage—"specific property"—"Annual profits"—"Machinery, stock in trade"—"Declaration of trust "as security—" Letter of hypothecation."

Board of Revenue *v.* Orr

An instrument recited that O in order that certain creditors of the firm of which her husband was the sole proprietor (whose executrix she was) may be repaid their debts, has entered into an agreement with the Bank of Madras by which the Bank has agreed to advance to O a certain amount on a promissory note to be executed by one B in favour of the firm and to be endorsed by the latter to the Bank upon the said O executing a declaration of trust of the machinery, plant etc., connected with the business. In consideration of the advance to be made by the Bank O declared that she held the machinery, plant etc., on trust for and on behalf of the Bank. After a provision as regards interest, full power was given to the trustee to use and employ the trust property and to replace sold portions etc. The substituted goods were to be included in the security. Finally there was a declaration that the trustee stood possessed of the net profits realised after payment of all expenses including a sum not exceeding Rs. 20,000 to be retained by the trustee, annually in trust to pay and apply the same in payment of sums advanced by the Bank.

It was argued that the document was only a declaration of trust in respect of net profits and as they were not " specified property " the document could not be construed as a mortgage.

Held that as there was an express declaration of trust in respect of the machinery etc. (whatever the extent of the beneficiary interest of the bank therein) and the document was a mortgage.

Held also :—that a formal declaration of trust could not be treated as a letter of hypothecation within the exemption in Art. 40.

Reference under the Stamp Act S. 46 [1] referred to

Case stated under Sec. 57 of Act II of 1899 by the Secretary to the Commissioner of Salt, Abkari and Separate Revenue.

Government Pleader for referring officer.

W. Barton for executant.

Executee was unrepresented.

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*R. C. No. 5 of 1913 24th October 1913.

1. (1887) I. L. R. 11 M. 216.

Board of Revenue v. Orr

The question in this case is whether the document in question is a mortgage or a trust. By this document the executant agrees to have all her goods plants and machinery in the firm of P. Orr & Sons as security for the repayment of a loan of Rs. $4\frac{1}{2}$ lacks and agrees to be a trustee for the lender in respect of the goods. It was stamped with a Rs. 15 stamp as if it was a trust.

Government Pleader :—The document is not a trust but a mortgage. If a document comes within two or three descriptions, it is chargeable with the highest duty provided for any one of them; S. 6 of stamp Act. If it is a mortgage it does not matter that it contains also a declaration of trust. The property that is sought to be mortgaged is specified.

W. Barton :—A pronote was given to the firm of P. Orr & Sons by T. W. Barton and that is endorsed by the firm to the Madras Bank. That was the contract. The rest was only a trust deed with certain conditions, fixing a method of payment. The object of the rest of the transaction is not to give a security on the stock in trade. The Bank cannot sue for a sale of the stock in trade. The lady can sell the whole stock. Moreover a property *viz.*, net profits which is not specific but very fluctuating cannot be the subject of a mortgage. *Reference under the Stamp Act S. 46*[1] *Reference under the Stamp Act S. 46*[2].

[*S. Nair* J. There may not be a mortgage, but is there not a charge]. The case may be viewed as one coming under 2nd Exemption to art. 40.

The Court delivered the following

Judgment :—*The Chief Justice.*—The question we have to consider is whether the instrument which has been submitted to us is a mortgage deed within the meaning of S. 2 (17) of the Indian Stamp Act (II of 1899). If so it is chargeable with stamp duty as such under Article 40 of the 1st Schedule to the Act. Mr. Barton has argued that the instrument in question is a declaration of trust and that it is chargeable as such under article 64. At the conclusion of his argument he suggested that the instrument might be construed as a letter of hypothecation accompanying a bill of exchange and therefore fell under the 2nd exemption to Article 40.

A mortgage deed is defined for the purposes of the Stamp Act, and for the purposes of that Act only, as including "every instrument whereby, for the purpose of securing money advanced, or to be advanced by way of loan, or an existing or future debt, or the

1 (1883) I. L. R. 7 M. 209. 2. (1887) I. L. R. 11 M. 216.

performance of an engagement, one person transfers or creates to, or in favor of another, a right over or in respect of specified property." The definition is almost as wide as the definition of a bill of sale in the English Bills of Sale Acts.

What are the material provisions of this deed? It is an instrument to which the parties are one Mrs. Orr and the Bank of Madras. It recites that probate of the will of the late Mr. E. W. Orr was granted to Mrs. Orr as sole executrix thereof, that the late Mr. Orr was the sole proprietor of a certain Gold and Silver smiths business, that Mrs. Orr, in order that certain creditors of the firm may be repaid their loans and with a view to certain other matters, has entered into an agreement with the Bank of Madras by which the Bank has agreed to advance to Mrs. Orr a certain amount on a promissory note to be executed by one Thomas William Barton in favour of the firm (Messrs. P. Orr and Sons) and endorsed by them to the Bank of Madras upon the said Mrs. Orr executing a declaration of trust of the machinery, plant, stock in trade, goods, chattels and effects in connection with the business more particularly described in the Schedule to the instrument. In consideration of advances to be made by the Bank Mrs. Orr declares that she holds the said machinery, plant, stock-in-trade and etc., on trust for and on behalf of the Bank. There is a provision as regards interest. There is then a provision that the trustee shall have full power to use and employ the trust property in certain ways and to replace and make good such portions of the trust property as may be sold or otherwise dealt with and that the substituted goods shall be included in the security; there is a provision for insurance. Then there is a declaration that the trustee stands possessed of the net profits, realized after payment of all expenses including the retention by the trustee of a sum not exceeding Rs. 20,000 annually, in trust to pay and apply the same in payment of sums advanced by the Bank. (The reference in the letter of the Board of Revenue to this part of the instrument is not quite accurate).

These are the covenants to which I need refer. In the schedule we have the headings "machinery, plant, fixtures and furniture in Madras and Rangoon" and "stock-in-trade, goods, chattels and effects in Madras and Rangoon." Under these headings are set out the various classes of articles with their respective values. By the instrument Mrs. Orr creates a trust, declares that she is the trustee and that certain property shall be trust property. She constitutes the Bank of Madras *cestui que trust* in respect of the trust property. That is the object and purport of the deed. Whatever

Board of Revenue v. Orr

White C. J.

the precise rights of the *cestui que trust* may be it is not for us to consider. But it seems to me anamolous for a party who sets up a case to say that the trust does not give a beneficial interest to the *cestui que trust*, or that the *cestui que trust* has not, in the language of S. 2 (17) any right in respect of the trust property. That is really what Mr. Barton's argument comes to. It seems to me that there are two trusts created by the deed. Mr. Barton has agreed that there is a trust in respect of the net profits in paragraph 5 of the deed, but that there is also a trust in express language in paragraph 1 in respect of the machinery, plant, stock in-trade, goods, chattels and effects in or upon the business premises of the firm.

It has been suggested that the definition is not satisfied because the trust property is not specified and could not be specified since the trust property consists of the net profits. We have been referred to a Full Bench decision of this Court which is reported in (*Reference under Stamp Act S. 46*)[1]. In that case there was an agreement between certain persons to transfer the future surplus profits of their respective trades to a trustee, in order that the trustee should hold the fund so to be created on certain trust declared in the agreement. It was held that it was liable to stamp duty as a declaration of trust and it was also held that the fund intended to be created under the agreement was not "specified property." In that case the learned judges had to consider whether a certain sum of money which was to be accumulated by certain parties who were willing to contribute money for certain purposes was "specified property." It may be that the net profits here are not specified property within the meaning of the definition. But we have a trust declared by the instrument in respect of the machinery, plant, stock-in-trade etc. With regard to them we have the schedule to which I have referred. It seems to me that so far as the stock in trade, which are described in the deed as trust property are concerned the trust property is specified. It is perfectly clear that the object of the instrument was to give the Bank some rights by way of security. They had their contractual rights on the promissory-note. They wanted something more: and I see no reason for holding that the deed does not to some extent—to what extent it is unnecessary for us to consider, carry out the object which was in the minds of the parties when the deed was prepared.

I need scarcely say that the fact that the instrument is a trust deed does not make it the less a mortgage. It is, in my opinion a mortgage deed for the purposes of the Stamp Act, because it creates

1. (1887) I. L. R. 11 M. 216.

a right in respect of specified property for the purpose of securing money advanced or to be advanced.

I can deal shortly with Mr. Barton's second point. Hypothecation is not defined in the Stamp Act nor in the Transfer of Property Act either. Assuming that this instrument is a bill of exchange within the meaning of the definition in the Stamp Act, it seems to me it is not a letter of hypothecation within the meaning of the exemption. According to Mr. Barton the instrument is a formal declaration of trust. I do not think a formal declaration of trust can be treated as a letter of hypothecation within the meaning of the exemption. I quite agree that a fiscal enactment should be construed strictly and in favour of the subject, but it seems to me that whatever else the instrument may be, it is a mortgage deed within the meaning of the definition in S. 2 (17) of the Stamp Act.

Sankaran Nair J.:—I agree.

Oldfield J.—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

Sree Balusu Buchi Saravagarudu Garu ... *Appellant.** *1st Plaintiff.*

v.

Kovvuri Venkata Raju and others ... *Respondents.*

Estates Land Act Ss. 3 cl. 7 (2), 6, 153—Passing of the Act in the middle of a term lease—Effect of—Acquisition of occupancy right not prevented—Proviso to S. 153—Operation of.

Where land in an estate was admittedly not subject to occupancy rights before the passing of the Estates Land Act but was in possession of tenants under leases of varying duration and the act was passed during the operation of a term lease.

Held that the land was not old waste and under S. 6 the tenant acquired occupancy right.

Held also that proviso to S. 153 relates only to non-occupancy ryots of the kinds referred in S. 6 cl. 3, 4 and 5.

Achappa Raja v. *Krishna Yachendralu*[1] referred to.

The effect of S. 6 being to confer occupancy rights on all ryots in occupation of ryoti land not being old waste at the time of the passing of the Act, the definition of "old waste" in S. 3 cl. 7 (2) which requires that the land should not be subject to occupancy rights up to a point of time after the passing of the Act cannot prevent the tenant acquiring the right under the former section.

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* S. A. No. 1376 of 1912. 1st August 1913.

1. (1913) 24 M.L.J. 402.

Buchi Saraya-garudu v. Venkata Raju

Second appeal from the decree of the District Court of Godavari at Rajahmundry in A.S. No. 260 of 1910 preferred against the decree of the court of the summary suits Deputy Collector of Godaveri in summary suit No. 829 of 1910.

G Venkatramiah for Appellant.

B. Narasimha Rao for Respondent.

G. Venkatramaya.—Submitted that the land was old waste; even if otherwise proviso to S. 153 gave him the right to evict the defendant. *Chaganti Achaparaja* v. *Raja Velugoti Krihna Yachandrulavaru*[1] with all respect he would submit, is not good law. Proviso to S. 153 is perfectly clear. The proviso suppliss another ground on which ejection can be sustained. In any different view, it would be taking away what is given in S. 153 by S. 157, which could hardly have been intended by legislature. S. 23 does not help the tenant. He has affirmatively to prove that it is ryoti land not being old waste before he can acquire occupancy right.

B. Narasimha Rao:—Submitted that S. 23 made it incumbent on the party asserting that a particular land was not ryoti land other than old waste to show that it was not so. If it was ryoti land, S. 6 conferred occupancy right on the tenant and the landlord cannot evict him any longer. He would submit that the case cited is perfectly right. The term "A non-occupancy ryot" is wider than "ryot of old waste". Both S. 153 and 157 are satisfied by understanding the sections in the sense in which they are understood by their Lordships in the case referred to. See Sec. 8 cl 6.

G. Venkatramiah replied.

The Court delivered the following

Judgments:—*Sadasiva Aiyar J.*—S. 23 of the Madras Estates Land Act says that a land "shall be presumed to be ryoti land *other than old waste*" until the contrary is proved. The important question in issue in this case is whether the plaint land is ryoti land coming under the definition of old waste or ryoti land not coming under the definition of "old waste". For, if it was not "old waste". S. 6 gives the ryot in possession on the date of the passing of the Act an occupancy right in the land; and this suit by the landlord (appellant before us) in ejectment was rightly dismissed by the lower courts. Old waste is defined in S. 3 cl 7. Cl. 7 contains two sub-clauses Nos. 1 and 2. The plaint land admittedly does not come under sub-clause (1). As regards sub-clause (2) there are two parts

1. (1913) 24 M. L. J. 402.

in it. The land in question does not come under the description of the land in the second part, that is, land in respect of which an ejectment decree against the ryot has been obtained before the coming into force of the Act. As regards the first part of sub-clause (2), it refers to a land which has remained without occupancy rights being held therein at any time within a period of not less than 10 years immediately prior to letting by the landholder after the passing of the Act. To find out whether a land was "old waste" or not *at the time of the passing of the Act*, a definition which says that a land shall be considered as old waste at the time of a letting after the passing of the Act, if certain conditions are then fulfilled cannot be resorted to, because S. 6 applied at once on the passing of the Act, and when once occupancy rights are vested in a ryot at the time of the passing of the Act, the land ceases to be old waste.

Hence, it seems to me, that the plaint land, which was clearly ryoti land (that is, cultivable land other than private land according to the definition in S. 3 clause 16) on the date of the coming into force of the land Act and which land the landlord could not then prove to be "old waste" under either of the sub-clauses of S. 3 must be held to have then been ryoti land other than old waste. If so, the defendant got a right of occupancy then under S. 6 and could not be ejected thereafter.

As to the argument that the addition made to S. 153 by the amendment Act of 1909, namely " nothing shall affect the liability of a non-occupancy ryot to be ejected on the ground of the expiry of the term of a lease granted before the passing of this Act," that this addition would become useless if all non-occupancy ryots in possession got occupancy rights on the passing of the Act, there are certain kinds of non-occupancy ryots included in S. 6 clauses 3, 4 and 5 of the Act, who do not obtain occupancy rights even if they were in possession on the date of the coming into force of the Act. The additional clause inserted by the amending Act in S. 153 would apply to such lands. On these grounds I would dismiss this second appeal with costs.

If the land was " old waste," S. 157 of the Act as interpreted in *Achaparaju* v. *Krishna Yachendrulu*[1] will bar this suit. But it is unnecessary to base my decision on that ground, as the correctness of that decision has been attacked in the arguments before us.

Tyabji J.—The plaintiff prays for an order of ejectment against the defendant, his tenant; the tenant alleges on the other hand that

1. (1913) 24 M. L. J. 402.

Buchi Saravagarudu v. Venkata Raju

Tyabji J.

he is a ryot in possession of the land at the date when the Madras Estates land Act came into question having been admitted by the plaintiff into the possession of the land which he alleges is ryoti land not being old waste and on this ground the defendant contends that he has the right of permanent occupancy in his holding. The first question therefore we have to decide is whether the land is ryoti land not being old waste. The defendent relies upon S. 23 of the Madras Estates Land Act which raises the presumption that any land the nature of which it is necessary to determine is ryoti land other than old waste, until the contrary is proved. The onus therefore is on the plaintiff to establish that the land in question is old waste land. He seeks to do so by establishing that the land falls within the terms of S. 3 sub-section 7 cl. (2). That clause according to the learned pleader for appellant is applicable to the facts of this case, his contention being that the land in question is old waste because at the time of the taking of the land in 1909 by the landholder it had remained without any occupancy rights being held therein within a continuous period of 10 years, namely, from 1899 to 1909. It is admitted by the respondent that up to 1904 the land in question was not subject to any occupancy rights; and that it had been let to tenants under leases of varying terms the last of which expired 1904. In that year the present tenant obtained a lease for 5 years and took possession of the land under his lease. It is also admitted that, up to the time when the Act came into operation, namely, 1st July 1908, the land was not subject to any occupancy rights; but the respondent contends that on the 1st July 1908 while he was in occupation of the land in question it became impressed with occupancy rights by the operation of the Act and he relies on S. 6 for this contention. The question therefore at this stage is whether the land was impressed with occupancy rights on the 1st July 1908 by reason of the provisions of any section of the Act.

Now, S. 6 on which reliance is placed by the respondent does not deal directly with the question in what way occupancy rights may be acquired in lands which up to the coming into operation of the Act were without occupancy rights. Nor does it say in what way lands such as would come within the description of 'old waste' may be turned into ryoti land. But the section proceeds on the assumption that the lands to which it appears are ryoti lands not being old waste. It is therefore to my mind rather unsatisfactory that when we have to determine the question whether the particular piece of land which at one time was not subject to occupancy rights became subsequently impressed with such rights,

we should fall back upon a section which deals with land, which *ex hypothesi* is subject to occupancy rights. I feel constrained however not without a great deal of hesitation to come to the conclusion that in such a case also the person claiming that the land is old waste must affirmatively establish that the land in question comes within the definition of old waste contained in some provision of the Act such as section 3 sub-section 7 clause 1 and as a consequence must if necessary prove that there are no occupancy rights in the land. I come to this conclusion on a consideration of the presumption raised under S.23 and the definition contained in S. 3 cl. 16 of 'ryoti land' together with the provisions of S. 3 cl. 7 relating to the definition of 'old waste.'

Turning then to the definition of old waste in S. 3 (7) and to the means which are provided in it for establishing that any land is 'old waste' after the Act came into operation, it is admitted that the plaintiff has not obtained a final decree of a competent civil Court establishing that the ryot has no occupancy right before the passing of the Act. It is also admitted that the land in question was not possessed by the landholder or his predecessor in title for a continuous period of not less than 10 years. Nor has it continuously remained uncultivated during that time so that the two modes of affirmatively establishing that the land is old waste which are referred to in the 6th clause of S. 3 cannot avail the plaintiff. It follows that the lower courts have not erred in holding that it was for the plaintiff to establish that the land in question was 'old waste' and that they had not succeeded in discharging their burden. For these reasons I agree that this appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Tyabji.

Kuthalidatt Narayanan Moothad and others. — *Petitioners.**

v.

The Cochin Sirkar represented by the Dewan of Cochin. — *Respondent.*

Civil Procedure Code (Act V of 1908) S. 86—Foreign Prince or Chief—Suit against.

A foreign Prince or Chief such as the Rajah of Cochin cannot be sued in British Courts even in his private capacity (in this case he was sued as a trustee of a temple in the British territory) except in conformity with the provisions of S. 86 C. P. C.

*C. R. P. Nos. 510 to 512 of 1912. 16th October 1913.

Narayanan Moothad v. Dewan of Cochin

Petition under S. 115 of Act V of 1908 praying the High Court to revise the orders of the Court of the Subordinate Judge of South Malabar at Calicut in O. S Nos. 32, 40 and 26 of 1911.

T. R. Ramachandra Aiyar and *N. A. Krishna Aiyar* for Petitioner.

C. V. Ananthakrishna Aiyar for Respondent.

The Court delivered the following

Judgment:—The question in this case is whether the Subordinate Judge was right in ordering the name of the 1st defendant as representing the Rajah of Cochin to be struck off from record. He made this order because he was of opinion that S. 86 of the Civil Procedure Code applied and that the Rajah of Cochin could not accordingly be sued. It is admitted that the consent of the Governor-General in Council has not been obtained and that if the section applies the Subordinate Judge's order is correct.

It was argued before me however, that in this case the Rajah of Cochin was sued not as such Rajah, but as trustee of the temples referred to in the plaint and that S. 86 applies only in cases where a Prince or Chief is sued in his capacity as such Prince or Chief. I am unable to accede to this argument. I see nothing in S. 86 to warrant a Prince or Chief being brought on the record except on the terms referred to in S. 86. The section seems to me to be exhaustive with reference to the question when such a Prince or Chief can be brought on the record against his wish. I see nothing to support the contention that the question whether or not a Chief or a Prince can be brought on the record depends upon the relief sought or upon the question whether the acts alleged to constitute the cause of action are of a sovereign or of a private character. It seems to me that S. 86 definitely lays down in what cases Municipal Courts have the power to adjudicate upon any matters whatever against such Princes or Chiefs as are referred to in the section. It was held in the *Maharajah of Jaipur* v. *Lalji Subhai*[1], that the Governor General in Council has no power to give his consent to a suit except in the three instances specifically referred to in clauses (*a*), (*b*) and (*c*) of the section and that if leave is granted in cases not falling within any of the three clauses, Courts of law are required to dismiss the suit as against the Prince or Chief.

As the question is of importance I think it is necessary to refer to the authorities, in order to explain rather than to support the

1. (1907) I. L. R. 29 A. 379.

Narayanan Moothad v. Dewan of Cochin

view that I have taken of the construction of section 86, for the section seems to me to be clear in itself. The general rule of International law is thus stated in Westlake on Private International Law. "Foreign States, and those persons in them who are called sovereigns, whether their title be Emperor, King, Grand-Duke, or any other, and whether their power in their States be absolute or limited, cannot be sued in England on their allegations whether *ex contractu, quasi ex contractu* or *ex delicto*" 5th Edition (1912) page 271. The apparent exceptions to that general rule, so far as the English Courts are concerned, are stated in the same book, and in the *Sultan of Johore's case* [1] It seems to me that section 86 of the Civil Procedure Code lays down the same general rule with certain exceptions specified and clearly defined in the section itself,—which exceptions are of a legislative extension of the jurisdiction ordinarily exercised by Municipal Courts and are made to depend upon the consent of the Governor-General in Council being previously obtained. The general rule of International law just referred to by me was lately restated in *Statham* v. *Statham* and the *Gaekwar of Baroda*[2]. In that case the question was whether His Highness the Maharaja of Gaekwar of Baroda could be made a party to proceedings in the Courts of England against his will; and it was laid down in the clearest terms that that course could not be adopted. It was not alleged that the question whether or not the Gaekwar could be sued in England depended upon the nature of the cause of action, or upon whether he was purported to be sued in his private or in his sovereign capacity and yet these contentions could have been raised on the facts in that case if they could have furnished any answer to the objection.

The case relied upon by the learned pleader who appeared for the petitioner seems to me to furnish very little assistance for the decision of the point with which I have now to deal. The first case relied upon by him was that of *Chanda Lal* v. *Awah Bin Umar Sultan*[3] in which Mr. Justice *Strachey* expressed the view that it is in the power of the prince or chief to waive the provisions of S. 86 and submit himself to the jurisdiction of the Courts of British India

It is not alleged that there was any waiver in the present case. But it is argued that if waiver can give jurisdiction to the Court, then it is implied that the exceptions contained in the clauses (*a*),

1. (1894) I Q. B. 149, 156.
2. (1912) Probate 92.
3. (1896) 21 Bom. 351 at 373.

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(*b*) and (*c*) to the general rule in S. 86 are not exhaustive,—in other words that the sole exceptions to the general rule are not those specifically mentioned in S. 86 itself; and that just as waiver may be added to the exceptional cases in which the Courts have jurisdiction over independent sovereigns, so also another exception may be made and that one such other exception is the case when the sovereign is sued in his private capacity and not as sovereign. As I understand, however, Mr. Justice *Strachey's* decision, it is to the effect that, though S. 86 provides certain exceptions to the general law that, sovereigns may not be sued, that general law is in itself subject to the proviso that the sovereign may himself waive his right of questioning the jurisdiction of Municipal Courts. Therefore assuming that this argument for the petitioner can have any force in the construction of the section, it can certainly have no force unless it is shown that the alleged exception is recognised in International Law as restricting the scope of the general rule just in the same way as the exception about waiver is recognised. But in the first place I do not think that the ruling in *Chanda Lal* v. *Awah Bin Umar Sultan*[1] establishing another exception to S. 86 so as to derogate from the section being construed as exhaustive in itself. Secondly the alleged exception is not recognised by general International Law. It was contended before me that certain dicta in the case of the *Duke of Brunswick* v. *The King of Hanover*[2] show that sovereigns may be sued in their private capacity. But the actual decision in that case was that the Court had no jurisdiction, and I do not think that the cautious dicta on which reliance was placed can be of any assistance in view of the law as laid down in such cases as *Nighell* v. *Sultan of Johore*[3] and *Statham* v. *Statham* and the *Gaekwar of Baroda*[4]. The point was expressly considered by *Willes J.* in the *Sultan of Johore's case*[3] where the effect of the Duke of Brunwick's case is explained. For these reasons I think that this petition must be dismissed.

The judgments in Civil Revision Petitions Nos. 511 and 512 of 1912 will follow.

I do not wish to interfere with the order of the Lower Court as to costs; but here the petitioner in each case will pay one third of the Respondent's costs.

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1. (1896) 21 Bom. 351 at 373.
2. (1848) 2 H. L. Cases 1.
3. (1894) 1 Q. B. 149, 156.
4. (1912) Probate 92.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH].

Present :—Sir Arnold White Kt., Chief Justice and Mr. Justice Miller and Mr. Justice Sankaran Nair.

Angammal ... ... *Appellant** *Appellant in O. S. A. No. 7 of 1910.*)

v.

Melic Muhamad Syed Aslam Saib. *Respondent* (*Rept.* in *do.*)

Landlord and Tenant—Transfer of Property Act S. 108—Right to remove buildings or for compensation after the termination of the tenancy—Consent to making improvements—Effect of—Right to reasonable time for removal after determination of tenancy—Period of dispute as to landlord's right to possession excluded—Form of decress in ejectment suits.

Angammal v. Syed Aslam Saib

Per *Miller* J.—Apart from estoppel or contract, the tenant has no right to demand compensation for buildings left by him on the premises when be quits them whether those buildings were erected with the landlord's consent or without. Consent will only be of use to the tenant as leading to an estoppel or as evidencing an agreement.

Ismai Kani Rowthan v. *Nazarali Sahib*[1] followed.

During the continuance of the lease, the tenant has an absolute right to remove the buildings raised by him on the land. After the expiry of the lease the landlord has an option either to take the buildings paying compensation or to allow the tenant to remove them within a reasonable time after the determination of the tenancy. Time will not count against the tenant so long as the landlord's right to demand possession is in dispute. Hence the practice of Courts to make decrees in ejectment suits against tenants postponing execution for a period sufficient to enable them to remove the buildings if they so desire before surrendering possession. Once the time is allowed to expire, the right to remove them is at an end.

Accordingly where the tenant was allowed a reasonable time to remove the buildings after he was turned out of possession by ejectment proceedings in the Small Cause Court but failed to take advantage of it,

Held that he could not ask the Court to give him any further time.

The tenant entered into the land on a twenty years' lease. During that time he erected the building. Subsequently when the land changed hands, he attorned to the successor agreeing to give up the land on a month's notice. In the second lease, there was a clear recognition of his right to the building. There was no evidence of an express consent on the part of the landlord to the erection of the building but there was evidence that he was aware of it and did not object.

Held, in the circumstances, and having regard to the conditions of the tenancy, an undertaking by the landlord to pay compensation could not be inferred.

Held further that the recognition by the landlord of the tenant's right to the building could not be regarded as a recognition of a higher right than that allowed by the law.

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*L. P. A. No. 59 of 1911. 28th April 1913.

1. (1903) I. L. R. 27 M. 211 at 216.

Angammal v. Syed Aslam Saib

Per *Chief Justice*:—Under the Transfer of Property Act, after the determination of the lease, the tenant had no right either to remove the building or to demand compensation.

Per *Sankaran Nair* J.:—The tenant does not lose his right of property in the improvements effected by him by reason of the expiration of the time allowed to him for removing the same. It is open to the landlord to remove the building and sue the tenant for damages caused thereby but if he elects to retain the building, he is bound to pay compensation for it.

The rule enunciated in *Mahalaxmi Ammal* v. *Palaniappa*[1] should be preferred to that in *Ismai Kani Rowthan* v. *Nazarali Sahib*[2] being more in consonance with justice, equity and good conscience.

Appeal under S. 15 of the Letters Patent from the decision of the Hon'ble the Chief Justice and Mr. Justice *Sankaran Nair* in O. S. A. No. 7 of 1910 preferred against the decision of the Hon'ble Mr. Justice *Wallis* in C. S. No. 16 of 1908 on the file of the High Court (Original side).

The judgments of the *Chief Justice* and *Sankaran Nair* J. are reported in 21 M. L. J. p. 891.

K. Narayana Rao for Appellant.

C. Venkatasubbaramiah for Respondent.

The Court delivered the following

Judgments:—*The Chief Justice*:—I adhere to my former judgment, and I think that the appeal should be dismissed with costs.

Miller J:—As regards the point that the building was not attached to the land by the plaintiff or her husband during the tenancy under Exhibit II, a point which was not taken in the Courts below I do not think it is necessary to hold that S. 108 of the Transfer of Property Act would be inapplicable to the case. So far as I can see, the recognition, for the period of the new tenancy, of the tenant's property in the building has no other necessary effect than to prevent the landlord from treating the building as having been surrendered to him at the end of the previous term; it may be taken as evidence of a contract to allow the removable fixture to remain *as such* upon the land for the new term. I find nothing inconsistent with this view in Exhibit II, and the effect so far as the tenant's right to the building is concerned, is to reserve to him for the new term whatever rights he had during the old term and not to create new rights i. e. rights distinct in view from the old ones. There is no necessity, I think to infer the creation by Exhibit II of

1. (1871) 6 M. H. C. 245. 2. (1903) I. L. R. 27 M. 211.

Angammal v. Syed Aslam Saib

Miller J

any more extensive right than the plaintiff's husband had before, and seeing that the point was not taken on behalf of the plaintiff below we may therefore not have before us all the available evidence, I am not prepared to draw any inference in the plaintiff's favor which the words of Exhibit II do not necessarily import.

As to the question of compensation I think it is clear that it is not the law that, apart from estoppel or contract, the tenant has any right to demand compensation for buildings left by him on the premises when he quits them whether these buildings were erected with the landlord's consent or not. Consent will only be of use to the tenant as leading to an estoppel or as evidencing an agreement. I see no reason, if I may say so, to doubt the correctness of the statement of law on this point in *Ismai Kani Rowthen* v. *Nazarali Sahib*[1].

As to the facts I am content to accept them as found by the learned judge who heard the evidence. His estimate of it was not seriously attacked in the argument addressed to us on behalf of the appellant. He finds that there is no trustworthy evidence of an express consent on the part of the original landlord to the erection of the house but that is clear that the 1st defendant the original landlord's successor knew of the additions made to it. I agree with him that,this being the state of the evidence, and having regard to the conditions of the tenancy, there is no room for a presumption that there was any undertaking by the landlord to pay for the house if the tenant did not remove it. Even if it can be presumed that the house was originally built with the knowledge of the then landlord, that will not be enough: and I venture to think that recognition of ownership is of no effect at all: the law gives the tenant ownership during the term, and the landlord's recognition of that will not estop him or be evidence of an agreement.

There remains the question whether the tenant's right of removal ceases with the expiration or determination of tenancy, or if not then, when?

This question is dealt with in *Ismai Kani Rowthan* v. *Nazarali Sahib*[1]. It is there pointed out that in S. 108(h) of the Transfer of Property Act " nothing is said as to the rights of parties in respect of such things after the termination of the lease, if they have not been already removed by the tenant. The question may arise whether the tenant forfeits all his rights in such things if he has not so removed them, and in the absence of any contract on that point

1. (1903) I. L. R. 27 M. 211 at 216.

Angammal v. Syed Aslam. Saib

Miller J.

the question will have to be solved with reference to local usage whatever may be the precise sense in which that expression is used in S. 108." This last sentence no doubt suggests a misreading of the section by the learned judge, but that does not, I think, affect the following passage which, as I understand it contains his solution of the question. "According to the customary or common law of the land as laid down in the case of *Thakin Chawle Paramanaik*[1] the option will be with the lessor either to take the building paying compensation or, if he is unwilling to pay compensation, to allow the tenant to remove the building." And this solution seems to be in accordance with the cases in India.

Inasmuch then as the lessor's right of election comes into operation only after the expiration or determination of the tenancy for till then he has no right to interfere, it follows that, if he elects to allow the tenant to remove the buildings he must allow him a reasonable time after the termination of the tenancy, in which to effect the removal and accordingly the Courts in India as is pointed out by *Sankaran Nair* J., have been in the habit, when making decrees in ejectment suits, of postponing execution for a period of sufficient duration to enable the tenant to remove his buildings if he so desires, before surrendering possession and in *Deni Ram* v. *Kundan Lal*[2] the Privy Council took a similar course and making a decree for ejectment allowed the tenant to remove his buildings.

It is for the landlord to give a reasonable time, but the Courts will not count the time as against the tenants so long as the landlord's right to demand possession is in dispute. It would be inequitable to require the tenant to pull down his buildings before the question of his liability to give up possession is decided. Hence the time is counted from the date of the decree.

But there is nothing in any of the cases or in the texts of the Hindu and of the Muhammadan Law givers cited in the cases to suggest that after possession has been given up to the lessor, the lessee retains any right to remove the buildings or to demand compensation for them. If he has had time after the termination of the lease to remove the buildings and has not done so before he gives up possession, then I am satisfied he has no further right to do so. It is not necessary in this case to decide whether the buildings are to be held to be "a gift in law to him in reversion" or to be forfeited, or abandoned or whether it is only the right of recovery from the lessor that is barred. The result is the same so far as we are concerned with it.

1. (1860) Beng. L. R. Supp. F. B. 2. (1899) I. L. R. 21 A. 496.

Angammal v. Syed Aslam Saib

Sankaran Nair J.

Now in the present case possession was obtained by means of an ejectment order of the Presidency Court of Small Causes, and the procedure of that court does not, we are told, admit of the postponement of execution which in other cases is effected by the decree. Nevertheless the tenant is by law entitled to a reasonable time and opportunity to remove his buildings, and as I have above pointed out, that time must generally at any rate be dated from the ejectment order and not from the termination of the tenancy. The question is therefore has the tenant been given that reasonable time and opportunity by the landlord? If not the court will give it now or make the landlord pay compensation. If so, the tenant has no further right to remove the building.

There can be no doubt, I think that the answer must be that the tenant has been given ample time and ample opportunity of removing the building after he gave up possession in February 1907 and that being so his suit was rightly dismissed and this appeal must be dismissed with costs.

Sankaran Nair J:—I have read the judgment of *Miller* J. For the reasons already given by me I agree with the view that the improvement of the building in this case belongs to the tenant, the appellant, and that he is entitled to remove it, if the defendant is not willing to pay him its value. I am unable to agree, however, with the view that ownership is lost if not exercised within a reasonable time. The tenant is bound to remove the building within a reasonable time or before he surrenders possession. If he does not do so, I fail to see how it has the effect of transfer of ownership. The landlord may restore the land to its old condition and claim damages.

The law as to right to compensation laid down by my learned colleagues following the decision in *Ismai Kani Rowthen* v. *Nazar Ali Khan*[1] is undoubtedly the English Law. The English common Law has been harsh and oppressive to tenants and is not a law of justice, equity and good conscience. Indian agricultural prosperity is built on tenant's labor. Indian legislation both Local and Imperial has been steadily directed towards getting rid of the consequences that followed the application of the English law of landlord and tenant based on contract to India where such regulation is regulated by custom. In the Madras Presidency the Sudder Court in 1859 and eminent judges of great experience like *Holloway* and *Innes* laid down a different principle which I followed in my judgment under

1. (1903) I. L. R. 27 M. 211 at 216.

Angammal v. Syed Aslam Saib

appeal. As between the two I have little hesitation in making up my mind to follow their decision in *Mahalakshmi Ammal* v. *Palaniappa Chetty*.[1]

It is true that the question that the building was not attached during the tenancy was not raised in the court below. But Exhibit II was a part of the plaintiff's case and it was for the defendant to raise any plea that may get rid of the inference to be drawn from Exhibit II.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim.

Sivagurunátha Chettiar and another ... ... *Petitioners**

v.

Ramasami Aiyangar ... ... *Respondent.*

Sivagurunatha Chettiar v. Ramasami Aiyangar

Civil Procedure Code (Act V of 1908) S. 2 cl. 11—Order 1 Rule 8—Scope of —Similar interest though distinct—Order XXII rules 2 and 3—Representative action—Sole plaintiff—Death of—Continuance or renewal of action by person interested in action—Legal representative—Order XXII—Applicability of.

On the death of a sole plaintiff in a representative action under order 1 rule 8 the suit can be revived and continued by one of the persons having the same interest in the action.

One S a voter in the Kumbakonam Devasthanam circle brought a suit in his representative character for a declaration that the election of the 7th defendant as a member of the committee was void and for an injunction to restrain him from exercising the functions as member. Pending adjudication he died. The Respondent, another voter was made a party on his application and allowed to continue the suit.

Held:—That though Respondent was not the legal representative of the deceased plaintiff within the meaning of S. 2 cl. (11) C.P.C. yet he was entitled to continue the suit.

Held further:—That if he was entitled to continue the suit mere misdescription of the respondent in the order as legal representative of the deceased plaintiff would not be a ground for setting aside the order.

Order XXII has no application to the continuance of a representative action by persons interested, on the death of a sole plaintiff.

The plaintiff in a representative action is *dominus litis* and not merely trustee of the action, in that he has entire control of the suit so far as the continuing of the suit is concerned. He is not bound to prosecute the suit. He may withdraw the suit or even compromise it.

Nevertheless the interest of the other persons is a vital one and that interest subsists even after the death of the plaintiff so as to enable them to pursue the action.

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*C R. P. No. 334 of 1910 20th October 1911.

1. (1871) 6 M. H. C. R. 245.

Sivagurunatha Chettiar v. Ramasami Aiyangar

Sub-Rule 2 of Rule 8 of Order I does not impose any time limit within which the application to be joined as a party must be made.

The Court, however, has a direction whether it should or should not grant an application in the circumstances of a particular case.

O. I, R. 8, is not confined to cases where the interests are concurrent but applies also to cases where the interests are similar though distinct.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam in Interlocutory Application No. 130 of 1910 in No. 26 of 1909.

S. Srinivasa Iyengar & *S. Muthiah Mudaliar* for Petitioners.

S. V. Padmanabha Iyengar for Respondent.

The Court delivered the following

Judgment:—This petition raised the question whether, when the sole plaintiff in a representative suit instituted with permission obtained under Rule 8, Order. I, dies before there has been any adjudication, the suit can be revived or continued by one of the persons having the same interest in the suit. The question is not directly covered by any precedent and is one, by no means, easy to decide.

The suit in which the order impugned by this petition has been made was instituted with sanction obtained under Rule 8 Order 1 by one Sreenivasa Chariar, a voter in the Kumbakonam Devasthanam circle, seeking a declaration that the election of the 7th defendant as a member of the Devasthanam committee is void and for an injunction to restrain him from exercising the office of such member. Sreenivasa Chariar died before the date on which the case was posted for examination of witnesses and, on the application of the Respondent, and the voter in the Devasthanam, who wanted to proceed with the suit, it has been revived, and the Respondent's name has been ordered to be entered in the cause title as the legal representative of the deceased Sreenivasa Chariar. The Respondent claimed that in law he was the representative of Sreenivasa Chariar in as much as he was one of the voters on whose behalf Sreenivasa Chariar instituted the suit. It seems to me clear beyond dispute that the respondent does not come within the definition of legal representative as given in clause (11) of S. 2, and it has not been contended before me that he does. He cannot in any way be said to represent the estate of the deceased; in fact he has no concern with such estate. But if he is entitled to continue the suit, mere misdescription of the respondent in the order of the Subordinate Judge as legal representative of the deceased plaintiff would not in itself justify me in setting aside the order. The misdescription may be rectified if necessary.

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The substantial question therefore is, whether the suit can be continued by the respondent. There can be no doubt that the right of the deceased plaintiff to sue in this case was personal to himself and so far as that right is concerned, it must be held to have come to an end on his death. Mr. S. Sreenivasa Aiyangar contends that with the cessation of the deceased plaintiff's right to sue the suit itself ceased to exist or became dead, while the learned pleader for the respondent contends that the action being a representative one, the other persons having the same interest, whom the deceased was allowed to represent, must be held for the purposes of continuing the action to be his co-plaintiffs. Before proceeding further I may mention that Mr. Sreenivasa Aiyangar also contended that the sanction granted to the deceased plaintiff under Order I Rule 8 is itself bad in as much as the right of each voter is personal to himself. But as pointed out by *Shephard* J. in *Sreenivasa Chariar* v. *Raghavachariar*[1] in reference to the corresponding provisions of the Code of Civil Procedure of 1882 and the language of Rule 8 Order I is identical in this repeat with the language of S. 30 of the code of 1882, this rule of procedure, which is founded on a rule of the English Court of Chancery, applies not only to cases where the interests are concurrent but also where they are similar though distinct. Besides, the defendants never objected to the order granting sanction under Rule 8. I will therefore deal with the present question on the basis of the sanction having been validly granted. I shall first examine the provisions of the code. It cannot be said that either Rule 2 or Rule 3, Order XXII, in terms applies to this case; not Rule 2 for the simple reason that it contemplates cases where there are actually more than one plaintiff or defendant on the record, and not Rule 3 for the same reason as far as the first part of sub-rule 1 is concerned, and so far as its second part is concerned, it could not apply as it deals with cases in which a sole plaintiff's right to sue survives to his legal representative and here the right of the deceased to sue, in so far as it was for his own benefit would not survive at all. Sub-rule (2) apparently deals with cases where an application could be made under Sub Rule (1) and has not been made, though that is not expressed but if the direction that the suit shall abate was to be taken to apply to cases other than those contemplated by sub rule (1) the result would be that the suit would abate so far as the deceased plaintiff is concerned. But as I have said the legislature does not purport by these sections to deal with the revivor, or more strictly speaking the continuance of a representative suit instituted by a sole plaintiff.

1. (1897) I. L R. 23 M. 28 at p. 31.

Now let us see what light is thrown on the question by Rule 8. Order. I. and the other provisions of the Code. The effect of the permission granted under Rule 8 is to make the suit as one 'on behalf of and for the benefit of' the deceased and other voters in the Devasthanam including the respondent. All the voters are to be given notice of the institution of the suit and any of them might apply to be made a party to such suit and would subject perhaps to the discretion of the court, be entitled to join.

Sub-rule 2 does not impose any limit or condition as to the time within which the application must be made, but it is contended by Mr. S. Sreenivasa Aiyangar that one necessarily implied condition is that the suit must still be in existence at the date of the death of the plaintiff. He says that, when Srineevasa Chariar died, the suit died with him, and therefore there would be nothing to revive or continue. No doubt that would be the result, if the suit was instituted solely in his own right and not under the provisions of Rule 8. The contention however is that the sanction obtained under that rule does not in any way affect the personal character of the action so far as its prosecution by the plaintiff up to adjudication is concerned, though after adjudication other members of the class will be bound by and entitled to the benefit of the decree, as provided by S. 11 Explanation VI of the code. It is only after adjudication that the other interested persons not parties to the suit would be treated as claiming under the person litigating and allowed, when necessary, to take part in the proceedings so that if the plaintiff dies after decree any of the other persons on whose behalf the suit was brought can carry on the proceedings. But until adjudication the plaintiff is *dominus litis* and not a trustee of the action, and therefore on his death the action, if his right to sue does not survive as in this case must necessarily cease to exist. This in substance is the argument of Mr. Sreenivasa Aiyangar, and in support of it he relies on a number of English rulings.

The provisions of the code regarding suits of a representative character are apparently as I have said founded on the rules of Chancery practice in England, and as there is no clear and express provision in the code relating to the particular question, I may appropriately refer to the English decisions to ascertain the principle which should govern this case. It stands to reason that, so far as the continuing or not continuing the suit is concerned, the plaintiff should have entire control of an action of this nature ; he has no doubt obtained permission to prosecute the suit on behalf of the others, but has not bound himself to do so. In that sense he is un-

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doubtedly *dominus litis* and not a trustee of the action. He may therefore withdraw from the suit or compromise it with the defendants, and it cannot be open to other persons to prevent him from doing so and to compel him to devote his time and money in prosecuting the suit for their benefit. This is what is laid down in *Handford* v. *Storie*[1], *Ward* v. *Alpha Company* : *In Re Alpha Company*[2] and *Wolf* v. *Can Boolen*[3]. But it does not follow because the plaintiff on the record can withdraw from the suit or compromise it for his own benefit, that other members of the class have no interest in the suit. In fact they have a most vital interest as the adjudication will bind them equally with the plaintiff, and I see no reason why that interest should not be considered still subsisting after the death of the plaintiff to enable them to pursue the action. It is conceded that the suit may be continued when the plaintiff dies after the decree, but why should it make any difference that he died before the decree? It is argued that after decree the plaintiff becomes a trustee of the action. But this is not so, though he would be a trustee of the fruits of the decree in his hands. At least in actions other than those involving administration of the estate of a debtor on behalf of all the creditors i. e. creditor actions, it cannot be said that the plaintiff who has obtained decree in a representative suit is bound to go on with it. It is observed by *Kekewich* J. in *Ward* v. *Alpha Company*,[2] which was an action by a debenture holder on behalf of himself and other debenture holders, "he can't prevent another debenture holder coming in and claiming benefit of the decree but he is not bound to go on because some other person may be entitled to the benefit of the action." He then points out that the reason why a second suit with the same object would be stopped after the first suit has been commenced is to prevent improper costs, and it seems to me clear that in this country, the legislature having permitted the other members of the class represented by the plaintiff to apply to be made parties in the plaintiff's suit, it would be the duty of the Court to restrain a second independent suit.

As I have pointed out the Legislature in Sub-rule (2) Rule 8 Order. I. does not for obvious reasons impose any limit of time within which applications must be made to be made parties, as it may be necessary for the prosecution of their interests that other persons interested should be allowed to intervene at any stage of the suit.

1. (1825) 57 Eng. Rep. 320. 2. (1903) 1 Ch. 203.
3. (1906) 94 L. T. 502,

See also *Watson* v. *Cane*[1]. And it does not stand to reason why if any member of the class is competent by a future application to come in as a plaintiff or defendant in order to safeguard his interest or to get rid of the effects of improper conduct of the suit by the plaintiff, he should not be allowed to do so in a case where the plaintiff is dead and his legal representative is not competent to maintain the suit. Why should all the proceedings already taken be treated as wasted, when the very policy of representative actions is to prevent a multiplicity of actions ? On the other hand the Court is vested with discretion as to whether it should or should not grant an application under sub-rule (2) of rule 8 in the circumstances of a particular case.

In this case, the action in my opinion being continued, there can be no doubt that the respondent has been rightly allowed to continue it.

This petition must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer

Batchu Ramayya. *Appellant *(Plaintiff.)*

v.

Dhara Satchi *Respondent (Defendant).*

Transfer of Property Act S. 43—Alienation of service Inam lands—Applicability to.

S. 43 of the Transfer of Property Act cannot be invoked in favour of alienee of service Inam land whose alienation is wholly void under the law.

Ramaswami Naick v. *Ramaswami Chetty* [2] *Narahari Sahu* v. *Korithan Naidu* [3] followed

Angannayya v. *Narasanna* [4] dissented from.

Second appeal from the decree of the court of the Temporary Subordinate Judge of Rajahmundry in A. S. No. 64 of 1912 preferred against the decree of the Court of the District Munsif of Peddapur in O. S. No. 374 of 1909.

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* S. A. 1590 of 1912 10th October 1913.

1. 17 Ch. D. 19. 2. (1906) I. L. R. 30 M. 255.

3. (1913) M. W. N. 415 s. c. 24 M. L. J. 462.

4. (1907) 18 M. L. J. 247

Ramayya v. Dhara Satchi

B. N. Sarma for Appellant.

B. Narasimha Rau for Respondent.

The court delivered the following

Judgment :—We think we should follow the decisions in the cases reported in *Ramaswami Naick* v. *Ramaswami Chetti* [1] and *Narahari Sahu* v. *Korithan Naidu* [2]. In the latter case the decision in *Angannayya* v. *Droor Narasinna* [3] has been dissented from and we also with all respect dissent from the ruling in *Angannayya* v. *Narasanna* [3]. It follows that the alienation of the service Inam land by the 1st defendant's husband to the plaintiff was wholly void and S. 43 of the Transfer of Property Act could not be invoked by the plaintiff in his favor.

As regards two other contentions urged by the Appellant's learned Vakil, namely (1) that the emoluments of the office consisted only of the assessment, and (2) that it does not appear that the lands had not been enfranchised even before the sale deed to the plaintiff, not only were these points not taken up in the Lower Court or even in the second appeal memorandum but the plaint (as we read it) admits that the enfranchisement was after the date of the plaintiff's sale deed.

The point again that if the plaintiff's sale deed is void, he is entitled to recover his purchase money from the defendant was also taken up for the first time in argument before us. The claim for possession is based on the contention that the sale deed is or has become effective while this new claim could only be based on the entirely opposite contention that the sale deed is void and ineffective. This new claim cannot be put forward in this suit without an amendment of the plaint which should not be allowed at this stage.

The second appeal is dismissed with costs.

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1. (1906) I. L. R. 30 M. 255.
2. (1913) M. W. N. 416 s. c. 24 M. L. J. 462.
3. (1907) 18 M. L J. 247.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Narasamma Hegadthi. ... (*Plaintiff*)—*Appellant**

v.

Billa Kesu Pujari and others ... (*Defendants*)—*Respondents.*

Evidence Act, Ss. 8, 21—Statement by executant as to circumstances of execution—Long after execution—Inadmissible—Construction—Deeds—Subsequent conduct—Inadmissibility of, to control clear terms of document—Draft—Aliyasantana Law—Gift to wife—Rule as to Putravakasam property—Applicability of.

Statement by a person as to the circumstances under which he executed a document (sought to be used to prove undue influence) a considerable time after the execution of the document and not accompanying any conduct which is relevant cannot be admitted to prove the facts stated by him. Narasamma Hegadthi v. Billa Kesu Pujari

Except in the case of ancient documents, the construction of a document whose terms are clear cannot be controlled by the subsequent conduct of the parties.

It was accordingly held that where a gift was made to a woman to enjoy the property from generation to generation, evidence of intention on the part of the donor to make the gift to her children was not admissible.

The ruling in *Kunhach Umma v. Kutti Haji Mammi*[1] is not applicable when the gift purports to be made only to the wife and not to the children also.

A draft deed prepared long before the fair was prepared is inadmissible for the purpose of construing the latter.

Second appeals from the decrees of the court of the Temporary Subordinate Judge of South Canara in Appeal Suits Nos. 109, 107, 108 and 106 of 1908, presented against the decrees of the Court of the District Munsif of Udipi in Original Suits Nos. 448, 456, 457 and 449 of 1906.

B. Sitarama Rao for Appellant.

K. Ramanatha Shenai, *K. Naraina Rao* and *K. Yegnanarayana Adiga* for Respondents.

S. A. 710 of 1910.

The court delivered the following

Judgment:—The principal question in this case relates to the construction of the document, Ex. A, in the case. It was executed by one Mainda Hegade in favour of his wife, Ummakke, in 1864. It purported to be a deed of sale. But both the courts have found that it was in reality a deed of gift, and that finding is binding upon us. In fact the finding has not been impeached by either party in

*S. A. Nos. 710 to 713 of 1910. 2nd April 1913.

1. (1892) I. L. R. 16 M. 201.

Narasamma Hegadthi v. Billa Kesu Pujari

this Court. 1903 Ummakke executed a deed of gift (Ex. B.) of the properties comprised in Ex. A. in favour of the plaintiff. This suit by the plaintiff is to recover the property leased to defendants Nos. 1 and 2 on chalgeni lease by Ummakke. The contention of the tenants, defendants Nos. 1 and 2, is that they surrendered posssesion to the 3rd defendant, a son of Ummakke, and that the rent sued for was also paid to him. The plaintiff's answer to this contention is that the property in question belongs to herself alone under Ex. B, and that she is entitled to recover it from defendants Nos. 1 and 2 with the arrears of rent, and that any payment made to the 3rd defendant could not be set up in answer to her claim. The other children of Ummakke including the 3rd defendant were made parties to this suit, and they pleaded that the deed of gift, Ex. B, was obtained by the plaintiff from Ummakke by undue influence and that in any event the deed was invalid because under the deed, Ex. A, the right to the property vested not in Ummakke alone but in herself and in her children subject to the incidents of Alyasantana Law. The District Munsif found that the defendants had failed to prove that Ex. B was brought about by any undue influence; but he was of opinion that Ummakke was not the sole owner of the property under Ex. A. The appellate court agreed with the court of first instance with regard to the construction of Ex. A, and held further that undue influence was exerted on Ummakke to make her execute Ex. B. In second appeal it is contended that there is absolutely no legal evidence in support of the appellate court's finding on the question of undue influence, and that with respect to the construction of Ex. A, both courts are wrong. We may first deal with the question of undue influence in as much as, if we are able to confirm the finding on that point, it would be unnecessary to go into the construction of Ex. A. We feel constrained to uphold the contention of the appellant that there is no legal evidence to support the finding. The evidence referred to by the appellate court consists of the statements of the plaintiff's 2nd witness and of the 3rd defendant. Both of them speak to statements made by Ummakke, that she did not know the nature of the contents of Ex. B, when she executed it. No pressure is spoken to by either of them. All that is stated is that Ummakke said that she was asked to execute the document and that she did so. This fact, assuming the evidence to be relevant, is no evidence of undue influence at all. There was nothing wrong in the plaintiff asking her mother to make a gift of the property to herself alone, and, if the mother was willing to do so, there would be nothing improper in her taking it. We are however of opinion that the evidence of the 3rd defendant and of

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the plaintiff's 2nd witness of statements made to them by Ummakke is not in the circumstances of this case admissible at all to prove the facts alleged to have been stated by Ummakke. Her statement was admittedly made after her return from the house of the plaintiff's husband, where she had gone on a visit. According to the evidence of the witnesses mentioned above, she stayed two or three months in that house. Ummakke's statements did not accompany any conduct on her part, nor were they made at the time when the document Ex. B, was executed. Evidence regarding the statements made by her would not come within the purview of either S. 8 or S. 21 of the Evidence Act. A statement made by a person as to the circumstances under which he executes a document a considerable time after the execution cannot be admitted to prove the facts stated by him. If we reject the statements, as we hold we are bound to do, there is absolutely no evidence in support of the plea of undue influence. We must therefore set aside the finding of the Lower Appellate court on that question.

It is then necessary to decide what right Ummakke obtained under Ex. A. The terms of the document seem to us to be quite unambiguous. Mainda Hegade delivers the property absolutely to his wife and says that she is to enjoy the property from generation to generation. These are words appropriate for the creation of an absolute interest, and they are not consistent with any limitation of the right of the donee. It may be, as urged by the learned Vakil for the respondent, that the donor wished by the gift to benefit not only his wife but also his children. But the question is what is the correct interpretation to be placed upon the words of the document. On that matter we have no doubt that it creates an absolute interest in favour of the wife. The donor may have hoped that his wife would transmit his estate to all his children and was content to rely on her doing so, but whatever his idea may have been, the document is perfectly clear and we cannot hold that it confers on Ummakke any other than an absolute estate. The case is not similar to *Kunhacha Umma* v. *Kutti Mammi Hajee* [1] where the gift was to a woman and her children. The Lower Appellate Court refers in support of its construction to two documents, Exhibits XIV and XV, which came into existence two years before the date of Ex. A. They were apparently prepared by Mainda Hegade for the purpose of being executed. These documents are of no use in construing Ex. A, which is in our opinion unambiguous. It may be that the donor changed his mind. He certainly did so as

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to the language in which he should express his wishes. But whether he had any different intentions at the time of Ex. A from those he had at the time when Exhibits XIV and XV were prepared or not, the construction of Ex. A, cannot be controlled by anything to be found in Exhibits XIV and XV. For the same reason we must also hold that the subsequent documents which were put in to show the conduct of Ummakke as to what she thought was the correct construction of Ex. A, are also useless. It is settled law that except in the case of ancient documents the construction of a document whose terms are clear cannot be controlled by the subsequent conduct of the parties. In reality those subsequent documents do not afford much help in the construction of Ex. A. In 1882 it appears that Ummakke sued a tenant for rent in conjunction with one of her sons. This was 18 years after Ex. A, was executed ; but it appears also that in 1892 she instituted another suit against a tenant by herself. The only other document relied on as evidence of her conduct is a petition by her son, Chandayya, for pattah for a land adjoining one of the items included in Ex. A. The petition stated that Muli No. 18 included in Ex. A. was in the possession of the applicant Chandayya; but the Revenue authorities in their order recognised the possession only of Ummakke and granted a cowl in favour of Chandayya on the ground that Ummakke consented to it. These detached documents, even if admissible, would afford no safe guide in the construction of Ex. A, especially when we find that Ummakke did not always act in conjunction with her sons in matters connected with the administration of the property. Mr. Naraina Row has tried to support the judgment of the Lower Appellate Court on two grounds, neither of which was raised till now. The first ground is that there was a secret trust at the time of the execution of Ex. A, in favour of the children of Ummakke. No such trust was pleaded by the defendants. The question whether there was a secret trust or not is one of fact. We cannot allow it to be raised in second appeal. The District Munsif no doubt says that "whatever the outward form of which the transaction eventually took, the real nature of the transaction is disclosed by Exhibits XV and XIV and Ummakke took the property burdened with the trust in favour of herself and her children contained in Exhibits XV and XIV." We do not think that the District Munsif in this passage is really speaking of any secret trust accepted by Ummakke. The documents are apparently referred to by him as throwing light on the intention both of the donor and of Ummakke. There is absolutely no evidence that Exhibits XIV and XV were brought to the

knowledge of Ummakke and that she consented to accept the property on any trust.

The second contention is that, whatever the original character of the gift under Ex. A may be, Ummakke threw the properties comprised in it into the common stock by incorporating it with other properties belonging to the family. Here again no issue was raised to try the question; and the question being one of fact we must decline to allow it to be raised here. It would have to be shown that the property was continuously enjoyed by Ummakke and her children together. The documents referred to by the lower Courts do not bear out any such theory of continuous enjoyment by the whole family. We must disallow this contention also. The result is that the decrees of the Lower Courts must be reversed, and the plaintiff must be given a decree for the possession of the property.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

Manager to the lessees of the Shivagunga Zemindary. } *Appellant.** *Plaintiff.*

v.

Chidambaram Chetti and others ... *Respondents.* *Defendants.*

Estates Land Act S. 42 cl. (2)—Landlord—Claim to enhanced rent—For area in excess of that mentioned in lease deed—Maintainable—Applicability of S. 42—When claim to enhanced rent based on contract.

By a registered deed a tenant agreed that in case the land leased should on measurement be found to be more than the area mentioned therein he would be liable to pay enhanced rent on such excess area from three years prior to the date of the discovery. *Held* that the landlord could maintain a suit for enhanced rent without any application to the Collector to determine the excess area under S. 42 of the Estates Land Act.

It is only when the landlord has to base his claim for enhancement on the Estates Land Act that he has to obtain an order from the Collector determining the excess area. *Dintarini Dasi* v. *L.P.D. Broughton*[1] and *Ramachender Chuckerbutty* v. *Giredher Dutt*[2] followed.

Second appeal from the decree of the District Court of Ramnad in A.S. No. 551 of 1911 preferred against the decision of the Court of the Special Deputy Collecter of Ramned in S. S. No. 1559 of 1910.

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* S. A. No. 163 of 12 25th September 1913.

1. (1896) 3 C. W. N. 225. 2. (1891) I. L. R. 19 C. 755.

Manager to the lessees of Shivagunga Zamindary *v.* Chidambaram Chetti

K. Srinivasa Aiyangar and *T. R. Venkatrama Sastri* for Appellant.

V. Visvanatha Sastri for Respondent.

The Court delivered the following

Judgment:—The plaintiffs are the lessees of the Shivagunga Zemindari and they are the appellants before us. They are the landlords under the Estates Land Act. In 1899 a registered rent deed was executed by the defendants in favour of the plaintiffs. The terms of that agreement were that the defendants should pay assessment on the area of a certain holding at the rate of Rs. 11 per sei in respect of Ayan lands in 3 villages leased to the defendant. The term of the lease has not yet expired. Under that same registered deed, the defendants agreed to pay assessment at Rs. 8 per sei on the Ayan lands in a fourth village also leased under the same deed. The area of the leased lands in the three former villages was given in the deed as 19-3-5 seis. The area of the land in the fourth village was given as 2-11-4 seis. In paragraph 6 of the said lease deed, however a provision was inserted *viz.*, that in case the areas of the lands should on measurement, be found to be more than the areas mentioned above, the defendants should be liable to pay teerwa at the rate of Rs. 27-8-0 per sei on the excess so found from 3 years prior to the date on which such excess area was discovered. The plaintiff's allegations are that the plaintiff's Inspector discovered an excess of 2-3-5 seis in one of the first three villages and 0-0-4 sei in the fourth village in June 1909 and on this total area of 2-4-3 the defendants are liable to pay excess amount at Rs. 27-8-0 per sei from fusli 1315 including the current fusli of the plaint, namely fusli 1319. The suit was brought in the 27th May 1910.

Several defences were raised by the defendants. It is necessary however for the purposes of this second appeal to notice only one of them, *viz.*, that contained in paragraph 4 of the written statement. The contention in that paragraph is that according to clause 2 of S. 42 of the Estates Land Act the plaintiffs are not entitled to file a suit in respect of arrears for the excess measurement until the Collector had decided on application by the plaintiffs what such excess area was. The lower Courts accepted this contention and dismissed the suit without going into the other issues raised by the pleadings. We think that the decisions of the lower Courts cannot be upheld. S. 42 of the Estates Land Act corresponds to S. 52 of the Bengal Tenancy Act. Though S.52 of the Bengal Tenancy Act does not contain the provisions contained in the proviso to clause 2 of S. 42 of the Madras Estates Land Act, S. 188 of the Bengal Tenancy

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Act imposes another condition before a claim by a landlord under that act for an enhancement of rent can be recognised *i.e.* that in the case of joint landlords all must act together. In *Dintarini Dasi* v. *L. P. D. Broughton*[1] the learned judges had to deal with a case similar to the present. The term of the lease there was that "landlords were at liberty to measure the lands of tenants and, if the area of the lands be found greater in quantity than 150 bighas, its then estimated area, the tenant would pay rent at the rate of annas 10 per biga on the area found. The question was whether a suit brought by the landlord for the enhancement on this contract was a suit brought in respect of a right granted or declared *by the Act* in the landlord's favour and it was decided in the negative. The same question has been similarly decided in *RamchunderChuckerbuty* v. *Girdhur Dutt.*[2] It was only where the landlord wants to enhance the rent, basing his claim on the right granted and declared by section 42 clauses 1 (a) and (b) that he should obtain under clause 2 the order of the collecter for such alteration of rent before he could claim the altered rent. As observed in the 3 Calcutta Weekly Notes case, "The plaintiff does not seek in this suit under the provision of S. 52 of the Bengal Tenancy Act) " (S. 42 of the Madras Estates Land Act) to alter the rent of the defendant. He says the rent has automatically been altered by the provisions of the defendants' lease on the land being measured and found to exceed 150 bighas in area " Applying this principle it seems to us the proviso found in clause 2 of S. 42 which requires the order of a Collector before enhancement of rent can be allowed does not apply to the claim of the plaintiff in this case. On similar grounds the learned Judges in the Calcutta case hold that the condition in S. 188 of the Bengal Tenancy Act that all landlords should act together did not apply to a suit brought for enhancement based on contract and not on S. 52.

The decrees of the lower Courts will therefore be reversed and the suit remanded for decision on the other issues raised in the case. Costs will be costs in the cause.

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1. (1896) 3 C. W. N. 225.

2. (1891) I. L. R. 19 C. 755.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

D. Srinivasa Iyengar ... ... *Appellant** (*1st Defendant.*)

v.

1. Minor Thiruvengadathaiyangar by guardian Krishnasamy Iyengar.
2. Minor Srirangammal by guardian Rukmani Ammal.

} *Respondents.* (*Plaintiff and* (*6th Defendant.*)

Hindu Law—Policy of Life Insurance—Premia paid out of family property—Effect of—Partition—Expenses of Upanayanam of brothers, marriage of brothers and sisters—If to be provided for—Paternal Estate—No difference between father's self-acquisition and ancestral estate—Maintenance of step-mother—Charge on both son's and step son's shares—Order 41 rr. 22, 33—Provision for maintenance disallowed by Lower Court against step-son—Allowed on memo of objections by son—Marriage of male only Niyama Vidhi or Parisankhya Vidhi—Father not bound to marry sons.

Srinivasa Iyengar *v.* Thiruvengadathaiyangar

A Hindu father took out a policy of insurance on his life. The policy stated that it was taken for the benefit of his wife and two sons. Of these, the wife and one of the sons subsequently died. Plaintiff was the son by his second wife. The premia were paid out of the family property.

Held: the amount of the policy was family property and the plaintiff was entitled to share in it.

[But Cf. *Balamba* v. *Krishnayya*[1]].

A minor co-parcener living separately for no fault of the manager is not entitled to claim mesne profits.

There is no difference in principle between a minor co-parcener and a major co-parcener in this respect.

Even where there has been exclusion and the excluded co-parcener sues for past profits the manager is entitled to have credit for all sums properly expended by him.

Maintenance of the widows of the father is a charge not only on the shares of their own children but also on those of their step-children.

Where the lower appellate Court refused to make provision for the maintenance of the plaintiff's mother on the ground that it was to come out exclusively from the share of the plaintiff but the plaintiff's mother failed to appeal against it. *Held*:—Nevertheless that it was open to the plaintiff (respondent) as a party affected by the lower court's order, to urge by memorandum of objections that her maintenance should be provided for out of the shares of both himself and the 1st defendant (his step-brother).

Per Sundara Aiyar J. Provision ought to be made at partition not only for the Upanayanams of brothers and marriages of sisters but also for the marriages of brothers who have not been married and such provision ought to be

* S. A. No. 355 of 1911. 30th August 1912.

1. (1913) 25 M. L. J. 65, (F. B.)

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made whether the property to be divided is merely self-acquired property of the father or ancestral property.

Per Sadasiva Aiyar J. Marriage of males is not one of the ceremonies for which provision is to be made at the partition.

The expression "paternal estate" in Hindu Law books does not mean the father's self-acquisition alone but merely means the estate which the son can inherit or obtain through his relation as such son to his father. Liability to provide for the marriages of daughters and Upanayanam of sons attaches to all such property without distinction.

Marriage of sons not being a Samskaram which the father is bound to perform, a deduction from the paternal estate for the purpose of providing for it need not be made before partition.

The doctrine of "property by birth" and its history discussed.

Marriage is only a Vikalpa Vidhi and it is not a Nitya or Apurva Vidhi. It is either a Niyama Vidhi or is only a Parisankhya Vidhi.

Second Appeal from the decree of the Court of the Subordinate Judge of Trichinopoly in Appeal Suit No. 52 of 1910, presented against the decree of the Court of the principal District Munsif of Kulitalai in Original Suit No. 351 of 1907.

P. R. Ganapathy Aiyar for Appellant.

C. V. Anantakrishna Aiyar for Respondent.

P. R. Ganapathy Aiyar :—Under the Hindu Law, provision cannot be made for the prospective marriage and Upanayanam expenses of sons. Mitakshara Chap. I. Sec. 7. pl. 3 applies only to father's own property. The text of Yajnavalkya has reference only to ceremonial duty. Mitakshara expands it into a duty to spend out of the common wealth but that has reference only to father's wealth which is common to the sons. Smriti Chandrika (Krishnaswami Aiyar p. 90) Chap. XIII pp. 33 and 34 and Vyavahara Madhava both support this position. Narada's text as translated in the Sacred books of the East series also is clear. At any rate, the *Samskaras* referred to in Yajnavalkya's text do not include marriage. He referred to *Kameswara Shastry* v. *Veeracharlu* [1], *Ponnappa Pillai* v. *Papuvayyangar*[2], *Govindarajulu Narasimham* v. *Devara Bhotla Venkatanarsayya*[3], *M. Sundra Bai* v. *Shivnarayana*[4]. In these cases it does not appear whether the property was ancestral or paternal. The distinction between the two kinds of estates is well known. Smriti Chandrika Chap. XII p. 41 is only a precept of moral or imperfect obligation.

Next he submitted that the manager is not bound to pay mesne profits when the other member has not been excluded. *Krishna* v. *Subbanna*[5] is a case of exclusion.

1. (1910) 20 M. L. J. 855.
2. (1881) I. L. R. 4 M. 1.
3. (1903) I. L. R. 27 M. 206.
4. (1907) I. L. R. 32 B. 81.
5. (1884) I. L. R. 7 M. 564.

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C. V. Anantakrishna Aiyar:—Submitted that under the Hindu Law proper there was no distinction between ancestral estate and paternal estate except in that the father has larger powers of disposition. Property is by birth in the one kind of estate as in the other. Mitakshara Chap. I. 7 pl. 3 has been mistranslated by Colebrooke and there is no justification for confining Samskara to Upanayana in the case of the male and interpret the same word as including marriage in the case of the female. The whole misconception has now been cleared by the judgment of *Krishnasami Aiyar* J. in *Kameshwara Shastry* v. *Veeracharlu*[1].

Memo of objections: A preliminary objection was taken by the appellant that the lady concerned not having appealed, the point was not open to the respondent [Objection overruled.]

C. V. Ananthakrishna Aiyar argued on his memo of objections, that the father's widow's maintenance is a charge on the entire estate and not only upon the share of her son. Each of the father's wives had a share under the Mitakshara but custom has substituted for this maintenance. He relied also on *Sivananuntha Perumal Seturoyer* v. *Meenakshi Ammal*[2].

P. R. Ganapathy Aiyar contended that in the last case the Zamindari having remained joint in spite of the partition, there was no difference between the liability of step-sons and sons.

Cur ad vult.

The Court delivered the following.

Judgments:—*Sundara Aiyar, J.*—The suit in this case is one for partition by a Hindu minor. The 1st defendant is the plaintiff's step-brother. The 5th defendant is the plaintiff's mother and 1st defendant's step-mother. The 6th defendant is the plaintiff's elder-sister. The 5th and 6th defendants were made parties on the ground that provision should be made for the maintenance of the former and for the maintenance and marriage and other expenses of the latter.

The first question raised in second appeal is whether the plaintiff is entitled to a share of the amount recovered from a Life Insurance Company on a policy of insurance taken out by Doraisami Aiyangar the father of the plaintiff and the 1st defendant. The policy states that it was taken for the benefit of Dorasami's wife and two sons of whom the wife and one of the sons died, and the 1st defendant alone was left; but both the Courts have found that the premia for the policy were paid out of funds belonging to the whole family. This finding has been attacked in second appeal; but we are unable to interfere with it. It was argued that the finding of the Lower Appellate Court was based in part on the

1. (1910) 20 M. L. J. 855. 6. (1870) 5 M. H. C. 377.

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supposition that Doraisami Aiyangar was the managing member of the family and that this was not the fact. But no objection was taken to the finding on this ground in the Memorandum of Second Appeal: nor does Doraisami Aiyangar's management seem to have been denied in the Lower Appellate Court. The plaintiff was therefore rightly held entitled to a share of the insurance money.

The next question is whether the decree in plaintiff's favour for mesne profits for 2 years before the suit is right. It was alleged by the plaintiff that he and his mother were turned out of the family house and have to live elsewhere. The Subordinate Judge has found that the plaintiff has failed to prove that they were turned out of the house ; but he allowed mesne profits, because he held that a minor plaintiff is entitled to recover mesne profits in a suit for partition. I am of opinion that there is no foundation for this view. The case relied on by the Subordinate Judge *Krishna* v. *Subbanna*[1] does not support it. In that case it was observed ' If an adult member is not excluded, but chooses to live apart from the manager, then as he did not choose to enforce partition, it may be very reasonable that, apart from the consideration of fraud or misappropriation by the manager, the principle above stated should be applied to him." [That is, the principle that the manager is not bound to account for past transactions or past income). " But the principle cannot apply to the case of an infant member, who has been excluded by the manager from the family house and from enjoyment of the property. The infant is, by reason of infancy, incompetent to authorize the act of the manager or, at all events, cannot be legally bound by any authorization in fact given during his infancy. Moreover, the infant being excluded, cannot be assumed in point of law or fact to have known of any act of the manager." The observations relate primarily to a suit for account including an account of past profits. An infant who has been excluded from commensality was held entitled to an account of past profits during the period of his exclusion. They do not support the view that the mere fact that the infant was living separately when it was not due to any fault on the part of the manager would entitle him to recover a share of the profits. The manager of a Hindu family is entitled to spend the income for the benefit of all the members of the family. It is unnecessary to consider whether a member living separately could make a claim for the expenses of his maintenance ; for that is not the question raised for decision

1. (1884) I. L. R. 7 M. 564.

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before us. The manager after making all proper expenditure is expected to add any surplus that may be left to the family funds. No member is entitled to claim a share of past profits on the ground of his separate residence. If he is excluded by the act of the manager, he has, no doubt, been held then entitled to call upon the manager to account for the profits received during the time of his exclusion. The manager would then be entitled to credit for all proper expenditure including any investments made in which of course the excluded member would be entitled to share. With respect to any profits for which the manager is unable to account, the excluded member would be entitled to his share of them. There is no reason why the same principle should not apply to a minor co-parcener. No authority has been cited in support of the application of a different principle. The question here is not one of the right to an account. No doubt one reason for refusing an account to an adult co-parcener suing for partition has been stated to be that "every adult member of an undivided joint family living in commensality with the Karta, must be taken, as between himself and the Karta, to be a participator in, and authorizer of, all that is from time to time done in the management of the joint property to this extent, namely, that he cannot without further cause call the Karta to account for it". *Abhaichandra Roy Chowdhry* v. *Pyari Mohan Guho*[1]. This reason would not of course be applicable to the case of a minor member. But the point has no bearing in deciding whether a minor is entitled to claim mesne profits. The claim for mesne profits must therefore be disallowed. The Subordinate Judge's decree awarding 61½ on this account must be set aside.

The next question is whether the expenses of the plaintiff's Upanayanam and marriage and the 6th defendant's marriage were rightly provided for in the decree for partition. *Jairam* v. *Nathu*[2] and *Mahadeva Pandia* v. *Rama Narayana Pandya*[3] are clearly in support of the plaintiff's case. Two contentions have been raised in this Court :

(1) that such provision can be made only out of the separate or self-acquired property of the father of the parties, and cannot be made out of the ancestral property of the father derived from his father, and

(2) that the plaintiff is entitled to have a provision made only for his Upanayanam and not for his marriage the latter not being a necessary *Samskara* according to Hindu Law.

1. (1870) 5 B. L. R. 347, 354. 2. (1906) I. L. R. 31 B. 54.
3. (1902) 13 M. L. J. 75.

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Sundara Aiyar J.

The first contention is entirely without foundation. Mr. P. R. Ganapathy Aiyar, the learned vakil for the plaintiff who has argued the question very fully relies on certain passages in the Mitakshara. Yagnavalkya's text Chapter 2 verse 124 does not expressly refer to the ceremonies to be performed for the brothers the text being to the effect that "Uninitiated sisters should have their ceremonies performed by those brothers who have already been initiated giving them a quarter of one's own share." But the text has been interpreted by commentators as including the ceremonies of brothers too. The Mitakshara in Chapter 1 section 7 verse 3 expressly provides.

"If any of the brethren be uninitiated when the father dies who is competent to complete their initiation? Uninitiated brothers should be initiated by those, for whom the ceremonies have been already completed." Verse 4 lays down " By the brethern who make a partition after the decease of their father, the uninitiated brothers should be initiated at the charge of the whole estate." Reliance is placed on Chapter 1 Section 6 Verses 14, 15 and 16. These verses deal with the power of the father to make gifts to one or another of the sons. The power to make gifts is now regarded as confined to the separate or self-acquired property of the father. The contention is that these verses show that Section 3 verse 1 dealing with partition after the father's decease—"Let sons divide equally both the effects and the debts, after [the demise of] their two parents," relates only to the self-acquired property of the father. To a question put to the appellant's vakil from the Bench which text, then, provides for the division of the father's ancestral property ?, his answer was that Section 5 verse 1 does so. "But among grand-sons by different fathers the allotment of shares is according to the fathers." But this verse is intended merely to show that where the brothers have an unequal number of sons, the grandsons take *per stirpes* and not *per capita.* Section 1 of Chapter 1 was referred to as showing that the father and his sons have equal rights in the property descending from the grand-father. But this does not help the contention that Section 5 verse 1 of Chapter 1 and Section 3 taken together show that the provision in Section 7 for the Samskaras of the uninitiated brothers and sisters is intended to be made only out of the self acquired property of the father.

Reference is also made to the Smrithi Chandrika Chapter 4 verses 36 and 37. verse 36 cites a text of Vishnu which runs thus :— "The Text of Vishnu that 'the initiations of unmarried daughters are to be defrayed in proportion to his own wealth' is applicable

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either to a case where no partition of heritage takes place from there being an only son, or to a case where brothers live in union." Verse 37 is in these terms:—"Hence Vyasa, brothers whose investiture and other ceremonies have not been performed are to be initiated in due time from the paternal wealth *alone* by brothers whose sacraments have already been completed. Unmarried sisters are also to be initiated by their elder brothers according to law." The word 'alone' is the translation of the Sanskrit word 'Eva,' the meaning being that the paternal wealth *must* be used for the purpose indicated. The use of the word 'paternal' is relied on as showing that only the father's own wealth was intended. But this contention cannot be upheld. The language is comprehensive and would take in all ancestral property. The same observation applies to similar texts of Brihaspathi and Narada in verses 38 to 41. There is nothing to show that the author of the Smrithi Chandrika understood the expression 'paternal wealth' as meaning the self-acquired property of the father. The texts cited from the Madhaviya pages 17 and 18 of Burnell's edition, the Viramitrodaya p. 81 of Sitarama Sastri's 'Hindu Law Books' and the Vivada Chintamani p. 49 of the same book do not carry the case any further. I must hold that the plaintiff is entitled to have funds set apart for his ceremonies out of the ancestral property which descended to plaintiff and the first defendant from Doraisami Iyengar.

The second contention is that the ceremonies for which the plaintiff is entitled to have provision made do not include his marriage. It is argued that marriage is not a necessary ceremony in the case of a Brahmin male and the case of *Govindarajulu Narasimham* v. *Devara Bhotla Venkatanarasayya*[1] is relied on. That case decided that a debt borrowed for the expenses of the marriage of a co-parcener could not be enforced against the other co-parceners. That position has been considerably shaken by the observations contained in *Kameswara Sastri* v. *Veeracharlu*[2]. The learned Chief Justice who was a party to the judgment in the earlier case was subsequently prepared to reconsider his view. The question has been elaborately considered by *Krishnaswami Aiyar* J. in *Kameswara Sastri* v. *Veeracharlu*[2] and by *Chandavarkar*, J. in *Sundarabai* v. *Shivnarayana*[3]. I have nothing to add to the reasons given by these learned Judges for holding that marriage is a proper ceremony for a Brahmin and an obligatory ceremony for all with extremely few exceptions. See also West and Buhler page 781; Strange's

1. (1903) I. L. R. 27 M. 206. 2. (1910) I. L. R. 34 M. 422.
3. (1907) I. L. R. 32 B. 81.

Hindu Law vol. 2 pages 286, 288 Sircar's Hindu Law (3rd edition) page 245 Section 292. But I do not think that it is necessary to rest the decision in this case on the ground that marriage is absolutely obligatory. There are no doubt texts in favour of the position that the initiatory ceremonies in the case of the three higher castes end with the Upanayanam. See Smrithi Chandrika chapter 4 verse 42 which is supported by the author of the Vivadachintamani. See Seetarama Sastri's edition page 40. The Smrithi Chandrika text has been explained by *Chandavarkar*, J. in *Sundarabai* v. *Shivnarayana*[1]. It was decided very recently in *Gopalakrishna Raju* v. *Venkatanarasu*[2] by a Full Bench of this court after the arguments in this case were heard that marriage is considered an obligatory ceremony for Hindus except in the case of one who is prepared to live the life of a perpetual Brahmachari or of a Sanyasi and that a debt borrowed for the marriage of one of the co-parceners is binding on all. This judgment in my opinion practically concludes the point raised in this case. The first defendant has no right to compel the plaintiff to abjure marriage and to become either a Naishtika Brahmachari or a Sanyasi. The plaintiff has the right to become a grahasta and to live the life which is ordained for Brahmins in general; marriage is an indispensable ceremony (avasyam kartavyam) for all except the most spiritually advanced persons. The family property should provide the means for such an initiatory ceremony. There can, at any rate, be no doubt that marriage is regarded as a most proper ceremony for every Hindu. This is sufficient to justify the plaintiff's claim for a provision for his marriage. The first defendant has been married at the expense of the family. There is no reason for treating the brothers differently. Modern custom is undoubtedly in favour of allowing the provision. In deciding what ceremonies are regarded as proper and necessary regard should be had in my opinion to the sentiments of the community especially when there is a difference of opinion amongst text writers. I am also prepared to hold that a brother who has had his own marriage performed at the family expense is not entitled to object to a similar provision being made for the other brothers. The Subordinate Judge's view therefore must be upheld with respect to the allotment both for the plaintiff's Upanayanam and for his marriage. In the result the appeal must be allowed in so far as the award of mesne profits is concerned and dismissed in other respect.

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Memorandum of Objections :—The first respondent has put in a Memorandum of Objections objecting to the Lower Court's refu-

1. (1907) I. L. R. 32 B. 81.
2. (1912) 23 M. L. J. 288.

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sal to make a provision for the maintenance of the 5th defendant, the plaintiff's mother. A preliminary objection was raised by Mr. Ganapathy Aiyar to the memorandum on the ground that the 5th defendant who appealed against the decree of the District Munsif disallowing a provision for her maintenance has not herself appealed to this Court against the disallowance and that it was not competent to the plaintiff to do so. The ground on which the Subordinate Judge refused to make an allotment for the 5th defendant's maintenance was that her maintenance should come out of the plaintiff's own half share of the property and cannot be enforced against the first defendant's half share. The first respondent (*i. e.*, the plaintiff) is therefore affected by the judgment and is interested in disputing its correctness. The 5th defendant is a party to the Second Appeal. This Court has power under Order XLI, Rule 33 of the Civil Procedure Code to pass such decree as it thinks proper dealing with the rights of all the parties before it. The preliminary objection must be disallowed.

On the merits the Memorandum is entitled to succeed. The question was decided so long ago as 1870 in the *Zamindar of Orcad* v. *Meenakshi Ammal*[1], by *Holloway* and *Innes* JJ. The Smrithi Chandrika supports her claim. See Chapter 4 verse 14. "The word mother includes a step mother." In verse 7 a text of Vyasa is quoted "Even childless wives of the father are pronounced equal shares and so also are all the paternal grand-mothers: they are declared equal to mothers." See *Kumaravelu* v. *Virana Goundan.*[2] The basis of the mother's right is as pointed out by the author is the interest that she has by reason of her relationship to her husband. This reason is equally applicable to the step-mother. Mr. Ganapathi Aiyar's argument that the question was not really considered in the *Zemindar of Orcad* v. *Meenakshi Ammal*[1] cannot be accepted. The same view was apparently taken in *Subbarayalu Chetty* v. *Kamala Valli Thayaramma*[3] though the decision itself proceeded on another ground. The case relied on by the Subordinate Judge *Hemangini Dasi* v. *Kedarnath Kundu Chowdry,*[4] was based upon the express provisions of the Dayabhaga according to which the step mother's right is only against the share of her sons.

The Subordinate Judge must be requested to return a finding on the 7th issue. He will also find whether the 5th defendant is in possession of any family jewels as distinguished from her own Stridhanam jewels and if so what is their value. One month will be allowed for the findings and seven days for objections.

1. (1870) 5 M. H. C. R. 377.
2. (1879) I.L.R. 5 M. 29 at pp. 30 & 31.
3. (1911) I. L. R. 35 M. 147.
4. (1889) I. L. R. 16 C. 758.

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Sadasiva Aiyar J :—I have had the advantage of perusing the judgment of my learned brother in this case. I agree with him in all the conclusions formulated in that judgment except on one point which however is not unimportant. I am therefore obliged to write the following separate judgment and I shall notice in it only two points of Hindu Law, one point on which I regret I have to differ from and the other point on which I agree with my learned brother.

The distinction between the ancestral and the self-acquired property of a father was not known to the ancient Hindu Law. The expression 'paternal estate' when used in Hindu Law-books does not mean the father's self-acquisition alone but merely means the estate which the son can inherit or obtain *through his relation as such son* to his father. In *Venkatarazu* v. *Kotayya*[1], I have attempted to show that according to the Shastras, sons had no right in the property which belonged to their father till both their father and mother were dead. Sankha and Likhita state (see Jagannatha page 199) that even properties acquired by the sons themselves independently of their father cannot be partitioned among them while the father lives since the sons are not their own masters in respect of any wealth so long as their father lives. Harita Smriti also says the same. Manu says that three persons including a son can have no wealth of their own so long as their superior is alive. Of course we cannot now wholly go back to the ancient Law of the Shastras and we have to accept the Mitakshara which, relying mainly on a supposed text of Gautama, gives to the sons by their mere birth, rights in the (self-acquired and ancestral) properties of the father. This supposed text of Gautama is not found in Gautama's institutes now and is opposed to the undoubtedly genuine text of Gautama that property is acquired only in five modes viz., inheritance, purchase, partition, seizure, or finding. Even if it is genuine, it can only mean that 'birth' gives the son an inchoate and contingent right to inherit to his father or mother on their death and not a right *in presenti* in their property as soon as he is conceived. The text of Yagnavalkya in respect of ancestral immoveable property not being at the disposal of the father must be interpreted in the light of the moral obligation of a Grihasta to provide for the support of his wife and children because not only those already born but even those thereafter to be born to him require maintenance and support according to Vyasa's text. There are passages in the Smritis to show that to pass the ownership in immoveable property, the consent of even neighbours and the whole of his village is requisite, the unrestricted private ownership and right of alienation in landed property

1. (1912) 23 M. L. J. 223 at p. 227.

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having been greatly discouraged in some portions of the long past period of Hindu civilisation. In fact, the Mitakshara (Chapter I Section I slokas 24 to 27 clearly says that the father is not master of the immoveable property acquired even by himself. The text of Yagnavalkya about the ownership of father and son being equal in wealth received from the grand-father was merely intended as a moral injunction prohibiting the unequal division of the grand-father's wealth between the father and sons. In fact, this text has been rightly interpreted as giving only a figurative ownership to the sons in order that the father might fulfil his moral obligation of not making an unequal division of such property between himself and his sons. It was not at all intended to give a legal right of present ownership in ancestral property to the son. Some other commentators explain the text by saying that it was intended that where the father died leaving a son and grand-sons by a deceased son, the grand-sons by the deceased son should obtain a share equally with their uncle. In other words, it was intended that the surviving son alone as the nearest sapinda, should not take the whole of the estate to the exclusion of the grand-sons by the deceased son. It was therefore stated that the right of inheritance after the *grand-father's death* is the same in the case of the son and the grand-son (by a pre-deceased son). The son is never considered in the ancient text-books as the true owner of any property so long as his father or mother is alive. See Jagannatha's Digest page 283. Yagnavalkya says that among those whose fathers are deceased the allotments of shares is according to the fathers. Katyayana similarly says "should a brother die before partition, his share shall be allotted to his son provided he has received no fortune from his grand-father. The son's son shall receive his father's share from his uncle's son." As I have said already it may be that to avoid the consequences of the logical effect of the dictum that the estate belongs to the nearest sapinda that the Smriti texts make the son, the grand-son and the great grand-son of the deceased owner to equally partake (*per stirpes* in the case of the grand-son and the great grand-son) the estate of the deceased owner instead of the son alone taking the whole as such nearest sapinda. But if a great great-grandson is left, he cannot claim to inherit any share of his great great-grand-father's property directly from the deceased owner. The Mitakshara's having laid down the principle of present right by birth instead of a mere figurative right has led to a very large amount of anomalies in the Hindu Law. To adapt the language of *Beaman*, J. in a recent Bombay Case (that learned Judge was referring to the Mahomedan law). "There seems now little hope of expecting

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from the vast entanglements of the Mitakshara Hindu Law, anything like consistent principles, or intelligible classifications; and every single rule seems to be open to innumerable exceptions many of which appear to conflict in principle with the main rule." This modern main rule as to right by birth was in hopeless conflict with the son's undoubted legal liability under the ancient Hindu Law to pay his father's debts and hence the Privy Council have been obliged to virtually destroy this rule by allowing the validity of alienations effected to discharge the father's debts provided they are not illegal or immoral. This alleged right by birth is also ignored when the father was given the right to alienate his self-acquisitions, even if they were immoveables. This same right by birth has led to the so-called right of survivorship unknown to the ancient Hindu Law. It has also virtually killed the numerous texts which show that the great-great-grand-son has no right to inherit directly the property of his great-great-grandfather, if the great-great-grandfather at his death left nearer descendants. The clear texts (see Manu slokas 186 and 187 of Chapter 9 and the text of Katyayana) which deny the right of the great-great-grandson to inherit could not be explained away except by much involved ingenuity. Such misapplied ingenuity has been abundantly shown by the commentators who wrote Viramitrodaya, the Smritichandrika, the Madhavya, the Vivada Chintamani, and the Vivada Ratnakara. These unsatisfactory commentaries, the Courts have been obliged to accept as making the rule as to the non-existence of succession and inheritance beyond the third descending line, inapplicable to the cases governed by the Mitakshara Law. (See the elaborate judgment of my learned brother *Sundara Aiyar*, J. in *Tirumal Rao Sahib* v. *Rangadani Rao Sahib*[1]. For myself, I am unable to interpret the texts of Manu and Katyayana as intended only to apply to cases where the property to be inherited was the acquisition of the great-great-grandfather because the Mitakshara confers right by birth even in self acquisitions to the sons and through them, of course, to the grandsons and great-grandsons. I am clearly of opinion that the Mitakshara principle of right by birth utterly destroys the rule laid down in the texts of Katyayana and Manu that the great-great-grandson has no claim to inherit directly his great-grandfather's property.

When, therefore, the Hindu Law books treat of partition of the paternal estate—I would put it rather as the parental estate—they did not mean to confine themselves to the partition of the

1. (1912) 23 M. L. J. 79.

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father's self-acquired estate because according to the ancient law, both his self acquisition and his ancestral estate are his own and are parental estate so far as the sons are concerned. As my learned brother has pointed out, there are no separate chapters in the Smritis or even in the commentaries treating of the partition of self-acquired estate apart from the ancestral estate of the father. The only difference made is between partition during the father's life-time and partition after the father's death. Mr. Ganapathi Iyer has attempted to confine the texts of Yagnavalkya and other Smriti writers (Vishnu, Vyasa, Brihaspati and Narada) which required initiated brothers to set apart from the paternal property the expenses of the initiation of uninitiated brothers and sisters before dividing the paternal property, to the father's *self-acquired* properties and this attempt to restrict these texts to the self-acquired property of the father has, in my opinion, wholly failed. In fact, Narada says that if no wealth of the father exists, the ceremonies of uninitiated brothers must, without fail, be defrayed by the brothers already initiated *contributing funds out of their own private wealth.* Thus when the initiated brothers are bound even in the absence of any property inherited by themselves to spend money for the Samskaras of their uninitiated brothers, it is impossible to hold that they are not bound to meet those expenses out of the property which they inherit from their father as ancestral estate.

We now come to the question as to what are the Samskaras of uninitiated brethren, the expenses of which have to be first set apart from the inheritance before it is divided among all the sons. (Formerly, sisters also had shares in the inheritance along with their brothers and the texts about expenses of initiation refer to both uninitiated brothers and sisters). Brihaspati's text clearly points to the Samskaras in question, *viz.*, those which the brothers initiated by their father had to perform for their brothers and sisters whose initiation had been left incomplete by the father at his death, such initiations which are morally obligatory on the father being rounded up by the Upanayana ceremony. His text is as follows:—"For younger brothers, whose *thread investiture* etc., ceremonies have not been performed, their elder brothers shall perform them out of the cellected wealth of their father." If the expenses of the marriage Samskara were also intended to be set apart before partition, that Samskara would have been mentioned in perference to the thread investiture ceremony. The word "Dvijati Samskara" as used in the Shrimad Bhagavatam and other sacred books, is

intended to apply only to that important Samskara which initiates the Hindu into his caste *viz.*, the Upanayanam ceremony. It is well known that females also, according to the Shastras, had the Upanayana Samskara performed in former ages, just like males though now the Vivaha Samskara has become practically the only Samskara for females. But even now, at the time of the Vivaha Samskara, most of the previous Samskaras are rapidly gone through for females. The Smirthi Chandrika is clearly of opinion that the ceremonies contemplated by Narada's text commence with Jatakarma and end in Upanayana. Now the Samskaras are variously numbered from 8 to 48 and even more (see also Jagannatha's introduction page XXX). The Savitri or the ceremony of investiture is the 7th when numbered from Jatakarma according to the Samskara Ratnamala and the 8th or 10th when numbered from Garbhadanam according to other works. Marriage or Vivaham comes as the 14th or 16th ceremony. That the marriage of males is not considered an indispensable Samskara is clear to me after a perusal of several of the ancient Shastraik books. The late Dewan Bahadur Ragunatha Rao a very learned, accurate, and unprejudiced Sanskrit scholar, has in my opinion, conclusively shown in his works that marriage both for males and females is optional and not obligatory. The late Mr. Justice *Krishnaswami Aiyar* while inclined to attach great importance to the Vivaha ceremony (see *Kameswara Sastri* v. *Veeracharlu*)[1] admits that the Jabala Upanished, Manu, Yagnavalkaya, and Mitakshara lay down that a Hindu can go straight from the Brahmacharya stage after Upanayana to the Sanyasashrama stage without having been a Grihastha and having had the Vivaha Samskara if he has conquered his animal passions during the Brahmacharya stage. (Yad Shareva Viramet Tad Shareva Pravrajet). See also Mitakshara, Prayaschitta Kandam on Yati Dharma. We have the well-known text of the Bhagavatham that animal sacrifices, intoxicating liquor sacrifices, and marriage are not obligatory Samskaras but are intended only for those who have not conquered their desires for flesh, spirituous liquors and sexual gratification.

> Loke Vyavayamishamadhya Seva Nitiyastu Jantoh nahi tatra chodana Vyavasthitis thesu vivaka Yagna sura Grahair Asunivrvrithi rishta.*

The texts which praise the Grihasthasramam as supreme are only what are known as Arthavada and laudatory texts intended to encourage the married house-holder to perform his duty of maintaining the other three Ashramas and were clearly not intended to

1. (1909) I. L. R. 34 M. 422.

* [Bhaghavatham Ekadesa Skandham 5th Adhyaya 11th Stanza Ed.].

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really lay down that the Grahasthashrama is superior to the other Ashramas. In fact, in the Bhagavatham and other religious works and also in the Smirthis, the married stage is in several places despised as the Jaghanyasrama and it is clearly laid down that apart from the exceptional cases of Gnana Sanyasis like Janaka, a man who dies as an ordinary Grahasthashramee will be merely moving round and round in the three lower worlds, whereas the Naishtika Bramacharya the vanaprastha and the Sanyasi alone can go to the higher four worlds after passing to which there is no further ***involuntary*** return to the rounds of births in the three lower worlds. Marriage is only a Vikalpavidhi and it is not a Nitya or Apurvavidhi. It is either a Niyama Vidhi or is only a Parisankhya Vidhi. Even *Chandavarkar, J.* in *Sundarabai* v. *Shivnarayana*[1] does not state that marriage is always obligatory but only that it might "become obligatory" in the cases and for the reasons he has set forth (page 93, 1st line). As regards the texts quoted by *Krishnaswami Iyer*, J. which ordain that a man should discharge his three (or five) debts and that he should pro-create sons by marriage to discharge one of those debts, *viz.*, the debt due to his Pitris, there are numerous passages in the Shastras to show that when real Vairagya is obtained and real undivided devotion to the Supreme Lord, the debts to Devas, Rishis, Bhootas, Aptas (fellowmen) and Pitris all become non-existent and completely discharged and that on the very day such Vairagya and devotion are obtained that very day you should give up the wordly life. The learned Judge himself does not state that marriage is a compulsory samskara even for the man who is not fit to pass at once to the vanaprastha stage but that is practically compulsory; *Kameswara Sastri* v. *Veeracharlu*[2]. The Bhagavatham says.

> "Devarshir Bhootapta Nrinam Pitrinam na Kinkaro Nayamrineecha Rajan Sarvatmana Yassaranam Saranyam Gato Mukundam paribritya Kartam"*

Now according to the texts (see especially Narada quoted in the Smrithi Chandrika, page 59 of Mr. Krishnaswami Iyer's translation) which require the initiated brothers to perform the ceremonies of their uninitiated brethren, it is clear that it is only those ceremonies which the deceased father was expected and bound to perform for his sons, if he was alive that the initiated brothers had to perform in the place of their father for their uninitiated brothers. "What is left of the father's property after the father's obligations have been discharged, let the brothers divide." Now

1. (1908) I. L. R. 32 B. 81. 2. (1909) I. L. R. 34 M. 422.

* [Bhaghavatham Ekadesa Skandham 5th Adhyaya 40th Stanza, Ed.]

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what are those ceremonies: Manu says "Let the father himself perform the 8 cermonies *which perfect the second birth of a twice-born man* like the ceremony on conception". Thus, it is clear that the father is under an obligation to perform only up to the Upanayana ceremony, the Samskaras to be performed for his son. Vivaha is a ceremony which is performed after a man attains his majority and depends on his own will and option. It is, therefore, perfectly clear to me that the marriage Samskara is not one of the Samskaras which the initiated brothers have to perform for their uninitiated brothers and the expenses of the future marriage ceremony of the uninitiated brother is therefore not intended by the texts to be deducted out of the patrimony before it is divided. I am glad to have for the above view, the support of that very learned Judge, the late Mr. Justice *Krishnaswami Aiyar,* who has said in *Kameswara Sastri* v. *Veeracharlu*[1] "there is also another reason for separating marriage from the Samskaras that precede it, for, as pointed out at page 300 of the Digest, it is not a Samskara which a father does for the sons as he does in the case of the preceding Samskaras but one in which the son himself participates as the active agent." The learned Judge further on says "The marriage of an unmarried brother is certainly not a duty cast on the married brothers where there is no patrimony". The texts of Narada make the initiated brothers perform the Samskaras of uninitiated brothers even out of the own acquisition if there is no patrimony and as the Samskaras so made obligatory on the initiated brothers are the same whether there is patrimony or not, if such Samskara cannot include the marriage Samskara in the one case, they cannot include it in the other case also. In the case of uninitiated sisters, as the marriage ceremony has now taken the place of their Upanayana, the marriage expenses must be met or set apart, but in the case of uninitiated brothers, I think we must stop at the Upanayana ceremony as even the Smriti Chandrika does not venture to go beyond the expenses of the Upanayana ceremony as obligatory on the patrimony. If we go as far as the optional sacrament of marriage, why should we not go to the 30 and odd sacraments which follow the marriage sacraments and where are we to stop? In these days when it is deemed essential to postpone the marriage of boys till their education is completed, I am not prepared to allow any monies for the future marriage of a minor boy to be set apart several years before the marriage is likely to take place. The making of such of provision will be the holding out of a temptation to the boy and his

1, (1909) I. L. R. 34 M. 422.

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widowed mother to hasten the marriage before he completes his education and such early marriages are utterly opposed to the shastras. The question decided in *Kameswara Sastri* v *Veeracharlu*[1] was that the expenses of the marriage of a male Hindu are expenses incurred on account of the "family necessity" because they are reasonable and proper expenses. That question is quite a different question from that which we are now considering, *viz.*, whether the expenses of such marriage ought to be set apart at a division among the brothers as the expenses of an obligatory Samskara, under the texts of Narada and other sages. The expressions "family necessity" and "family benefit" have always been liberally construed to include the expenses for purposes usually and reasonably incurred according to the status of the particular family and that question was recently decided in S.A. 1703 of 1909* by a Full Bench of which I was a member but the present question as to the expenses of what Samskaras have to be set apart at partition has no connection with the question decided by the Full Bench, the decision of the Full Bench merely affirming that where the marriage had taken place and where therefore, the Vivaham sacrament of male was found to have been obligatory owing to the unfitness of that male member for the life of a Naishtika Brahmacharya or of a Sanyasin, the reasonable expenses which had been incurred for his marriage were proper family expenses which would support the alienation of family property made for meeting such expenses. I wish to add that in these times when the giving of a Varasulkam is so rampant, it is very problematical that any expenses need at all be incurred for a boy's marriage when he comes of marriageable age and on that ground also I should hold that the allowance of Rs. 150 to the minor plaintiff for his marriage expenses is based on a remote speculative necessity. In this case, the plaintiff is only a boy 5 years old and to speculate about his marriage and his marriage expenses now seems to me to be a great deal premature. In the result, I would modify the lower Court's decree by deleting the provision made in it to the extent of Rs. 150 for the plaintiff's marriage, plaintiff being a child five years old, his marriage, if it takes place at all in future, having to be postponed till he is 24 according to the shastras, it being problematical whether his marriage instead of entailing expense may not even be a source of pecuniary profit to him when it occurs and the Hindu law contemplating the expenses up to Upanayanam alone being set apart at the time of

1. (1909) I. L. R. 34 M. 422.

* (1912) 23 M. L. J. 288.

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division for the benefit of uninitiated brothers. In other respects, I agree with the judgment of my learned brother and I agree in the order proposed by my learned brother to be passed in this case as regards the question of 5th defendant's maintenance.

Sundara Aiyar J.

Sundara Aiyar, J :—As my learned brother does not agree with my view on the question of the plaintiff's right to have provision made to defray the expenses of his marriage, we refer under section 98 of the Code of Civil Procedure for the decision of a third Judge the question whether, when one only of two co-parceners in a Hindu family has been married at the family expense the other co-parcener, a minor, is entitled at a partition of the family property to have provision made for his marriage out of it.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White Kt., Chief Justice and Mr. Justice Oldfield.

Mrs. Annie Besant ... ... *Appellant** (*Defendant.*)

v.

G. Narayaniah ... ... *Respondent.* (*Plaintiff.*)

Guardian and Wards Act (VIII of 1890)—Suit for declaration of right of guardianship and for custody—Right of suit—Suit in District Court—Transfer to High Court—Letters Patent Cl. 17—Exercise of powers under—Validity of—Infants not resident within jurisdiction of Court—Domicile and residence of father—Test—C.P.C. Ss 9, 20—Order 32 r. 5—Guardianship—Parents' right—Waiver—Delegation—Revocability—Natural right of parent—Welfare of minor not sole test—Jurisdiction—Express abandonment—Immaterial—May be raised before Court of Appeal.

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Plaintiff instituted the suit in the District Court of Chingleput for a declaration that he was entitled to the guardianship and custody of his two minor sons and for the recovery of the boys from the defendant to whom he had made them over for purposes of education constituting her their guardian. The minors were residing in England. By consent, the suit was transferred to the Original Side of the High Court. The minors were declared wards of the Court and plaintiff was appointed guardian. The defendant was also directed to hand over the children to the plaintiff.

Held: The Court had jurisdiction to make the order.

A party is not precluded from raising a question of jurisdiction before the appellate Court though he expressly abandoned it in the lower Court.

The doctrine excluding jurisdiction on the ground of "ineffectiveness" of the decree that might be made has no application when the Court which can give effect to the decree and the Court which passed the decree are Courts of the same Sovereign.

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*O. S. A. No. 40 of 1913. 29th October 1913.

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The Guardian and Wards act (VIII of 1890) did not take away any common law or equitable jurisdiction vested in the Civil Courts at the time of its coming into force.

Shamlal v. Bindo[1] dissented from.

Sharifa v. Munikhan[2] followed.

Held further that in the circumstances, the order was right.

A father surrendering the custody of his child can recover it at any time after the custody has been surrendered unless his doing so would be injurious to the child.

The fact that change of custody might involve the denial of European education to the children is not a ground for not enforcing the father's right to claim back the children but his making charges of grossly indecent character against them knowing the charges to be false might be a ground.

Neither waiver nor delegation will preclude the father from reasserting his parental authority unless the circumstances are such that the Court considers it detrimental to the interests of the minor that he should be allowed to do so.

The fact that a minor is nearly 18 when a guardian is asked to be appointed and the order will have the effect of extending his minority is only one circumstance among others which the Court has to take into consideration in determining whether a guardian should be appointed.

Equity courts are never guided solely by considerations of the welfare of the minor without regard to the natural rights of the father.

They do not interfere with the rights of the father unless he so conducts himself as to render it essential to the safety and welfare of the children in some serious and important respect either physically intellectually or morally that they should be removed from his custody.

That the father is in narrow circumstances, that he is negligent, injudicious and faulty, that he is a person from whom the discreet, the intelligent and the well disposed, exercising a private judgment would wish his children to be for their sakes and his own to be removed are not reasons for removing his children from him.

Principles on which the court would act on a writ of *Habeas Corpus* distinguished.

There is no difference in the principles that should govern court's action in the matter of custody of infants in India and in England.

The provision of the Civil Procedure Code, Order 32, r. 5 that no order passed against a minor is valid unless he is represented by a guardian *ad litem*, or the principle of law on which that rule is based has no application when the minor is not a party to the suit or proceeding,

Per Chief Justice. The High Court trying a suit transferred to it in the exercise of its extraordinary original jurisdiction is not precluded from exercising any jurisdiction vested in it as a Court of Original Civil Jurisdiction.

Like the Court of Chancery and the Supreme Court whose powers it has inherited, the High Court can appoint guardians for the person and property of

1. (1904) I. L. R. 26A. 594.

2. (1901) I. L. R. 25 B. 574.

minors provided the residence and domicile of the father are within the jurisdiction of the court though the minors themselves are residing outside the Court's jurisdiction. Annie Besant v. Narayaniah.

In determining whether the court will exercise its jurisdiction and in what manner it will exercise it, many factors have to be taken into consideration amongst others, the question of the residence of the children.

The words "within the Presidency of Madras" in cl. 17 of the Madras Letters Patent were used for the purpose of territorial limitation and do not qualify or restrict the powers of the High Court with regard to the guardianship of minors.

Per Oldfield J. The Chingleput District Court had jurisdiction to try the suit both under S. 20 C. P. C. and under Private International Law as the defendant was residing within its jurisdiction at the date of the plaint.

The Guardian and Wards Act gives only a concurrent remedy and does not preclude the Common law remedy of suit to which parties were entitled before the Act.

A proceeding instituted in a court without jurisdiction is not validated by its being transferred to a court having jurisdiction.

Held accordingly that if the Chingleput Court had no jurisdiction to make the order it could not be justified under the Letters Patent.

The doctrine of "ineffectiveness" is applicable only if the whole relief would be beyond the power of the court and could have no application where the court has in its power to enforce the personal obedience of the defendant.

Appeal from the Judgment and decree of the Hon'ble Mr. Justice Bakewell in C. S. No. 424 of 1912 on the Original Civil Jurisdiction of the High Court.

The plaint alleged that the Plaintiff, a Government pensioner, who had been a member of the Theosophical Society prior to his retirement was at the beginning of 1909, invited by the defendant, President of the Society to take up his residence at Adyar and do the work of Assistant Correspondence Secretary of the Esoteric Section, that he had at the time great veneration for her as spiritual preceptress; that the plaintiff accordingly took up his abode at Adyar along with his second and third sons Krishnamurthi and Nityananda who were respectively aged 14 and 11, that the boys were receiving education at the P. S. High School at Mylapore, but as Mr. R. B. Clarke and Mr. C. W. Leadbeater of the Theosophical Society undertook their education, he stopped them from the School and put them under their charge; that in December 1909, Defendant promised to undertake their future education, that about the beginning of 1910, the defendant requested the plaintiff to give a letter constituting her guardian of the boys; that he did so after some persuasion from the defendant and others, that subsequently in March 1910, he discovered that his son

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Krishnamurthi was being led into improper ha[illegible] by C. W. Leadbeater; that the plaintiff objecting to the children being left with Leadbeater, the defendant promised not to do so but broke the promise and ultimately said that the boy and Mr. Leadbeater were for many births together and could not be separated; that the boy was being put forward as Lord Maitreya and as the author of a book called 'At the feet of the Master' which is calculated to warp the moral nature of the boys and to make them moral degenerates. The plaintiff prayed, therefore, for judgment—

(*a*) declaring that he was entitled to the guardianship and custody of his minor boys

(*b*) declaring if necessary that the defendant was not entitled to or in any case unfit to be in charge and guardianship of the boys and

(*c*) directing the defendant to hand over the boys to the plaintiff or to such other person as the Court may deem fit to direct.

The defendant alleged that she conceived a liking for the children, that as they appeared emaciated and much neglected in their education and also showed signs of ill usage she undertook their education, that they were living with her in Adyar since 1909, that she got the letter referred to in the plaint, that the plaintiff never complained to her of any impropriety on the part of the boy or Mr. Leadbeater although in December 1911, he did ask her to separate the children from Mr. Leadbeater without assigning any reason, that she was not aware of any evil practices of Mr. Leadbeater, on the other hand, she felt assured of the purity of his life, that since they came under her, they have been well fed, well cared for, clothed and carefully educated by the defendant, that the defendant has secured for the minors the services of Mr. G. S. Arundale as tutor, that they were at present under the protection of the widow of the Right Hon'ble Jacob Bright M. P., that the suit was not instituted bona-fide in the interests of the minors but was being instigated and financed by third parties.

The suit was first instituted in the District Court of Chingleput within whose jurisdiction the defendant resided and was transferred with the consent of both the parties to the High Court, at Madras.

The following issues were framed.

First—Has this Court jurisdiction to entertain this suit, the residence of minors being outside British India.

(a) Has the defendant waived the objection to the jurisdiction.

Second—Do the provisions of the Guardian and Wards Act, 1890 apply to this suit.

Third—Is the plaintiff entitled to revoke the authority given by him to the defendant to have the custody and guardianship of his children.

Fourth—Was the plaintiff entitled to give an irrevocable authority to the defendant over his children.

Fifth—Was the plaintiff, when he granted the said authority, prevented from the free exercise of his will by reason of the spiritual influence of the defendant.

Sixth—Has either of the children been party to the acts mentioned in para 5 of the plaint (improper acts referred to).

Seventh—Was the defendant aware of the said acts and did she with knowledge thereof permit the children to associate with the person committing the same.

Eighth—Did the defendant permit the children to associate with a person of immoral character.

Ninth—Was the plaintiff aware of the facts mentioned in issues 6, 7 and 8 and is he thereby unfit to have the custody and guardianship of children.

Tenth—Has the defendant stated that the elder boy is going to be Lord Christ or Maitreya.

Eleventh—To what relief, if any, is plaintiff entitled.

The Judgment of Mr. *Justice Bakewell* who tried the suit was as follows:—

The plaintiff has been since 1882 a member, and the defendant is President, of the Theosophical Society which has its Headquarters at Adyar in the Chingleput District, near the Southern boundary of the city of Madras. The plaintiff is an orthodox Hindu, Brahmin by caste and a retired Tahsildar. He has had ten children and has four sons living. In January 1908 he offered his services to the defendant, she refused them; but in December 1908 through the influence of friends he became acquainted with the defendant and obtained a secretarial post under her, and in January 1909 he and his family including his brother-in-law and wife and other dependants took up their residence at Adyar in a building belonging to the Society which he occupied rent

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free. He was subsequently given additional duties all of which he performed gratuitously. In September 1909 he removed two of his sons Krishnamurthi and Nityananda, from their school at Mylapore and they were taught gratuitously at Adyar by Messrs. Leadbeater, Clarke, S. V. Subramaniam and other residents there as well as by the plaintiff. In December 1909 the defendant came to Adyar and made the acquaintance of these two boys who were then aged about 14 and 11 respectively. Later in the same month at Benares the defendant told the plaintiff that something great and good was going to happen to Krishnamurthi and plaintiff was not to throw any obstacle in Mr. Leadbeater's way. In January 1910 the plaintiff returned to Adyar and later in the same month some ceremony called "an initiation" took place with respect to Krishnamurthi. The plaintift consented to this ceremony and, as a member and officer of the Society and a member of an inner circle called the Esoteric Section, was undoubtedly aware of the importance attached by defendant and Mr. Leadbeater to this ceremony. In February 1910 the defendant returned to Adyar and proposed to take charge of the boys Krishnamurthi and Nityananda and give them an English education. There is no doubt that the plaintiff was perfectly well aware that the motive operating upon the defendant was the preceding initiation of Krishnamurthi, and that she desired to bring up the two boys in such a manner as to develop their spiritual powers, and, presumably to promulgate the peculiar tenets of the Society; but I do not think that plaintiff or the defendant herself then contemplated the development of the boy Krishnamurthi into "a vehicle" for the manifestation of supernatural powers or persons. The defendant herself has stated that matters developed in course of time. On the 6th March 1910 plaintiff signed a letter Exhibit A appointing defendant guardian of his two sons. The defendant, as the head of an Occult Society, professing mysterious powers, must have greatly influenced the plaintiff in the execution of the agreement, Exhibit A, but it is evident that he was not helpless in her hands, for Exhibits A1 and A2 show that there was considerable discussion as to the terms of the agreement, and plaintiff took the advice of a very eminent lawyer and ex-judge of this Court, as to the legal effect of the document he was executing. The plaintff was, with a large number of dependants, living rent free in the Society's premises, and his position as an office-bearer of the Society and member of an inner circle, was no doubt of importance to him; and these considerations, as well as the additional prestige he might obtain through his sons, and the advantage to them of an English education, would strongly influence him and are sufficient to explain

his agreeing to make the defendant the guardian of his sons. The evidence of the plaintiff himself does not show that there was any undue influence exercised by the defendant, and I answer the 5th issue in the negative.

The plaintiff alleges that about 14th April 1910, that is shortly after the agreement, he witnessed the incident described in para 5 of the plaint and para 1 of the particulars. Matters however went on much the same at Adyar and Mr. Leadbeater still took part in the education of the boys. Plaintiff also alleges that in January 1911 he was told by some residents at Adyar that Lakshman, a servant of the defendant has seen the incident mentioned in para 2 of the particulars, and that in February 1911 he complained strongly to the defendant that the boys should not be allowed to associate any longer with Mr. Leadbeater.

In March 1911 the defendant took the boys to Benares and thence to England, and in October 1911 they returned to Adyar and remained there until December 1911, when Mr. Leadbeater who had been throughout at Adyar, took them to Benares. Plaintiff alleges that sometime between October and December the defendant spoke of a further ceremony for the boys, who were to be entrusted to Mr. Leadbeater and the plaintiff objected to their being with the latter. On the 28th December 1911 a meeting of an Inner Order of the Society of which the boy Krishnamurthi had been made the head, took place, at which the idea of his being " a vehicle" for extramundane powers seems to have been fully developed. On the 31st December 1911 Mrs. Van Hook (D. W. 2) had a conversation with the plaintiff; she says "I saw plaintiff looking depressed and he said he was harassed by people in regard to his sons, and that he had sold them to the defendant, and he regarded the ceremony of 28th December 1911 as a possible source of ridicule; he said the boy was being put in a false position and he and his sons would be the laughing stock of India. He said ' You would not believe in Leadbeater if you knew what I know'. And then he accused Mr. Leadbeater of the incident described in para 1 of the particulars. On the same day plaintiff went to the defendant and demanded that the boy should be separated from Mr. Leadbeater aud referred defendant to Mrs. Van Hook for the reason. The defendant refused plaintiff's request. Plaintiff returned to Adyar at the beginning of January 1912 and made complaints to various persons at Adyar; and it appears from a telegram sent about 10th January 1912 by Mr. Wadia to defendant at Benares, that he had been threatening to take legal proceedings. On the 19th January 1912 an interview took

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place at Adyar between plaintiff and defendant and several members of the Society with respect to the custody of the plaintiff's sons. There are discrepant accounts as to what took place, but I think that it is clear from Exhibit 11, a note of the proceedings made at the time, that the plaintiff raised the question of the separation of the boys from Mr. Leadbeater and that the defendant said that she had effected a separation and that the plaintiff thereupon agreed that the boys should go to England. Mr. Leadbeater had already left India, somewhat abruptly, about 13th January 1912, and on the 26th January 1912 defendant left Adyar with the two boys for Benares and shortly afterwards took them to England. It would seem from a letter dated February 7th, 1912 (Exhibit LL) addressed by defendant to plaintiff that she had been informed by persons at Benares or Adyar that the plaintiff had been making enquiries of Lakshman, her servant, with respect to the charge against Mr. Leadbeater contained in the 2nd para of the particulars; and by this letter she called upon the plaintiff to leave Adyar and stated that she intended to keep his sons in Europe. It is in fact a declaration of war. Defendant admits that she subsequently left the plaintiff's sons with Mr. Leadbeater and other friends in Sicily, and that they went with him to Genoa and thence to England. The defendant returned to Adyar in October 1912, leaving the plaintiff's children in England and the plaintiff at once commenced a suit in the District Court of Chingleput for an order directing the defendant to hand over his children to him. The suit was removed from that Court by an order made under clause 13 of the Letters Patent and has been tried by this Court in the exercise of its extraordinary original civil jurisdiction. Both parties to this suit have admitted that they are being financed in this litigation by third parties; and this fact and the offer made by plaintiff's Vakil to deposit Rs. 10,000 in Court on behalf of the minors and to procure some prominent citizen of Madras to act as their guardian, show that some question other than the welfare of the children has influenced this litigation. I have held that the matter before the Court is the welfare of the children and have refused to permit the intrusion of extraneous matters, but it is evident that there have been influences which affect the evidence given in the case. On the one hand there has been a strong animus against the defendant and her colleague, Mr. Leadbeater, and on the other hand they have been supported by disciples who can see no wrong in either of them. Moreover many of the facts spoken to took place three years and more ago, and this must affect the evidence of the witnesses, especially as to dates.

I now proceed to consider the evidence as to the charges contained in para 5 of the plaint and paras 1 and 2 of the particulars which form the subject of the sixth issue. It is clear that the plaintiff's children were first selected as likely subjects for training in the tenets of the Society by Mr. Leadbeater, who professes to have peculiar powers in this respect, and that it was through his influence that the defendant was induced to take an interest in them, and that from the first Mr. Leadbeater desired to get the children under his own control and out of that of the plaintiff whom he regarded as an obstacle to his own purposes (See Mr. Leadbeater's Letters Exs. W2, W3 and W4, dated December 1909 and Ex. Y1 dated 3rd January 1910).

Naturally after the signature of the letter of guardianship on the 6th March 1910 Mr. Leadbeater, as the delegate of the defendant, would attempt to exercise the powers which it purported to confer upon her and naturally also, the plaintiff would resent the slight to his parental authority. From his demeanour in the witness box, I should say that the plaintiff is of an emotional temperament, prone to tears, and not capable of much self-control and I can readily credit the statements of some of the defence witnesses that he showed himself a jealous and suspicious father. It must be remembered also that the plaintiff is an orthodox Brahmin and would be naturally suspicious that a European might lead his sons into some violation of the caste rules and would be tempted to spy upon his conduct. The only direct evidence as to the incident described in para 1 of the particulars is that of the plaintiff and Mr. Leadbeater and the conduct of the plaintiff at the time is of the first importance. The charge made in the original plaint was of a criminal offence and the act as stated to have occurred in or about the latter part of March 1910; but when the plaint was ordered to be amended by striking out matter of evidence, this charge was abandoned and the act now described in para 1 of the particulars was substituted, and the date of the occurrence was given as the second week of April 1910.

If the plaintiff originally believed that a disgusting crime had been committed upon his son or even that his son's person had been treated indecently as he now alleges, and that by a man whom he would regard as a Pariah, it is difficult to believe that he would not have gone weeping to his house with his sons and complained to his own household. His brother-in-law, who lived with him and in whom he would naturally confide, has not been called, and plaintiff admits that he did nothing but reprimand the children and keep

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them from going to Mr. Leadbeater. In cross-examination he said "I only scolded the elder boy for being naked" and also said "this occurrence was not made known to any person at Adyar until the quarrel on the 18th April. It did not strike me to wire to the defendant. There was no elder member whom I might complain to, to whom I could speak in confidence. I was in great distress at this time but did not wish to make it public and managed not to show it." I do not believe the plaintiff to be capable of this Spartan fortitude. It is admitted that there was some quarrel between Mr. Leadbeater and the plaintiff on the 18th April and Sir Subramania Aiyar was called in to compose matters and that a telegram was despatched to the defendant in the joint names of Sir Subramania Aiyar and the plaintiff to the effect: "Do not be anxious. All is right." Plaintiff made no complaint of the alleged occurrence to Sir Subramania Aiyar, who was the Vice-President of the Society and represented the defendant during her absence from Adyar and whom the plaintiff had consulted as to the legal effects of the letter of guardianship and various business matters connected with the Society. Plaintiff allowed his sons to associate with Mr. Leadbeater during the following months, and even left them in his charge during a short absence of himself and defendant from Adyar. Plaintiff explains the different dates of the occurrence given in the plaint and the particulars by saying that he had made further enquiry and fixed the latter date by reference to the Telugu New Year's Day, which would make the date about the 12th April; but in his cross-examination he gives the date as 14th or 15th April and stated it was not the 16th which his learned Vakil has argued was the correct date, with reference to an expression in Mr. Leadbeater's letter of April 18th, Ex. Y. 5. These changes in the nature and date of the occurrence, and the inconsistent conduct of the plaintiff at the time show that his evidence is not to be relied on. Mr. Leadbeater's denial of plaintiff's story is on the other hand confirmed by the public nature of the room in which the act is said to have occurred. and the daily routine to which the defendant's witnesses have spoken.

The second charge contained in para 2 of the particulars is of a criminal offence, and the only direct evidence is that of Lakshman, the defendant's servant, who at the request of both parties was called as a Court witness. The plaintiff alleged that he heard of the occurrence in January and February 1911 from various persons at Adayar, to whom Lakshman had spoken and that he complained to the defendant on her return from Burma in February 1911 where

she had gone in January 1911 with Mr. Leadbeater, the plaintiff's sons and other persons. He stated that he complained to the defendant that the boys should not be allowed to associate with Mr. Leadbeater and that he made no enquiry of Lakshman; and he does not appear to have made any complaint with respect to the present charge. In cross-examination he stated that he first heard of the occurrence in December 1910 and if this be true he allowed his sons to leave his care in the company of a man who he had reason to suppose, had just committed a disgusting crime upon one of them, He also appears to have been satisfied with defendant's promise, made upon his complaint that she would shortly take the boys away to England and to have allowed his sons to associate with Mr. Leadbeater until they left Adyar in the following month.

In December 1911, when he was undoubtedly agitated by the recent developments in his elder son's training, he commissioned Mr. Bhagavan Das (P. W. 3 on commission) to enquire into Lakshman's story. This witness states that Lakshman informed that "on opening the door he saw Mr. Leadbeater standing with a leg on a chair or sofa or some such thing and the elder boy was sitting on his knee and both were naked."

A curious enquiry and examination of Lakshman were made in March 1912 by several of the plaintiff's witnesses examined on commission. The account of Lakshman's story given by Pandit Bhavani Shanker (P. W. 4, on commission) is that "he went to the bathroom of Mrs. Besant with the object of fetching a lota. When he entered in he saw Leadbeater and J. Krishnamurthi naked and standing behind one another. When he saw them in that state he came out and muttered etc. . . . It was in an evening." Dhana Krishna Biswas (P. W. 6 on commission) gives practically the same story and states that after the institution of the suit, he met Lakshman and encouraged him to speak the truth. A European woman (P. W. 5 on commission) was also present at this enquiry but did not understand the language used. It may be observed that this later account differs, from that given by Bhagavan Das and from Lakshman's evidence before the Court and that his statement was not apparently reduced to writing.

On the 28th January 1912, Lakshman also made a statement (EX. L, to Mr. Iqbal Narain Gurtu and defendant, which omits the fact that the boy had no clothing. Lakshman's evidence is that he went to Mr. Leadbeater's Bangalow, at the time of the 11 o'clock morning meal, to call him and to fetch a towel. He opened the door

of the bathroom and saw Krishnamurthi and Leadbeater. Krishnamurthi's cloth was wet, it was all down. Mr. Leadbeater had a coat above his knees and nothing below, his knee was resting on a chair and Krishnamurthi was standing in front of him; Leadbeater's hand was on the boy's hair.

When the witness saw nakedness he could not say anything and went back. In cross-examination by the plaintiff he said "the boy had no cloth on his body, his cloth had fallen down, he was holding it by one hand. Hindus usually don't bathe naked; it is sinful. I did not think Mr. Leadbeater was doing wrong." In cross-examination by the defendant he said "what I was shocked at was that Krishnamurthi had not his cloth on. The wet cloth was on the ground. Leadbeater was combing the boy's hair. He had on a Kudtha to the waist." Other witnesses have stated that Lakshman in describing the occurrence to them stated that he had seen something bad. Mr. Leadbeater denies the charge, and explains it by saying that he found it necessary to cleanse the boy, and that he has been with the boy in the bath room once or twice and taught him to bathe in English fashion without clothing.

It is impossible that the plaintiff can have believed when he first heard the story that an offence had been committed since his whole conduct is consistent with a belief that the occurrence was only a violation of caste rules. He made no investigation into the story until December, 1911, when he was evidently strongly prejudiced against Mr. Leadbeater and was determined to enforce a separation from his sons; his first complaint only related to this separation and he permitted their association afterwards; he seems to have made no such charge at the meeting in January 1912 when he raised the question of this separation; and the enquiry of the witnesses at Benares was evidently for the purposes of this suit. Then the plaintiff asked Sir Subramania Aiyar as to the legal effect of the guardianship letter Ex A. He was advised that if he executed it he would have waived his right as father, and would not be able to revoke it at will, and the Court would consider what was best for the interests of the children; and it seems to me that this opinion induced the plaintiff to search for something which would influence the Court in revoking the agreement, has caused the revival of the charges made against Mr. Leadbeater in 1906 and has in fact coloured all the evidence in this case.

I am of opinion that plaintiff's evidence is not reliable, that Lakshman's evidence has not established that an offence was committed and that the sixth and seventh issues must be answered in the negative.

Mr. Leadbeater admitted in his evidence that he has held and even now holds, opinions which I need only describe as certainly immoral and such as to unfit him to be the tutor of boys, and, taken in conjunction with his professed power to detect the approach of impure thoughts render him a highly dangerous associate for children. It is true that both he and the defendant declared that he has promised not to express or practise those opinions, but no father should be obliged to depend upon a promise of this kind. The law upon the subject of the custody of minor children by their father has been repeatedly declared by high authority and is perfectly clear. A father is under certain legal and moral duties to his children with respect to their maintenance, education and up-bringing, and in order that he may perform these duties is entitled to their custody; and he cannot free himself from those duties or divest himself of the corresponding rights. Any delegation of guardianship by him is accordingly revokable and an agreement to the contrary is void. A parent may be unfit to perform his duties and may thus lose his right to the custody of his child, and the Court in exercise of the prerogative of the Crown as *parens patriae* will enquire whether a father has so conducted himself that the welfare of the child demands that he should be deprived of his rights of guardianship. In support of the propositions I may refer to a recent judgment of *Wallis* J. in *Pollard* v. *Rouse*[1], also to the cases *The Queen* v. *Barnardo*: *Jones*[2], *Barnardo* v. *McHugh*[3], *In re Agar-Ellis*: *Agar Ellis* v. *Lacelles*[4]. At the settlement of issues I enquired what charges the defendant desired to make against the plaintiff, and the 9th issue as to the fitness of the plaintiff was intentionally limited to the plaintiff's knowledge of the facts mentioned in the 6th, 7th and 8th issues. Since I have found that the alleged acts were not committed there is no allegation against the fitness of the plaintiff to be the guardian of his children. He has, in my opinion, attempted to strengthen his case with lies, but that cannot be said to render him unfit. I am of opinion that the plaintiff was not aware at the date of the letter Ex. A. that his son Krishnamurthi was to be brought up to consider himself a 'vehicle' for the manifestation of supernatural powers or persons, or that his children were to be devoted to a life of poverty and celibacy, conditions naturally repugnant to an Ex-Tahsildar and the father of ten children and that in any case he is entitled to insist that this training shall not be continued; and that he was also entitled to

1. (1910) I. L. R. 33 M. 288.
2. (1891) I. Q. B. 194.
3. (1891) A. C. 388.
4. (1883) 24 Ch. D. 317.

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insist that his children should not be allowed to associate with a person of Mr. Leadbeater's opinions, and now that his wishes have been disregarded, he can demand that his children shall be restored to his custody. I think also that the plaintiff only consented to the removal of the children from India, and therefore from his personal supervision, on the understanding that they should not associate with the person from whom he apprehended danger. Defendant has argued that she is able to educate the plaintiff's children in a manner, and to give them a social standing, such as are beyond plaintiff's means, and has already expended considerable sums of money upon them, but she has not provided any irrevocable endowment on the children for those purposes. It is quite clear that any expenditure which the defendant has already incurred cannot give her any right to the custody of the children. A father moreover is the best judge of the education and training which are suited to his children, and may well think that they will be happier and better trained in their natural environment than in a foreign land and in a society which may in the future make them strangers to their own kindred and to the society in which they were born.

The defendant has abandoned the first two issues, but I think it is desirable that I should express an opinion upon them in case the matter should go before another Court. With regard to jurisdiction, the plaintiff's children are subjects of the King Emperor, domiciled in British India, and are only temporarily resident in England, where they were taken by the defendant for purposes of education. The defendant has also, in my opinion, broken the understanding by which she was allowed to take them beyond the jurisdiction. In these circumstances I am clear that this Court has jurisdiction to pass orders as to the custody of the children, and is bound to enforce such orders by all means in its power, and I have no doubt that the English Courts will assist this Court by their process. In this connection I need only refer to the cases in *Hope* v. *Hope*[1] and *In re Willoughby (an infant)*[2]. The second issue does not really arise, since it is provided by Sec. 3 of the Guardian and Wards Act of 1890 that the provisions of that Act shall not affect the powers of the High Court. I am of opinion for the reasons I have given, that it is necessary in the interests of the children and for their future protection, that they should be declared wards of Court, and I declare accordingly. I also.

1. (1854) 43 E. R. 534 s. c. 4 De G. and Mac. 328.
2 (1885) 30 Ch. D. 324.

direct the defendant to hand over the custody of the two boys Krishnamurthi and Nityananda, to the plaintiff on or before the 26th May 1913. With regard to the costs of the case, this trial has been unduly protracted and considerable expense has been caused by the charges which were made by the plaintiff and I find not to have been proved. I therefore direct him to pay the costs of the suit and the defendant's, including the costs of the several commissions and all costs expressly reserved.

The matter coming on again his Lordship made the following order*—

The minors having been made wards of Court the parties are at liberty to apply with respect to their guardianship from time to time, though no orders were contained in my judgment. The decree in the case has not yet been drawn up and issued, and I think that I have power to supplement my judgment by giving the directions necessary for carrying my decision into effect and to embody them in the decree.

The question of the fitness of the plaintiff to be guardian of his sons was raised by one of the issues in the suit and I do not think that it is necessary now to direct an enquiry. It is true that I have found that the plaintiff has been unscrupulous in the means adopted by him to recover his children, and since the charges made by him were not established and their trial occasioned great waste of public time and useless expense and could not be well severed from the rest of the case in which he had succeeded, I directed him to pay the costs of the suit. It may well be that plaintiff had erred through his desire to recover the children but I do not think that he has been shown to be unfit to have their custody.

With regard to the jurisdiction of this Court under clause. 13, of the Letters Patent, the power thereby conferred seems to be analogous to that of the High Court of England to remove actions from inferior courts by writ of *certiorari*, and I think that this court has the same power in the trial of a suit removed from the District court as in a suit instituted here.

The other questions argued by the defendant on the application were considered at the trial of the suit and do not now arise.

I declare the plaintiff to be guardian of his two minor sons J. Krishnamurti and Nityananda and direct this order.

* 22nd April, 1913.

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Against this decision the defendant appealed and argued the appeal herself.

Mrs. Annie Besant :

The Guardians and Wards Act being a Code, its provisions alone must be resorted to for the reliefs sought for by the plaintiff, and a suit will not lie. The essence of a Code is to be exhaustive; *Gokul Mandir* v. *Padmanund Singh*[1]. A Code consolidates all matters, dealt with by it and prescribes the procedure and machinery by means of which alone a plaintiff must attain his purpose. The preamble to the Act expressly says that it is a consolidating Act. In the face of such an Act, all pre-existing rights of suit whether under the Common law or under previous statutes dealing with the subject must be deemed to have been taken away. *Sham Lal* v. *Bindo*[2]. No doubt *Sharifa* v. *Munekhan*[3]; *In the matter of Sirishchunder Singh*[4] take a different view. All the previous enactments on the subject have been repealed by the schedule annexed to the Act. This suit cannot in any way be deemed to be equivalent to a proceeding under the Act as the procedure therein prescribed, such as citations to the relations of the ward etc., has not been complied with by the plaintiff. Moreover the Chingleput District Court had no jurisdiction under S. 9 of the Act even if this suit be regarded as a petition; for the minors were not resident within the District Court of Chingleput at the time of the suit. Therefore the Chingleput District Court had no jurisdiction to entertain the suit.

If the District Court had no right to entertain the suit, the High Court is equally incompetent to entertain the same, as no higher powers are conferred on the High Court by the suit being merely transferred to it under S. 13 of the Letters Patent. The suit cannot be deemed as one instituted in the High Court and even if it can be so deemed, the objection of there being no right of suit by reason of the existence of a consolidating Act is equally applicable in spite of S. 3 of the Guardians and Wards Act which preserves the powers which the High Court possesses under the Charter Act.

A careful scrutiny of the powers conferred on the Supreme Court or of its successor namely the High Court by various Acts and Charters creating the same and of the Letters Patent accompanying them clearly shows that at no time either the Supreme Court or the High Court exercised any jurisdiction in respect of minors resident outside their territorial jurisdiction. The minors in this case were

1. (1902) I. L. R. 29 C. 707 at 715 (P. C.)
2. (1904) I. L. R. 26 A. 594.
3. (1901) I. L. R. 25 B. 574.
4. (1893) I. L. R. 21 C. 206.

not at the time of the suit or even thereafter residing in the District of Chingleput or within the Presidency of Madras. The appellant then referred to various sections relating to the jurisdiction of the High Court in respect of infants, from the earliest times and referred to *In the matter of the petition of Juandha Koer* v. *The Court of Wards*[1].

The powers of the High Court are limited by the wording of the Statutes and the Letters Patent and no analogy can be drawn from the powers exercised if any by the Courts of Equity in England.

Even if this Court were to grant all the prayers of the plaintiff the same would be ineffective as there would be no effective means of enforcing the order of the Court. Want of capacity to pass effective judgments i. e., judgments which the Court delivering them could enforce is said to be a want of jurisdiction. See Dicey's conflict of Laws, second Ed. p. 40.

In this case the minors being in England, the court cannot pronounce an effective Judgment in favour of the minor's father; for no foreign Court, such as the Court in England is bound to respect and much less enforce the decrees and judgments of our High Court. *Trimbak* v. *Lakshman*[2], *Srinivasamoorthy* v. *Venkata Varada Iyengar*[3], *Hope* v. *Hope*[4].

Moreover even if it be said that by a decree being passed against me *in personam* the plaintiff would be entitled to compel me by coercive processes to bring the minors before this Court, there being no judgment against the minors, the minors are not bound to obey and come to India however willing I might be to obey the decree. And the affidavits filed in this case show that the minors who are now of the age of 18 and 15 respectively have clearly expressed their unwillingness to return to India or to their father's custody and protection under any circumstances.

The minors ought to have been made parties to the suit. See O. 32 r. 5 of the Code of Civil Procedure; and as they have not been brought on record and as nobody represents them in the case, there could be no decree which will in any way compel the minors to come to their father's guardianship.

C. P. Ramaswami Aiyar with *A. Krishnaswami Aiyar, N. Chandrasekhara Aiyar* and *M. Subbaraya Aiyar* for Respondent.

A father has a right to the custody and the guardianship of his sons. If this right is infringed by anybody a suit will lie

1. (1881) I. L. R. 4 A. 159.
2. (1895) I. L. R. 20 B. 495.
3. (1905) I. L. R. 29 M. 239 at 254.
4. (1854) 43 E. R. 534.

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unless it is prohibited by any statute; for there is a right of suit in law as provided by S. 9 of the C. P. C. for the infringement of every civil right. The Guardians and Wards Act consolidates as regards only certain matters i.e. rights between the Guardians and the Wards *inter se*. It does not deal with all matters connected with a minor; for example the right to damages of Guardians for kidnapping the minor or of the minors against the malfeasance and misfeasance of natural Guardians or marriage laws of minors according to the law governing them. Such being the case it cannot be contended that the Guardians and Wards Act is exhaustive. There is nothing in the Act which expressly prohibits the right of suit. In fact Ss. 52 and 53 of the Act contemplate the appointment of a Guardian by any Court i. e. even by Courts subordinate to the District Courts. The previous Acts relating to minors did not negative any right of suit such as the one now brought, and in fact there are decisions under Act IX of 1861 to that effect. See *Reade* v. *Krishna*[1], *Abasi* v. *Dunne*[2], and *Balamukund* v. *Janki*[3]. Trevelyan on Minors p. 99. No doubt it is a well known principle that where an Act creates a new right that Act alone should be resorted to; but where an enactment is merely confirmatory of a pre-existing right, unless the Act expressly or impliedly says the contrary the right conferred by the Act is only cumulative. See *The Queen* v. *Clarke*[4], *Zemindar of Ettiyapuram* v. *Sankarappa*[5], *Ramayyar* v. *Vedachala*[6]. Trevelyan in his book on Minors at pp. 99 and 189 says that there was a right of suit in these matters.

Therefore there was a right of suit in the Chingleput District Court. Even if no suit will lie but only a petition under the Act, this suit can be converted into and regarded as a petition as the High Court has often done in other matters (See *Pasupathy Iyer* v. *Kothandarama Chetty*[7]) and S. 9 of the Act must be deemed to have been complied with, for the minors must be said to be resident only in Adyar i.e., within the jurisdiction of the District Court of Chingleput for two reasons:—(*a*) their absence from their permanent residence is only temporary (*b*) and their residence must be deemed to be their father's place of domicile. *Madhoo Soodan Singh* v. *Rajah Prittee Bullah Paul* *Sheik Mahomed Hussain* v. *Akbur Hussain*[9] *Sarat Chunder Chukerkutty* v. *Forman*[10].

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1. (1886) I. L. R. 9 M. 391.
2. (1878) I. L. R. 1 A. 598.
3. (1881) I. L. R. 3 A. 403.
4. (1857) 119 E R. 1217 s. c. 7 El. and Bl. 186.
5. (1903) I. L. R. 27 M. 483 at 489.
6. (1890) I. L. R. 14 M. 441.
7. (1904) I. L. R. 28 M. 64, 66.
8. (1871) 16 W. R. 24.
9. (1872) 17 W. R. 275.
10. (1889) I. L. R. 12 A. 213.

If the above view is wrong, then under Sec. 13 of the. Letters Patent, the High Court has not only got power to transfer to itself but also to try, cases from other Courts subordinate to its superintendence as a Court of Extra-ordinary Original Jurisdiction. The suit then is in all respects as if it is one originally instituted in the High Court; *vide* Sec. 20 of the Letters Patent as to the law applicable thereafter.

The power of the High Court under the Charter Act and the Letters Patent over infants is not confined to cases where infants actually reside within the Presidency of Madras. Its jurisdiction is like that of the Chancery Courts in England. *Maharajah Isturee Narain Singh* v. *Lal Chutterput Singh*[1] and *Brown* v. *Alexander Maclachlan*[2] and the words "within the Presidency of Madras" occurring in clause 17 of the Letters Patent refer only to the territorial jurisdiction and not to the place of actual residence of the minors. It only means that the permanent residence or domicile must be within the Presidency. It has been held in the following case that the High Court has power to appoint a guardian for minors resident outside the Presidency. *In Re the estate of H. G. Meakin*[3]. See also *Dorasami Pillai* v. *Thangasami Pillai*[4]; *Karmalli Rahimbhoy* v. *Rahimbhoy Habbibhoy*[5]. In this case the minors must none the less be deemed to be resident within the Presidency because they have left the country for a temporary purpose. The High Court has all the powers of the Supreme Court which preceded it and the Supreme Court was expressly authorised by the Charters which created it to exercise similar jurisdiction and similar powers in respect of infants as the Courts of Equity in England. It has been held in England that English Courts have got power to appoint guardians for infants resident not only in England or the British Isles but also on the Continent. *Marquis of Bute's Case*[6] *Hope* v. *Hope*[7]. *In re Willoughby*[8] 17 Halsbury 126. *Stephens* v. *James*[9] and *Re Pavitt*[10]. The case of *In the matter of the petition of Juandhakoer* v. *The Court of Wards*[11] is a case of lunatic to which the provisions of the Lunacy Act which lays down a different procedure are applicable.

1. (1842) 3 M. I. A. 100.
2. (1872) 4 P. C. 543.
3. (1896) I. L. R. 21 B. 137.
4. (1903) I. L. R. 27 M. 377.
5. (1888) I. L. R. 13 B. 137.
6. (1861) 9 H. L. C. 440.
7. (1854) 43 E. R. 534.
8. (1885) 30 Ch. D. 327.
9. (1833) 39 E. R. 818.
10. (1907) Ir. R. 234.
11. (1881) I. L. R. 4 A. 159.

The above cited decisions show that the English Courts did not give effect to the argument of ineffectiveness based on the residence of minors in foreign countries or on the probable unwillingness of Foreign Courts to respect or execute the orders of English Courts. Moreover the argument of ineffectiveness has been approved by English Courts only in cases where specific relief touching immovable property outside their jurisdiction was prayed for and even in such cases such of the reliefs as could be given and enforced against the person of the defendants were always given. Minors cannot be said to be immoveable property. The argument of ineffectiveness will apply only in cases where the two Courts are not of the same Sovereign, which is not the case here. Decisions of foreign or Indian Courts are respected and even enforced by Courts in England as will be seen from the case of *Newgent* v. *Vetzera* [1]. The defendant could be punished by this Court for disobedience of the orders of this Court, *Sha Karamchand* v. *Ghalabai*[2] *Damodar Bhutt* v. *Bhogi Lal* [3], *Prayag Doss Jivaru* v. *Tirumala Srirangacharlu varu*[4]. Moreover it will not lie in the mouth of the defendant to say that the judgment against her would be ineffective; for she cannot plead her own unwillingness to bring the boys who are under her custody and who were entrusted to her control. The possibility of the unwillingness of the boys is not a legitimate argument to prevent this Court from decreeing the suit as against the defendant or the plaintiff getting a favourable judgment, which he might enforce through English Courts.

The suit is not against the minors. It is only against the defendant for her infringement of the plaintiff's rights and to obtain such of the reliefs as are appropriate thereto. This is not a suit by or against the minors so that they should necessarily be made parties.—*Cur ad vult.*

On the question of jurisdiction their Lordships delivered the following.

Judgments :—*The Chief Justice.*—This is an appeal by the defendant against a Judgment of Bakewell J. on the Original side of this Court. The plaintiff asked (*a*) for a declaration that he was entitled to the guardianship and custody of his two minor sons, (*b*) for a declaration that the defendant was not entitled to, or that in any case, she was unfit to be in charge and guardianship of the said minors, and (*c*) for a direction that the defendant should hand over the boys to the plaintiff or to such other person as to the Court might seem meet.

1. (1866) L. R. 2 Eq. 704.
2. (1893) I. L. R. 19 B, 34.
3. (1899) I. L. R. 24 B. 45.
4. (1905) I. L. R. 28 M. 319.

In his judgment Mr. Justice Bakewell declared the sons to be wards of Court. The decree declared the plaintiff to be the guardian of the persons of the two sons and directed the defendant, on a date named, to hand over the custody of the sons to the plaintiff as the guardian of their persons. At the time the order was made appointing the plaintiff the guardian of the two boys, the elder boy was nearly 18 years of age and the younger boy was over 15. Under S. 3 of the Indian Majority Act, the effect of the order appointing the plaintiff guardian was to extend the minority of the boys until they were 21.

In her amended written statement the defendant did not plead to the jurisdiction, though the question of jurisdiction was raised in the first issue. The learned Judge observes in his judgment that the defendant abandoned the first two issues but that he thought it desirable that he should express an opinion on them in case the matter should go before another Court. The question of jurisdiction was raised before us, and we thought it convenient to deal with this question in the first instance. It was not seriously contended on behalf of the plaintiff that we were precluded from doing this by reason of the defendant having abandoned the issue as to jurisdiction. It is quite clear that, if there was an "inherent incompetency" in the Court to make the decree in question—and that is the defendant's contention—we are bound to consider and deal with this question of jurisdiction. If the defence of want of jurisdiction which has been raised on appeal is good, it seems clear there is an inherent incompetency in this Court within the meaning of the decision of the Privy Council in *Meenakshi Naidu* v. *Subramania Chetty*[1].

The suit was originally instituted in the Chingleput District Court and was transferred by consent from the District Court to this Court under the powers conferred by Clause 13 of the Letters Patent of 1865. The first ground of objection to the jurisdiction was that taken in the 10th and 11th grounds of appeal. This ground of objection, it would seem, was not taken before Bakewell J. It was argued that the Guardians and Wards Act being a Code, all common law remedies by suit were superseded by that Act. It was also argued that the learned Judge could only exercise jurisdiction in the suit as a tribunal acting in the place of the Chingleput Court, and that, if the proceedings by suit in the Chingleput Court were defective that defect was inherent in the jurisdiction which the learned Judge purported to exercise in the suit after it had been transferred to this Court. The defendant did not contend that,

1. (1887) 14 I. A. 160.

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assuming this Court had jurisdiction independent of the jurisdiction exerciseable under the Guardians and Wards Act, this Court would have been precluded from exercising that jurisdiction if the suit had been instituted here, though she did not admit that even in those circumstances there would have been jurisdiction in this Court. As regards this question, S. 3 of the Guardians and Wards Act expressly provides that nothing in that Act shall be construed to take away any power possessed by any High Court established under the High Court's Act. So far as I know, there is no case in which it has been suggested that the effect of the Act is to cut down the jurisdiction of this Court when proceedings are instituted here and guardians have been appointed by Indian High Courts under their general power irrespective of the Act. See for instance *In re Jairam Luxman*[1].

The Guardians and Wards Act is an Act passed in 1890 (VIII of 1890) for the consolidation and amendment of the law relating to Guardians and Wards. By that Act the earlier regulations and enactments were repealed.

There is authority for the defendant's contention that as regards suits instituted and tried in the subordinate Courts all common law remedies were superseded by the Act. The Allahabad High Court in *Sham Lal* v. *Bindo*[2] in a case decided since the passing of the Act of 1890 took this view. The judgment however is based mainly on the *argumentum ab inconvenienti* and there is considerable force in Mr. Ramasami Iyer's suggestion that the suggested anomalies were not new but had existed since the Act of 1861. This would also appear to be the view taken by the Punjab Chief Court. See the case referred to by *Chandavarkar*, J. in his Judgment in *Sharifa* v. *Munikhan*[3]. The Bombay High Court on the other hand in *Sharifa* v. *Munikhan*[3], also decided since 1890, held that the right to proceed by suit was preserved. The question does not seem to have been considered by this Court as regards the Act of 1890, but in a case decided under the Act of 1861 this Court held that that Act did not debar a District Munsif's Court from entertaining a suit by a Hindu father to recover the possession of his minor sons alleged to be illegally detained. See *Krishna* v. *Reade*[4]. Mr. Trevelyan in his Law relating to minors, edition 4, page 99, with reference to the jurisdiction of District Courts in matters relating to the appointment of Guardians observes:—"There being nothing in the Guardians and Wards Act or in any other

1. (1892) I. L. R. 16 B. 634.
2. (1904) I. L. R. 26 A. 594.
3. (1901) I. L. R. 25 B. 574 at p. 580.
4. (1885) I. L. R. 9 M. 31.

enactment to exclude their jurisdiction, the Courts in the Districts can appoint Guardians in suits brought for that purpose, but in consequence of the existence of the special procedure such suits have fallen into disuse." It was argued that the decision with reference to the Act of 1861, such as the Madras case to which I have referred, could not be relied on in support of the contention that the common law right to proceed by suit survived the Act of 1890 since the earlier enactment was an enabling and not a consolidating Act and contained no indications of the intentions of the legislature to supersede the common law right of action. There would be more force in this argument if indications were to be found in the Act of 1890 that it was the intention of the legislature that all right to take proceedings, otherwise than under the Act, should be superseded. There is certainly no express provision in the later Act that the legislature intended to put an end to the common law right of action, and I am not prepared to infer from the general scope and tenor of the Act that this was the intention. Such indications as there are within the four corners of the enactment, in my opinion, rather point in the opposite direction. We find in S. 52, the section which amends the Indian Majority Act of 1875, the words "any Court of Justice"—not "the Court exercising jurisdiction under the Guardian and Wards Act" though perhaps too much stress should not be laid on this since in a section amending the Indian Majority Act (where the words "any Court of Justice" occur) the words of the enactment which is amended would as far as possible be followed. Again S. 48 of Act VIII of 1890 provides that an order under the Act is final and shall not be contested by suit. Nothing is said as to the right to sue in the first instance being taken away or affected by the Act. I think the question is governed by the general rule that a special remedy under a special statute does not take away the common law right. The rule is thus stated in *Ramayyar* v. *Vedachala*[1], which is cited in *Zamindar of Ettiyapuram* v. *Sankarappa Reddiar*[2] ; 'where a statute creates a new offence or gives a new right and prescribes a particular penalty or special remedy, no other remedy can, in the absence of evidence of a contrary intention, be resorted to; but where a statute is confirmatory of a pre-existing right the new remedy is presumed as cumulative or alternative unless an intention to the contrary appears from some other part of the statute.' I am of opinion that the Act of 1890 did not take away any common law or equitable jurisdiction which was vested in a District Court at the

1. (1890) I. L. R. 14 M. 441. 2. (1903) I. L. R. 27 M. 483 at p. 493.

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time the Act came into force. I think this objection to the jurisdiction fails.

I am also of opinion that the jurisdiction of the High Court in this suit is the same as if the suit had been originally instituted in the High Court, and that it is not restricted to such jurisdiction as could have been exercised by the District Court if the suit had not been called up by the High Court. Clause 20 of the Letters Patent no doubt provides that the law or equity and rule of good conscience which is to be applied by the High Court when exercising its extraordinary original civil jurisdiction is to be the law or equity or rule of good consience which would have been applied by the local Court. But this provision, in my opinion, does not take away or cut down any independent jurisdiction which may be vested in the High Court. In the despatch of the Secretary of State dated 14th May, 1862, which accompanied the Letters Patent of that year, it is stated that by Clause 13 the High Court is empowered to call for and to try as a Court of First Instance any suit which the law requires to be instituted before some other tribunal, and that by the exercise of this power the High Court will be enabled to obviate all reasonable ground of complaint when it seems that any hardship or injustice is likely to result from the compulsory institution in a Zilla Court of a suit, which, but for the change of system, might have been instituted in the Supreme Court. This is inconsistent with the suggestion that the extraordinary original jurisdiction of this Court is more resticted than its ordinary original jurisdiction. I see no reason for holding that this Court when trying a suit as a court of extraordinary original jurisdiction should be precluded from exercising any jurisdiction which may be vested in it by law as a Court of original civil jurisdiction. I think this ground of objection also fails.

The objection to the jurisdiction which I now propose to consider is taken in the 12th ground of appeal. This raises the question whether the learned Judge had "power and authority" under Clause 17 of the Letters Patent to appoint the father the guardian of the persons of the minors and to direct the handing over of the minors by the defendant to him notwithstanding the fact that the minors were outside the presidency of Madras when the suit was instituted and when the Judgment was pronounced. Jurisdiction as regards infants was expressly conferred on the Supreme Court of Madras by Clause 32 of the Letters Patent of 1800 which created the Supreme Court. This clause authorised the Supreme Court to appoint guardians and keepers for infants and their estates according to the order and course observed in that part of Great Britain called England. The language of this Clause is

quite general and is not qualified by any limitations as to persons or place such as we find in other Clauses of these Letters Patent (see for instance Clauses 4, 21, 22, 31 and 41). The High Court of Judicature at Madras was constituted by the Letters Patent of 1862 issued under the powers conferred by the Indian High Courts Act 1861. By Section 8 of that Act on the establishment of the High Court, the Supreme Court and the Court of Sudder Adaulat and Foujdari Adaulat were abolished; and by Section 9 the jurisdiction of the abolished Courts was, subject to certain limitations, vested in the High Courts. In addition to the general vesting of jurisdiction by this section clause 16 of the Letters Patent of 1862 expressly conferred upon the High Court "the like power and authority with respect to the persons and estates of infants, idiots and lunatics, whether within or without the Presidency of Madras as that which is now vested in the said Supreme Court of Madras." Whatever may have been the purpose for which the words "whether within or without the Presidency of Madras" were introduced into this clause, it seems clear that it was the intention of the framers of the Letters Patent to confer in express terms upon the High Court, as regards the persons and estates of infants, the same jurisdiction as had up to that time been vested in the Supreme Court. The words "whether within or without the Presidency of Madras" seem to me to be inappropriate or at any rate unnecessary both in clause 16 which relates to jurisdiction as to infants and lunatics and in clause 17 which relates to the insolvency jurisdiction of the High Court.

In clause 13, the clause which gave extraordinary civil jurisdiction to the High Court, the words are necessary in order to include any Courts subject to the superintendence of the High Court which might be situated without the presidency. In the Letters Patent now in force, the Letters Patent of 1865, we find the words "whether within or without the Presidency of Madras" retained in clause 13, whilst in clauses 17 and 18, which correspond to clauses 16 and 17 respectively of the Letters Patent of 1862 for these words, the words, "within the Presidency of Madras" were substituted.

In the Despatch of the Secretary of State to which I have already referred it is stated that the reason for the introduction of the words "whether within or without" was to make it clear that the charter was meant to apply to certain extra local jurisdictions. It may be that the explanation for the omission of the words "or without" in clauses 17 and 18 of the Letters Patent of 1865 is to be found in Section 3 of the Act of 1865 (28 Vict. C. 15) which empowered the Governor-General to authorise any High Court to

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exercise the powers conferred by the Letters Patent in a place not within the limits of the Presidency for which the High Court was established, since the effect of this enactment may have rendered the words "or without" in clauses 17 and 18 unnecessary, though they would still be necessary for the purposes of the extraordinary original jurisdiction conferred by clause 13. However this may be, it seems clear that the words "within the Presidency of Madras" were used for the purposes of territorial limitation and that they did not qualify or restrict the powers of the High Court with regard to the guardianship of minors.

The jurisdiction in connection with the estates and persons of minors, in my opinion, is the jurisdiction which was exercisable by the Lord Chancellor in England acting for the Sovereign as *parens petriae* when the Supreme Court in Madras was instituted. The learned Judge in dealing with this question of jurisdiction referred to the fact that the minors were domiciled in British India. I do not think, when he referred to the domicile of the minors that he meant to lay it down that an Indian domicile on the part of the minors was necessary to give this Court jurisdiction. Clause 17 says nothing about the domicile of the minors. But it seems to me that the domicile of the minors, or the fact that they are Indians, may be factors to be taken into cnsideration when the Court is determining whether in a given case it will exercise jurisdiction or decline to do so. If the domicile and residence of the father within the jurisdiction of the Court of Chancery in England would have been sufficient to give jurisdiction to the Court in England, I think the same facts *mutatis mutandis* would be sufficient to give jurisdiction here. Whether the Court either in England or here should exercise the jurisdiction on the strength of these facts alone is a different matter. In determining whether the Court will exercise its jurisdiction and in what manner it will exercise it many factors may have to be taken into consideration, amongst others, as it seems to me, the question of domicile.

The defendant also contended that the decree was bad and must be taken to have been made without jurisdiction, because it must necessarily be " ineffective ". She relied on the proposition in the introduction to Professor Dicey's work on the "Conflict of Laws" which is stated as General Principle No. 3 (second edition p. 40). " The Sovereign of a country, acting through the Courts thereof, has jurisdiction over any matter with regard to which he can give an effective judgment, and has no jurisdiction over any matter with regard to which he cannot give an effective judgment". Professor Dicey

says (pp. 41 and 42) that a judgment which is "ineffective" means "a decree which the Sovereign under whose authority it is delivered has not in fact the power to enforce against the person bound by it; and which therefore the Sovereign cannot, even if he chooses, give his Court the means of enforcing". It may be a question whether this principle has any application whereas in the present case the Courts in England and the Courts in this country act through the same Sovereign. At any rate there can be little doubt that the Sovereign acting through his Court in England has the means of enforcing this judgment. Whether the Court in England would think fit to do so in the circumstances of this case is of course another matter. The rule is thus stated by Professor Dicey: "A guardian appointed under the law of a foreign country (called hereinafter a foreign guardian,) has no direct authority as guardian in England; but the Court recognises the existence of a foreign guardianship, and may in its discretion,give effect to a foreign guardian's authority over his ward" Dicey's "Conflict of Laws"(2nd Edition Rule 133 Page 475.) It does not follow that because the decree gives the father as guardian no authority in England, assuming it does not, the decree is "ineffective". In the more recent English cases the courts of England have recognised the foreign guardian. "The position, however, in England of foreign guardians is a subject on which it is difficult to lay down, precise rules, both because in all matters of Guardianship the High Court acts mainly on its discretion and with reference to the particular circumstances of each case, and because the later decisions involve a recognition of foreign guardianship not in reality consistent with the doctrine of the earlier cases that the powers of guardians are strictly local". (Dicey's Conflict of Laws, 2nd edition, page 478). I am not prepared to hold that the judgment in this case is ineffective and therefore bad.

The contention that the Court in England would say that the decree which it was asked to enforce had not been made by a Court of competent jurisdiction of course begs the question. It was argued that the Court of Chancery has wider powers than any Court acting under statutory powers. But in the present case the statutory power as regards the appointment of guardians for infants is given with express reference to "the order and course observed in that part of Great Britain called England." (See. cl. 32 of the Letters Patent of 1800). The test seems to me, would the fact that an infant was resident out of England in itself deprive the Courts in England of power on the application of a father domiciled and resident in England to appoint a guardian of the person of the non-

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resident infant? The answer is surely "no." As regards the English cases in *Johnston* v. *Beattie*[1] a case which came before the House of Lords in 1843 it was held that the rights of a Scotch "Tutor" could not be recognised by the Court in England, with reference to a minor residing in England. It was also held that the Court in England had jurisdiction to appoint guardians for the infant although her domicile and all her property was situated in Scotland. In *Hope* v. *Hope*[2] a case which came before Lord Cranworth in 1854, the Lord Chancellor laid it down that the Court of Chancery had jurisdiction over the custody of the children of an English subject, though such children were born and at the time, the jurisdiction was invoked were resident abroad. In this case the children were born out of the jurisdiction, the mother was resident out of the jurisdiction and an *interim* order had been made by the French Court entrusting to her the custody of the children. In the case before us the children were born within the Presidency of Madras, the appellant has not contended that she does not reside within the Presidency and no order has been made by the Court in England with which the order of *Bakewell* J. could conflict. The fact that the defendant must be deemed to be resident within the jurisdiction seems to me to be a matter of importance. In the *Hope case*, the Lord Chancellor said in his final Judgment (page 544). "If Mrs. Hope had not been abroad I should have made a short order directing compliance within a limited time, and in default that she should stand committed." On the facts of the Hope case the Lord Chancellor does not seem to have entertained the least doubt as to his jurisdiction, though in framing his order he took the greatest care to treat the French tribunal with all respect, and to avoid the possibility of a conflict between the French and English Courts. The final order which the Lord Chancellor made was that within a week the mother should deliver up the children to their father or otherwise concur with him in taking such steps as may be necessary for authorising them to be delivered up to him according to the laws of France. Whether anything was done in pursuance of this order we do not know. Assume nothing was done, this does not affect the question of jurisdiction. The Lord Chancellor was clearly of opinion that he ought to make the order and that the case was not one of the class of cases to which he referred in his first Judgment (page 542) when an order would do no good but would involve "a sort of scandal" on the Court by reason of an order being made which the Court could not enforce. Even in this class of cases the

1. (1843) 10 Cl. and F. 42 s c. 8 E. R. 657.
2. (1854) 43 E. R. 534.

Lord Chancellor apparently did not doubt the jurisdiction, but only the desirability of exercising it.

In *In re Willoughby*[1] the Court following *Hope* v. *Hope*[2] on the application of the infant's next friend, the father a natural born British subject being dead, the Court appointed a guardian of an infant born and resident in France, the mother a French woman, being entitled by the law of France to the status of natural guardian of the infant. The Court of Appeal affirming *Kay* J. were of opinion that the jurisdiction existed and in the circumstances ought to be exercised. Other English cases were cited to us but I do not propose to discuss them as the two cases to which I have referred are the only cases so far as I know which seem to me to be directly in point. Some Indian cases were cited in the course of the argument. I only refer to those cases where the question of the jurisdiction conferred by the Letters Patent was considered. In *In re the Estate of H. G. Meakin*[3] a mother residing in Poona was under the powers conferred by the Letters Patent appointed guardian of a child who was resident in England at the time the order was made. The making of the order, however was not opposed. In *In the matter of Srish Chander Singh*[4], on an application under cl. 17 of the Letters Patent *Sale* J. refused to appoint a guardian of the person and property of an infant, who was not a British subject and who was outside the limits of the ordinary civil Jurisdiction of the Calcutta High Court, there being testamentary guardians and no application having been made to remove them. The fact that the infant was not a European British subject does not seem material to the question of jurisdiction. The learned Judge would seem to have relied on the fact that there were testamentary guardians, and also on the fact that, under the Guardians and Wards Act the application should have been made to the Court in whose jurisdiction the minor resided. So far as I know there is no decision with the exception of the case to which I have just referred, that an Indian High Court has no jurisdiction under cl. 17 of the Letters Patent, where the infant is outside the jurisdiction when the Court is asked to exercise its power and authority.'

As regards the objection that the minors were not represented, in my opinion neither Order 32 Rule 5 of the Civil Procedure Code nor the principle of law or equity on which the rule is based applies to the present suit. The minors are not parties to the suit, and as from the very nature of the suit there must be the fullest and most

1. (1885) 30 Ch. D. 324.
2. (1854) 40 Eng. Rep. 534.
3. (1896) I.L.R. 21 B. 137.
4. (1893) I.L.R. 21 C. 206.

careful consideration of their interests before any order is made, it is not necessary that they should be separately represented in order that their interest may be protected.

I am of opinion that in this case *Bakewell* J. had power to appoint the father the guardian of the minors, and that the power of the Court to appoint a Guardian carries with it a power to make any order which may be necessary to enforce the authority of the guardian.

I express no opinion as to whether, apart from the power and authority given to the Court by the Letters Patent, this Court would have jurisdiction under the Code of Civil Procedure and the general law to make the decree which is now under appeal.

In my opinion the objections to the jurisdiction fail.

Oldfield J. :—The facts, necessary for disposal of the purely legal questions raised by the appellant (Defendant) are these: Plaintiff presented a plaint in the District Court of Chingleput, praying for declarations (1) that he was entitled to the guardianship and custody of his two minor sons (2) that defendant Mrs. Besant, was not entitled to and was unfit for the charge and guardianship of them and for a direction to her to hand them over to him or to such other person, as might be appointed. After the defendant had filed her written statement the case was transferred to the Original side of the High Court under Clause 13 Letters Patent. An amended plaint and written statement were afterwards filed, the relief prayed in the former being however identical with that already asked for. The suit was tried and disposed of by the Judgment under appeal. The minors were declared Wards of court, and it was decreed (1) that the plaintiff was declared their guardian (2) that the defendant should hand over custody of them to the plaintiff in that capacity.

The first ground of appeal argued is that these proceedings were taken in the form of an ordinary suit, although the relief claimed could be asked for only by petition under a special Act, the Guardians and Wards Act (VIII of 1890), if the terms thereof authorised its grant and the procedure therein prescribed were followed. The objection is substantial, because Section 9 of the Act requires that an application for the personal guardianship of a minor shall be made to the District Court, within the limits of whose jurisdiction he is ordinarily resident, and it is at least doubtful whether this requirement was complied with in the present case, when the minors had left the jurisdiction about 9 months previously. Sections 10 and 11 moreover prescribe that certain information shall be given in

the petition, which was not given in the present plaint, and that certain notices shall be served. It is not disputed that the relief now given by the learned Judge could have been claimed under the Act. It is argued that it could have been claimed only under it and that therefore the acceptance of the plaint by the Chingleput District Court and all subsequent proceedings were without jurisdiction. A defect in jurisdiction, such as that alleged, can be relied on at any time and could not have been cured by the defendants' waiver of her objection to it; and it is therefore unnecessary to refer to the course of her pleading in this connection. It has been suggested that in any case the plaint can be treated as a petition and the proceedings as proceedings under the Act, the minors having in fact been ordinarily resident within the Chingleput jurisdiction. But, if there were no legal objection to that course and the necessary finding as to residence could be reached, there is still a possibility that the defendant would suffer prejudice in respect of the merits of her case, which debars this Court from such use of its discretion. It is therefore necessary to decide whether the existence of the special Act makes a suit unsustainable under the common law.

There is no doubt that the provision of a simple and summary procedure under the Act has made suits rare, if it has not brought them into total disuse; and for that reason, whether or no the right of suit still exists, there are not likely to be many decisions regarding it. There is no Madras case for *Thiruvengadamier* v. *Periasami Tevar*[1] which was originally relied on, turned out on inspection of the record to relate to a petition under the Act. In the other Provinces conflicting views have been taken, as appears from the references given *Shamlal* v. *Bindo*[2] the High Court of Allahabad and the Chief Court of the Punjab being against and the Calcutta and Bombay High Courts in favour of the survival of the common law jurisdiction. The Judgments in all these cases are however inconclusive. For the anomaly foreseen in *Shamlal* v. *Bindo*[2] as a consequence of the conflict between the decisions of two Courts could be avoided as easily in this, as in other cases, by the use of the Court's power to join necessary parties at the instance of the person who was a party to both proceedings. *In the matter of the petition of KeshiChundersen*[3] was a proceeding under the Act, the question being whether its scope had been enlarged illegitimately; and the case is important only with reference to certain observations in the judgment of *Broughton* J. on one aspect of the matter, to which I shall

1. (1898) 9 M. L. J. 24. 2. (1904) I.L.R. 26 A. 594.
3. (1881) I.L.R. 8 C. 266.

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return. In another case not referred to in *Shamlal* v. *Bindo*[1], *In the matter of Sirish Chander Singh*[2] the question came before a single Judge on an application, primarily under the Letters Patent, but also under the Act. No order in fact was made, and there was no question of the existence of a concurrent right to sue. The Bombay case, *Sharifa* v. *Munikhan*[3] ended in a dismissal on the merits; perhaps on that account the judgments deal with the question of jurisdiction, one of them only by reference to an unreported case of the same High Court, the other by reference to the Calcutta cases.

In these circumstances the Defendant's contention must be dealt with on its merits. It is firstly that the provisions of the Act and their wording abolish existing remedies under the statute and common law expressly or by implication. The Statute Law before 1890 consisted in Madras Regulations V of 1804, (Section 20) and IX of 1831 and the Indian Acts XIV of 1858 and IX of 1861. The three first gave more or less general authority to Courts to appoint guardians and the last empowered District Judges to do so by summary process, at the same time expressly saving the validity of appointments made in suits, without restriction as to the grade of the Courts making them. None treated of the rights or liabilities of the guardian or minor. It is clear and it was recognised in *Krishna* v. *Reade*[4], in which the sustainability of a suit in a District Munsif's Court was upheld, that a comprehensive remedy was available at Common law, and in fact it was only as regards two matters, the appointment of a guardian and the procedure, by which he could obtain custody of his ward, that the statutes afforded any guidance whatever. The explicit repeal of the statutes by Act VIII of 1890 therefore entailed very little. In the language of the Act there is nothing, which in my opinion favours either the Defendant or the Plaintiff. There is no reference to remedies, rights or duties under the Common law or their abolition. There is no doubt no reference to guardians appointed under it, though one might perhaps have been expected in S. 26 (1), which refers to guardians appointed or declared by the Court or appointed by Will or other instrument. Plaintiff's suggestion that guardianships obtained by suit are included in this and other Sections in those declared by the Court fails in view of the definition of Court in Section 4 (5); and it is simpler to assume that the duties of guardians not appointed under the Act were left to be regulated by the Courts, which

1. (1904) I. L. R. 26 A. 594.
2. (1893) I.L.R. 21 C. 206
3. (1901) I. L R. 25 B. 574.
4. (1885) I. L. R. 9 M. 30.

appointed them. Sec. 52 refers to appointments or declarations made by any Court of Justice and may be a recognition of appointments not made under the Act or by the District or High Court. But it may be intended merely to cover those made by other Courts before the Act was passed. S. 7 provides for a procedure for the appointment of a guardian, the use of which is restricted to District Courts. But its language in no way excludes the existence of an alternative or is inconsistent with its merely enabling character. There is, it must be held, nothing in the Act itself which supports or negatives the defendant's contention.

She relies also on the more general argument that Act VIII of 1890 abolished existing jurisdictions and remedies, inasmuch as it is a codifying enactment. That it is one must be conceded. It is statedly intended to consolidate and amend the existing law, and that formula is as explicit as those and in other enactments usually recognised as codes. It repealed the existing statute law exhaustively. It reproduced it and the existing common law so comprehensively that the learned Vakil for plaintiff has been able to point to three topics only, as omitted from its purview; and their importance is insignificant or the necessity for their inclusion doubtful. But, though Act VIII of 1890 constitutes a code, the consequence alleged by the defendant does not follow. No doubt "when a statute gives a new right and prescribes a special remedy, no other remedy can, in the absence of evidence of a contrary intention, be resorted to." But this statement of the law is incomplete, unless it is remembered that "when a statute is confirmatory of a pre-existing right, the new remedy is presumed as cumulative or alternative, unless an intention to the contrary appears from some other part of the statute". The rule is given in those terms in *Ramayya* v. *Vedachalla*[1] and *Zemindar of Ettiyapuram* v. *Sankarappa*[2] and is moreover based on English authority. It is not material that in *Ramachandra* v. *The Secretary of State*[3] only the first portion of it was referred to. For that (it would appear) was owing to the assumption (made rightly or wrongly) that new rights alone were then in question; and this is borne out by the character of the English cases cited, the rights in question in them having been created by statute. Then the rule, thus ascertained as a whole is useless to the defendant. For, as was observed above, a common law jurisdiction existed, and the Act is only a re-affirmation of the powers exerciseable and the duties enforceable under it. The one exception among

1. (1890) I. L. R. 14 M. 441. 2. (1903) I. L. R. 27 M. 493.
3. (1882) I. L. R. 12 M. 109.

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its provisions to this statement is in S. 58, which postpones the date of majority in cases in which a guardian has been appointed. But its application is expressly extended to all such cases and is not limited to those, in which there has been an appointment by a Court as defined in S. 4 (5) of the Act. Although therefore the Act is a Code it cannot be held to bar remedies or to close jurisdictions open at its date; and though they may have fallen into disuse in the Mofussil in this presidency, they cannot affect the plaintiff's right to use them, when it has not been abrogated in any legal way. This objection to the jurisdiction therefore fails.

The first of the defendant's more general objections to it is that as no trial could be held, when the minors were not impleaded separately or represented by a guardian *ad litem* in accordance with Order 32 Rule 5 (2) C. P. C. This rule reproduces S. 444 of the Code in force when *Krishna* v. *Reade*[1] and the Calcutta and Bombay cases above referred to were decided, and I observe that the minors concerned were not made parties in them and that the minor is not among the persons, to whom notice must go in proceedings under Act VIII of 1890. But, the short answer to this objection is that, whatever its weight may be held to be, if it is urged by the minors as ground for discharging the order against them, it has not been shown how the defendant, who did not take it before the learned Judge, can take it here.

In order to meet the statement of the defendant's last and most important objection to the jurisdiction, it is necessary to refer to the learned Judge's own statements regarding it. In the order of 22nd April, 1913, he said "With regard to the jurisdiction of this Court under Clause 13 Letters Patent the power thereby conferred appears to be analogous to that of the High Court of England to remove actions from inferior Courts by writ of *Certiorari* and I think that this Court has the same power in the trial of a suit removed from the District Court as in a suit instituted here." Now if only clause 13 is in question, it is clear that the learned Judge's powers were under Clause 20 only those of the District Court of Chingleput, from which the suit was transferred. But in para 15 of his judgment he said "With reference to jurisdiction the plaintiff's children are subjects of the King-Emperor, domiciled in British India and are only temporarily resident in England, where they were taken by the defendant for purposes of education. "The defendant has also in my opinion broken the understanding, by which she was allowed to take them beyond the jurisdiction. In these circumstances I am

1. (1885) I. L. R. 9 M. 35

clear that this Court has jurisdiction to pass orders as to the custody of the children and is bound to enforce such orders by all means in its power." It is not clear how far the defendant ever abandoned her intention of contesting the issues relating to jurisdiction; but the learned Judge has dealt with them shortly, because, as he said, he understood her to do so. Probably on this account he has not stated explicitly the nature of the jurisdiction he professed to be exercising but has only referred to various foundations for it, the nationality and domicile of the minors and the defendant's conduct as constituting a cause of action. The defendant has argued that these foundations are useless, that no other is available and that the minors being resident outside British India, if a suit could be brought at all, neither the District Court of Chingleput nor the learned Judge was entitled to entertain it. She has maintained this directly and also with reference to the principle of effectiveness.

It is in my opinion unnecessary to consider at any length one answer to this argument, that the learned Judge could pass the decree under appeal in the exercise of the powers conferred by cl. 17. Letters Patent, because his action can, I think, be justified without reference to it. I therefore do not deal with the very careful discussion of the history of the Clause, which has taken place. I observe only that the powers conferred by Cl. 17, are those exercised by the defunct Supreme Court, that is those which would be exercised by the Court of Chancery in England, and that, whilst those powers have been exercised in cases referred to before us and can be exercised without any special invocation by petition or otherwise, the foundation for that exercise (so far as has been shown) has always been and presumably must be some proceeding pending before the Court in the legal use of its powers. This is material, because in the present case the legality of the proceedings and of their institution in the Chingleput District Court is denied, and the transfer under Cl. 13, Letters Patent to this Court cannot be treated as validating them; *Ledgard* v. *Bull*[1]. Cl. 17 therefore can be relied on only to supplement powers, which the learned Judge must be shown to have had already under Cls. 13 and 20 and with reference to the nature of the relief he could give, and only in case there was already a legally instituted proceeding before him; that is in case the Chingleput District Court had jurisdiction.

To return to the foundations for his jurisdiction, to which the learned Judge referred, there are no doubt some expressions used in English cases to be cited later, which imply that nationality and

1. (1886) I. L. R. 9 A. 191 at 202.

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domicile weighed with the Court of Chancery in the circumstances under consideration. But it is doubtful whether in them the jurisdiction was founded on the nationality or domicile of the minors alone; and I desire if possible, to justify the learned Judge's action on grounds unconnected with the exercise of the special powers of that Court. The defendant denied that she had been guilty of the breach of any agreement within or outside the jurisdiction. But neither the agreement in question, that of 19th January 1912, nor its breach is the whole or a major part of the subject matter of the suit; and therefore, though the agreement could ordinarily be sued on in Chingleput District, when it was made, it is unnecessary to pursue this further. The questions are whether any other legal justification for the institution of the suit at Chingleput is available and whether the non-residence of the minors is material.

The law as to the suits, of which in general Indian Courts are empowered to take cognisance, is stated primarily in S. 9, C.P.C. They have jurisdiction to try all suits of a Civil nature, the meaning of the last two words being restricted in a manner not at present material, by an explanation. This general statement is further qualified by reference (1) to the provisions of the Code itself. (2) to any express or implied bar. The latter exception no doubt covers suits excluded expressly or impliedly from the jurisdiction by other enactments. The question is to what extent it also recognizes the exclusion of suits under the provisions of unwritten, including private international law, if such excluding provisions exist. The alternative is with reference to the first qualification above referred to that the only further test of jurisdiction is supplied by Ss. 15 to 20, which prescribe the Court entitled to try each class of suit with reference to territorial considerations. If these Sections can be treated as establishing a general criterion applicable in cases of competition, not only between Courts in British India, but also between them and foreign Courts the jurisdiction of the Chingleput District Court is clear, since the case is covered by S. 20 (a) relating to the defendant's residence, not the locality of the cause of action. The suit is not one referred to in any of the earlier sections. The rules stated in the various portions of S. 20 are alternative. The defendant gave her residence in her written statement as alternately Adyar in Chingleput District, Benares and England, and as she was served at Adyar, it is not necessary to go through authorities to show that for the purposes of the Section she must be held to have been resident there. These Sections have

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been treated as affording the criterion above referred to as between Indian and Foreign Courts in a number of decisions and there are indications that they were intended to do so in the general absence of any restrictions on their operation and in the explanation to S. 16, which imposes a restriction, material in the present connection and, so far as it affects the proviso to the Section, constituting a deliberate departure from the private international law, recognised by English Courts, and stated in *Penn* v. *Baltimore*[1].

In *Annamalai* v. *Murugan*[2], it was however observed by their Lordships of the Privy Council " in both Courts in India it was apparently assumed that the question of jurisdiction turned on S. 17 (now S. 20) of the Code of Civil Procedure and that, although the defendant was a foreigner, and although the cause of action arose in a foreign country and although the defendant did not personally" reside within the local limits of the jurisdiction of any Court in British India, * * yet he could be sued "in a British Indian Court" and it was said that this assumption required more attention than it had received. It is true that in the same judgment their Lordships expressly approved the decision in *Ghirdar Damodhar* v. *Kassigar Hiryar*. In it one learned Judge said that the Court was not concerned with questions of international law and had only to determine whether the defendant was a person against whom the legislature had permitted a suit to be filed, in which a decree could be passed and executed against his person and property within the jurisdiction. The other in the portion of his judgment at page 666, to which reference is made in the footnote to the Madras case, quoted *Companhia de Mozambique* v. *B. S. A. Company*[4], to the effect that the question whether the Courts of a nation will or will not entertain jurisdiction of any dispute is to be decided by the Municipal law of the nation itself, thus far concurring in his colleague's adoption of that law as supplying the test required. But he continued the quotation (and it is to this and his connected observations that I understand the judgment of the Privy Council to refer). "If there is a proper inference to the same effect as that of express legislation, the result is the same. But there are certain rules which have by universal consent indicated the circumstances from which the inference may legitimately be drawn." It was with such inference and the question whether the circumstances supported it that the Privy Council and the learned Judges of the Bombay High Court were concerned in the cases under discussion, since in both

1. (1750) 27 E. R. 1132 s. c 1 Vessey Senr. 444
2. (1902) I. L. R. 26 M. 544
3. (1893) I. L. R. 17 B. 662
4. (1892) 2 Q. B. 358

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the phrase "carries on business" was under interpretation. But no such inference is under discussion or need be drawn in the present case, in which reference only to the defendant's residence and S. 20 (a) is necessary, and the facts, required for its application, are not in doubt. Here therefore there is no reason for resort to the principles of Private International Law.

Nor does the fact that the minors are not at present resident within the Chingleput jurisdiction afford such reason. It has been pointed out that the various portions of S. 20 are alternative, and there is therefore no reason for considering the place, where the cause of action arose or the minor's whereabouts as determining it. I shall refer later to the validity of the learned Judge's decision against the minors themselves and the possible consequences of the plaintiff's failure to implead them. In the present connection it is sufficient that this is an action *in personam*, and that, to quote the rule as stated at p. 361 Dicey's Conflict of Laws, 2nd Edn., "The Courts of a foreign country have jurisdiction, where at the time of the commencement of the action the defendant was resident (or present) in such country, so as to have the benefit and be under the protection of its laws." I deal below with the argument from the doctrine of effectiveness. But for the present purpose the principle just referred to is sufficient; and there is nothing in the work cited or any other authority adduced to derogate from its effect or to show that the absence from the jurisdiction of the object of the claim, be it minors or chattels, is sufficient in itself to deprive the Court of jurisdiction otherwise obtained.

Lastly, the doctrine of effectiveness, as enunciated at p. 40 Dicey's Conflict of Laws, 2nd edition, has been invoked. It is stated there as follows: "The Sovereign of a country, acting through the Courts thereof, has jurisdiction over any matter with regard to which he can give an effective judgment"; and the defendant would define effectiveness shortly as "the power of the Court to carry out its own decrees without resort to any other force than that of its sovereign." It is urged that the learned Judge has no power to carry out his decree without resort to the force of a sovereign, other than the Government of India, and that he therefore could not pass it. This, however, assumes, as I understand it, that the doctrine must be applied, not only to cases in which the whole relief claimed would be beyond the powers of the decreeing Court to enforce, but also to those in which only a part of it would be so. That assumption is not supported by authority. The distinction drawn between judgments wholly and partially enforceable by the decreeing Court is material

because the judgment before us would appear to be of the latter description.

So far as appears from the work cited, the majority of the cases in which the doctrine has been applied, related to claims to immoveable property. But it has been held that it did not prevent the Court from granting relief on claims to the specific performance of contracts or to equities connected with such property, in so far as such relief could be given *in personam* by action against the defendant within the jurisdiction. No doubt the defendant attempted to distinguish such cases as *Penn* v. *Baltimore*[1] on the ground that only the execution of a conveyance which the Court itself could execute on behalf of a recalcitrant defendant, was in question. But that is not the ground taken in the judgment; and such an explanation would be useless in other cases such as those enumerated at page 47, Lewin on Trusts, 9th Edn., in which the Court interfered to direct an account of rents and profits to order foreclosure of a mortgage, to relieve against the fraudulent conveyance of an estate and to prevent a defendant by injunction from taking possession. As appears from *Penn* v. *Baltimore*[1] and other decisions, the Court's jurisdiction is not negatived because the remedy within its power does not enable it to make a comprehensive disposal of the matter in dispute. It is sufficient that assistance can be given to the plaintiff as regards one stage in the working out of his rights in the case mentioned; the obtaining of a conveyance and the fact that as to the further stage, in that case the plaintiff's maintenance in quiet enjoyment, nothing can be done does not debar him from suing or the Court granting the relief within its competence.

It was for relief of this kind, which might or might not turn out to be finally sufficient, that the plaintiff asked in the present suit. He prayed for a declaration and injunction in the terms already stated. No doubt he chose to do so without making the minors parties, and it may be a question how far he will be able, even in India, in case they return there, to execute his decree against their persons. And in England he no doubt will not be able to execute or sue on his decree in the ordinary sense. But "a foreign guardian has, unless interfered with by the Court, control over the person of his ward, whilst in England." (Dicey, P. 478). And the plaintiff may fairly have been willing to trust to his son's recognition of his rights, as father and appointed guardian, after they have been freed from other influences, in England or in India, in case of their return. It

1. (1750) 27 E. R. 1132 S. C. 1 Vesey Senr. 444.

is however more important that the decree asked for might have been or may still be regarded as likely to be effective in two other ways, as the basis either of proceedings in execution here against the defendant personally under Order XXI R. 13 or of proceedings in England.

It is especially in connection with the former that the defendant's attitude before the learned Judge becomes important. The minors were in England. But she was served and was within the Chingleput jurisdiction. *Prima facie,* therefore, she was available for the imprisonment and her property for the attachment, by which under Order 21 Rule 32, a decree, such as that of the learned Judge granting an injunction, would be enforceable. And until after the date of the decree, there was nothing before the learned Judge to suggest that the injunction would be ineffective owing to defendant's inability to comply with it. He was, therefore, entitled to assume that his decree would to this extent be effective and his jurisdiction good. He no doubt subjected the defendant to mandatory injunction to hand over custody of the minors; and, if her ability to do so, had been denied in her written statement, that injunction would perhaps have been framed in negative terms, forbidding her to interfere with their return or plaintiff's effort to regain them. But it was given in the terms asked for in the plaint, and the defendant did not demur to them. It is only in this Court that she has alleged that the minors, who are aged eighteen and fifteen, refuse to return, and that, though she has ceased to supply them with funds and has deposited money for their passages to India, she cannot coerce them further. I assume her good faith, but all this was first disclosed after, and was not hinted at before the judgment under appeal. It is not in my opinion open to the defendant to contend in appeal that the learned Judge's powers were ineffective *ab initio* because of possibilities as to which she was silent, until the exercise of these powers had been decreed.

Lastly the judgment will be effective, in so far as it can be used as a basis for producing in any Court in England or elsewhere outside British India, within whose jurisdiction the minors may be. I have hitherto refrained from reference to English cases as to guardianship, because they were decided by the Court of Chancery and it was necessary to exclude the special characteristics of its jurisdiction from consideration. There can, however, be no objection to reliance on them in the present connection, when the doctrine of effectiveness under discussion must be supported as, of international validity and reciprocity, and equal status as between the Courts concerned, must be assumed. This is in fact recognised expressly

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in the Judgment of *Cotton* L. J. in *In re Willoughby*[1]. And it will in any case be safe to refer to these decisions if it is remembered that the English High Court's mode of dealing with foreign Judgments is a better test of the doctrine maintained by it than are the rules, by which it has defined the boundaries of its own authority. Though the reference to them is primarily intended to support the position that the decree creating a guardianship is effective in so far as it can be the basis of proceedings in foreign countries it will be seen that some of the decisions are also in the plaintiff's favour as negativing the necessity for the residence of the minors within the jurisdiction. In *Johnston* v. *Beattie*[2], it was no doubt held that " the rights and duties of a foreign tutor and curator cannot be recognised by the Courts of this country with reference to a child residing in it. The result is that such foreign tutor and curator can have no rights as such in this country". And in *Dawson* v. *Jay*[3], the Court appointed an English guardian for an English minor in England, refusing custody to a guardian appointed in America. But other cases are less uncompromising. In *Nugent* v. *Veizera* [4], the Court no doubt maintained the guardians appointed in England. But it was careful to reserve to the foreign guardian the right to exclusive custody of his wards, to which he was entitled by the order of the Court of his own country; and the right to that custody was the immediate matter in dispute. It is material with regard to the argument above referred to from the non-residence of the minors, that no question appears to have been raised in this case as to the jurisdiction of the foreign Court to appoint Veizera as guardian, although it appears from the statement of facts that the minors were at the date of his appointment outside its jurisdiction for the purpose of education, like the minors in the case before us. So also in the next two cases, *Hope* v. *Hope*[5] and *In re Willoughby*[6] the minors, and the opposing party (in whose custody they were) being in France; and, though there had been a formal settlement of property in the former case, the Lord Chancellor expressly declined to base his decision appointing a guardian on it.

To return from this digression as to non-residence to the bearing of these two cases on the doctrine of effectiveness, in neither of them was there any person within the jurisdiction against whom, the court could have expected to enforce its order; and they are therefore strong authorities, since only the possibility of the English appointment being utilised in a foreign court could have been in

1. (1885) 30 Ch. D. 324
2. (1843) 10 Cl. and F. 43
3. (1854) 43 E. R. 300; 3 De. G. M. & G 764
4. (1866) L. R, 2 Eq. 704
5. (1854) 43 E, R, 534; 4 De. G. M. & G, 320
6. (1885) 30 Ch.D, 324 at 334

question. It must be conceded that in each of them the foreign Court had stayed its hand in order that the decision of the English Court might be known and that a conflict between the Courts of the two countries was improbable. But the right of the English Court to interfere was contested strenuously and considered fully. In these circumstances it was said in *Hope* v. *Hope*[1] that there was not a want of jurisdiction but only a want of the power of enforcing it; and in *In re Willoughby*[2] to make a quotation, which represents the tenor of both decisions fairly; " It may well be that the French Court may give effect—though I do not say they ought to give effect—to our order, and make it operative by giving to the persons whom the Court here thinks ought to be appointed guardians power in France to deal with the infant and the property there, or it may, if it thinks fit appoint those persons guardians. It will be entirely a question for the French Courts. If on the other hand the French Court thinks that other persons ought to be appointed guardians, that is a matter with which we in no way interfere." And this *mutatis mutandis* might be said in the present case and it is sufficient to show that no ineffectiveness was to be apprehended in the decree to be passed, which could have deprived the learned Judge of Jurisdiction. No doubt the English or other Court, before which the plaintiff may attempt to use his decree will have other and valuable foundation for any decision it may reach, the increased age of the minors, and perhaps a *viva voce* expression of their preference, an advantage of which the learned Judge was deprived. But authority justifies the belief that the learned judge's decision also will have weight with the English Court and, if not indispensable to plaintiff, will be of material assistance to him. In that direction as well as in those already indicated it will therefore be effective. The objection to it, based on its alleged ineffective character accordingly fails.

*On the merits, their Lordships delivered the following**

Judgments:—*The Chief Justice*:—I have already dealt with the question whether the learned Judge had jurisdiction to grant the relief which he has given in this suit. The question remains whether his judgment should be upheld. The more important dates are as follow:—

The defendant is the President of the Theosophical Society and the plaintiff has been a member of the Society since 1882. About

1. (1854) 43 E. R. 534; 4 De. G. M. and G. 320.
2. (1885) 30 Ch. D. 324 at 331.

*29th October 1913.

the end of 1908 the plaintiff was appointed Assistant Corresponding Secretary of the Esoteric Section of the Society and he and his family took up their residence at the headquarters of the Society, Adyar, in a house which he occupied rent free. In September 1909 he removed his two minor sons, Krishnamoorti and Nityananda from school, and they received gratuitous instruction at Adyar from one Mr. C. W. Leadbeater and others. The boys were then aged about 14 and 11. The defendant first became acquainted with them in December 1909. On the 6th March 1910, the plaintiff signed a letter (Ex. A.) by which he constituted the defendant the guardian of his minor sons. The plaintiff alleges in the particulars which he was ordered to deliver that in April 1910 he witnessed the incident which is described in paragraph 1 of the particulars. He also alleges that between December 1910 and February 1911 and on later dates he was told by certain parties that they had seen the incident mentioned in paragraph 2 of the particulars. In March 1911 the defendant took the boys to Benares and thence to England. In October 1911 they returned to Adyar and remained there until December 1911. Mr. Leadbeater, who had been at Adyar throughout, then took them to Benares. On the 31st December 1911, the plaintiff informed Mrs. Van Hook at Benares of the incident described in paragraph 1 of the particulars, and on the same day the plaintiff went to the defendant and demanded that the boys should be separated from Mr. Leadbeater, and referred her to Mrs. Van Hook for the reason. The defendant refused the plaintiff's request. The plaintiff returned to Adyar at the beginning of January 1912 and made complaints to various persons. On the 19th January 1912 there was an interview at Adyar between the plaintiff and the defendant and several members of the Society. A note of the proceedings at the interview was taken down by the defendant. The note is to the effect that the plaintiff stated he had no objection to the boys being taken to England and that the defendant said that she had separated the boys from Mr. Leadbeater. Mr. Leadbeater had left India about January 13, 1912. On January 26, 1912, the defendant left Adyar with the two boys for Benares and shortly afterwards took them to England. The boys were left with Mr. Leadbeater and others for a short time in Sicily, the defendant being in England. The boys then followed the defendant to England, Mr. Leadbeater accompanying them to Genoa. It having come to the knowledge of the defendant that the plaintiff had been making enquiries with respect to the charge against Mr. Leadbeater contained in the second paragraph of the particulars, she wrote to him a letter on February 7, 1912, (L L) in which she dismissed him

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from his office of Secretary. On 11th July 1912 the plaintiff wrote to the defendant a letter (Ex. AA. 6) in which he purported to cancel the letter Ex. A and asked her to hand over to him his two sons. In October 1912 the defendant returned to Adyar leaving the boys in England and the plaintiff instituted this suit.

I propose, first, to state what appears to me to be the law as to the rights of a father to the control and custody of his minor children. I do not think it has been suggested that the exposition of the law relating to this matter contained in the judgment of Vice-Chancellor *Kindersley* in *re Curtis*[1], is not still the law of England. It is there laid down that the Court of Chancery cannot decide upon the custody of infants simply with reference to what is most for their benefit and cannot interfere with the rights of a father, unless he so conducts himself as to render it essential to the safety and welfare of the children in some serious and important respect, either physically, intellectually or morally, that they should be removed from his custody. The Vice-Chancellor in his judgment cited the case of *In re Fynn*[2], in which Lord Justice *Knight Bruce* made the following observations: "Of the present case I may say, that were I at liberty, as I am not, to act on the view which out of Court I should, as a private person, take of the course likely to be most beneficial for the infants, I should have no doubt whatever upon the question of interfering with the father's power. Without any hesitation—I should do so,—to what extent and in what manner I do not say. But there may and must be many cases of conduct, many cases of family differences, family difficulties and family misfortunes, in which though interposition would be for the interest and advantage of minor children, Courts of Justice have not the means of interfering usefully, or, if they have the means, ought not to interfere." "A man may be in narrow circumstances, he may be negligent, injudicious and faulty as the father of minors; he may be a person from whom the discreet, the intelligent and the well disposed, exercising a private judgment, would wish his children to be, for their sakes and his own, removed; he may be all this without rendering himself liable to judicial interference, and in the main it is for obvious reasons well that it should be so. Before this jurisdiction can be called into action between them, the Court must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shown himself to be a person of such a description, or is placed in

1. (1859) 28 L. J. Ch. 458 at 460.
2. (1848) 64 E. R. 205 s. c. 2 De. Gex. and S. 457.

such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended—should be superseded or interfered with. If the word "essential" is too strong an expression, it is not much too strong. The defendant suggested that the law as laid down in *re Curtis*[1] was altered by the Guardianship of Infants Act 1886 (49 and 50 Vict. C. 27). No doubt this enactment altered the law but its provisions, as it seems to me, do not touch the general principles to which *Kindersley*, V. C. referred. The cases in which the Courts have refused to deliver over a child when it has arrived at years of discretion to its father on a writ of *Habeas Corpus* are not in conflict with the rule of law that a father is entitled by the law of England to the custody of his children till they attain the age of 21. In dealing with these *Habeas Corpus* cases *Cotton* L. J., in his judgment in *In re Agar Ellis*[2] (1883) says :—"But then there are cases where undoubtedly the Court declined to interfere on *Habeas Corpus* in order to hand the child over to the father or to interfere with it when it was of the age of discretion—the age of sixteen in the case of girls and the age of fourteen in the case of boys. For what reason is that? When an infant is so young as not to be able in the eyes of the law to exercise a discretion, then unless that infant is in the proper custody, that is to say the legal custody of the father or the guardian appointed, it is not in legal custody, and the very object of suing out a *Habeas Corpus* is to have it ascertained whether the person who is sought to be brought up is under duress or imprisonment; but nobody can be placed in the position of being under duress or imprisonment if he expresses a wish to remain where he is at the time the writ is issued, that is to say, provided the person is competent to express such a wish; and, if he does, it is the duty of the law to regard it."

In *In re Agar Ellis*[2], the minor was a girl of over 16. In that case it was held that the Court will not interfere with the authority of the father as regards the control and education of his children until they attain the age of 21 except (1) where by his gross moral turpitude he forfeits his rights, or (2) where he has by his conduct abdicated his paternal authority, or (3) where he seeks to remove his children, being wards of Court, out of the jurisdiction without the consent of the Court. The defendant pointed out that in the *Agar Ellis* case the children were in the custody of the father

1. (1859) 28 L. J. Ch. 458 at 460. 2. (1883) 24 Ch. D. 317 at 331

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when proceedings were instituted by the mother. This no doubt is so. But for the moment I am only dealing with the principles of law which govern this question and I do not think that the fact that the children were in the custody of the father would give him greater rights than if they were not. In regard to the question of benefit of the infant, *Bowen*, L.J. in the same case, said at page 337 "Then we must regard the benefit of the infant; but then it must be remembered that if the words "benefit of the infant" are used in any but the accurate sense it would be a fallacious test to apply to the way the Court exercises its jurisdiction over the infant by way of interference with the father. It is not the benefit to the infant as conceived by the Court, but it must be the benefit to the infant, having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can". * * * "Except in cases of immorality, or where he (the father) is clearly not exercising a discretion at all, but a wicked or cruel caprice, or where he is endeavouring to withdraw from the protection of the Court, which is entrusted with such protection by law, the custody of the infant, as a rule, this Court does not and cannot interfere, because it cannot do so successfully, or I should rather say because it cannot do so with the certainty that its doing so would not be attended with far greater injury both to the infant itself and also to general social life". * * * "As soon as it becomes obvious that the rights of the family are being abused to the detriment of the interests of the infant, then the father shows that he is no longer the natural guardian—that he has become an unnatural guardian—that he has preverted the ties of nature for the purpose of injustice and cruelty. When that case arrives the Court will not stay its hand; but until that case arrives it is not mere disagreement with the view taken by the father of his rights and the interests of his infant that can justify the Court in interfering." Mr. Simpson in his Book on "Law of Infants" on page 131, (3rd Edition), suggests that the law as laid down in *re Agar Ellis*[1] "seems to be too narrow a statement of the law as at present administered," and the learned author refers to the judgment of *Fitz Gibbon*, L, J., In *in re Ohara.*[2] The strongest passage in the judgment of the Lord Justice which could be relied upon as supporting the suggestion that the judgments *in re Agar Ellis* [1], are too narrow a statement of the law is the following:—"It appears to me that misconduct or unmindfulness of parental duty, or inability to provide for the welfare of the child, must be shown before the natural right can be

1. (1883) 24 Ch. D. 317.
2. (1900) 2 Ir. R. 232.

displaced. Where a parent is of blameless life, and is able and willing to provide for the child's material and moral necessities in the rank and position to which the child by birth belongs—*i. e.* the rank and position of the parent—the Court is, in my opinion, judicially bound to act on what is equally a law of nature and of Society and to hold, in the words of Lord *Esher*, that, 'the best place for a child is with its parent'. Of course I do not speak of exceptional cases, where special disturbing elements exists which involve the risk of moral or material injury to the child, such as the disturbance of religious convictions or of settled affections, or the endurance of hardship or destitution with a parent as contrasted with solid advantages offered elsewhere. The Court, acting as a wise parent, is not bound to sacrifice the child's welfare to the *fetish* of parental authority by forcing it from a happy and comfortable home to share the fortunes of a parent, however innocent, who cannot keep a roof over his head or provide it with the necessaries of life." With all respect to the learned author, to my mind there is nothing in this passage which indicates that the learned Lord Justice intended in any way to dissent from the principle laid down in *In re Agar Ellis*[1]. In *Thomasset* v. *Thomesset*[2], *Lindley* L.J. said that "independently of writs of *Habeas Corpus* the Court of Chancery exercised the power of the crown as *parens patriae* over infants and in exercise of this jurisdiction the power of the Court has always been much more extensive than that possessed by Courts of common law under a writ of *Habeas Corpus*." The Lord Justice then refers to a case of *Todd* v. *Lynes* which is unreported, (see page 127 Simpson's Law of Infants) where a father obtained an order for the delivery to him of the custody of his son, a young man of 17 who had been persuaded by the defendant to leave his father and enter a monastery under the charge of the defendant. As is pointed out in *Thomasset* v. *Thomasset*[2], what the wishes of the boy were does not appear.

In *The Queen* v. *Gyngall*[3] Lord *Esher*, Master of the Rolls, pointed out the distinction between the Common Law jurisdiction under which the Common law Courts used to deal with these matters by *Habeas Corpus*, (I take it that the learned Judge did not mean this was the only way in which the common law jurisdiction could be exercised) and the Chancery jurisdiction. "At common law," the Master of the Rolls said, "the parent had as against other persons generally an absolute right to the custody of the child

1. (1883) 24 Ch. D. 317.
2. (1894) Probate 295.
3. (1893) 2 Q. B. 232.

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unless he or she had forfeited it by certain sorts of misconduct." The Chancery jurisdiction was a paternal jurisdiction "in virtue of which the Chancery Court was put to act on behalf of the Crown as being the guardian of all infants." I do not think that the Master of the Rolls meant to suggest that in the exercise of this jurisdiction the natural rights of the parent were not considered. All that was laid down was that a Court of Chancery could supersede the natural rights of a parent if the welfare of the infant demanded it. In *The Queen* v. *Gyngall*[1] the Master of the Rolls cites with approval the passage from the judgment of *Knight Bruce* V. C. in *re Fynn*[2] to which I have referred. I may also refer to *in re McGrath*[3] a case in the Chancery Division decided a year before ; *The Queen* v. *Gyngall*[1].

As regards the Indian cases, this High Court would seem to have acted in accordance with the principles of the decision in *In re Agar Ellis*[4]; see *Reade* v. *Krishna*[5], and *Pollard* v. *Rouse*,[6]. Certain Indian authorities were cited by the defendant. In *In the matter of Saithri*[7], the application was for an order in the nature of a *Habeas Corpus*. On the facts of that case the Court was not satisfied that the application by the mother was *bona-fide*, the mother being a servant earning 8 annas a month and having no house of her own ; and was of opinion that the mother had precluded merely by her conduct for 8 years from demanding that the child should be given up to her and that to do so would be most detrimental to the welfare of the child. In *Sarat Chandra Chakrabarti v. Forman*[8], the application for the custody of the minor was made not by his father but by his brother. The report says that the father had "gone to Benares to end his days there." I am unable to assume from this, as the defendant wished us to assume, that the natural right of the father had devolved upon the elder brother. In view of what I conceive to be the law I feel considerable doubt as to whether I should be prepared to follow the decision of the Allahabad High Court in *Bindo* v. *Shamlal*[9] and of this Court in *Muthuveerappa Chetty* v. *Ponnusami*[10]. In *Mookoond Lal Sing* v. *Mobodip Chandar Sinjha*[11] the Court decided on the facts of that case that the *prima facie* right of the father was displaced. See also *In re Joshy Assam*[12]. In the case of *re Ghulbhai and Lilbai*[13]

1. (1893) 2 Q. B. 232.
2. (1848) 64 E. R. 205 s. c. 2 De. G. & S. 457.
3. (1893) 1 Ch. 143.
4. (1883) 24 Ch. D. 317.
5. (1886) I. L. R. 9 M. 391.
6. (1910) I. L. R. 33 M. 288.
7. (1881) I. L. R. 16 B. 307.
8. (1889) I.L.R. 12 A. 213 at p. 219.
9. (1906) I. L. R. 29 A. 210.
10. (1911) 22 M. L. J. 68 s. c. 1911 I M. W. N. 561.
11. (1898) I. L. R. 25 C. 881.
12. (1895) I. L. R. 23 C. 290.
13. (1908) I. L R. 32 B. 50.

where it was held that the interest, well-being and happiness of the minors ought to be the paramount consideration of the Court, both the parents were dead. It was suggested by the defendant though I do not think the contention was very seriously pressed that the law of England was more favourable to the natural rights of the father than the Hindu Law. I do not think this has been suggested in any of the Indian cases, and I am not prepared to accede to it. In *Muthuveerappa* v. *Ponnusami* [1], the learned Judges no doubt say that the texts of Hindu Law do not recognise any "absolute rights of guardian in any one" but neither does the law of England.

So far, I have dealt with the general question of the natural rights of the father. In this case, however, we have what purports to be an express delegation of the father's rights by Ex. A, the letter of the 6th March 1910, and what purports to be an express revocation of that delegation by Ex. A A 6, the letter of 11th July 1912. It does not seem to be material whether the letter Ex. A is to be regarded as a waiver, or an express delegation, of the plaintiff's paternal rights. If it is to be regarded as a waiver, it does not in itself operate so as to preclude the father from re-asserting his rights. If it is to be regarded as an express delegation, I think the delegation is *prima facie* revocable though there may be circumstances which would lead a court to hold that the delegation ought not to be revoked. In *In re Agar Ellis*[2] *Colton* L. J, said on page 333 "the father, although not unfitted to discharge the duties of a father, may have acted in such a way as to preclude himself in a particular instance from insisting on rights he would otherwise have, as where a father has allowed, in consequence of money being left to a child, the child to live with a relative and be brought up in a way not suited to its former station in life or to the means of the father. There the Court says 'you have allowed that to be done, and to alter that would be such an injury to the child that you have precluded yourself from exercising your power as a father in that particular respect,' and then the Court interferes to prevent the father from having the custody of the child, not because he is immoral or has forfeited all his rights, but because in that particular instance he has so acted as to preclude himself from insisting on what otherwise would be his right. That was the case in *Lyons* v. *Blenkin*[3] which has been cited."

1. (1911) M. W. N. 561.
2. (1883) 24 Ch. D. 317.
3. (1821) 37 E. R. 842 s. c. Jac. 245.

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There can be no question in this case that the agreement of March 1910 has been acted on. In *Queen* v. *Barnardo*[1], *Lord Esher* said that if the parent revoked the agreement before it had been acted on, it would not be binding. Lord Justice *Lindley*, however, laid down the law in much more general terms. He said in page 315 "Notwithstanding such an agreement the parent would be the legal guardian of the child and she is incapable of binding herself not to exercise her rights as such. She could therefore, revoke the agreement at any moment, as could any other guardian in a similar case." Mr, Justice *Wallis* in *Pollard* v. *Rouse*[2], stated the law in much the same way. He said on p. 292, "This delegation of parental authority to the plaintiff is revocable at any time and it is the duty of the parents and guardians to revoke it if used to the detriment of the children." This question is discussed by Mr, Simpson on p. 135 and by Sir E. J. Trevelyan in his book on "The Law of India relating to Minors' on p. 70. The latter states the law thus:—"A father may also lose his right to the guardianship of his children, and to the control of their education where he has permitted another person to maintain and educate them, and it would be detrimental to the interests of the children to alter the manner of their maintenance or the course of their own secular or religious education. The Court will not, when he has acquiesced for some time, permit him arbitrarily or capriciously to alter the mode of their maintenance and education, or to take them from the custody in which he has allowed them to remain." There are further observations on the subject on page 132.

As the authorities were very elaborately discussed in the course of the argument of this appeal, I have thought it necessary to refer to them at some length. I am prepared, however, to accept and apply the succinct statement of the law which is to be found in Lord Halsbury's Laws of England, volume 17, p. 107. "After a surrender by him (the father) of the custody has actually taken place, he can recover the custody unless his doing so would be injurious to the interests of the child".

The defendant contended with reference to my judgment on the question of jurisdiction that inasmuch as the jurisdiction exercised by the learned Judge was the Equity Jurisdiction given by the Letters Patent, the Court would look solely to the welfare of the infants. I cannot accede to this. I do not think that the Courts in Equity have ever professed to look solely to what appears to them to be the welfare of the infant without regard to the natural

1. (1889) 23 Q. B. D. 305. 2. (1910) I. L. R. 33 M. 288.

rights of the father. The judgment of the Master of the Rolls in *R.* v. *Gyngall*[1] speaks of the "supersession" of the natural rights. This seems to me to involve that the natural rights must be recognised and considered.

There is one other question of law which I desire to refer to before I pass to the facts. The effect of the appointment of the father as guardian in this case, (it is the appointment of the father and not the making of the minors wards of Court, as I stated in my judgment on the question of jurisdiction, which has this effect), was to extend the period of minority of the elder boy to the age of 21. At the time the order was made, the elder boy was nearly 18, the ordinary age of majority under the Indian Law. We were referred by the defendant to *In the matter of the Petition of Nazirun*[2], where it was held that an application for the certificate of guardianship under Act XL of 1858 which, if granted, would prolong the minority of the infant from 18 to 21, should not be granted when the alleged minor is admittedly on the point of attaining the age of 18, unless under particular circumstances, as where very great weakness of mind was proved, or where it was shown that there was some absolute necessity for making such order. The words "*absolute necessity*" are of too general a character to enable us to derive much assistance from this decision. The fact that a minor is nearly 18 when an order is asked for, which will have the effect of extending his minority, is no doubt a matter to be taken into consideration by any Court which is called upon to determine whether in all the circumstances of the case such an order shall be made. The defendant asked to be allowed to adduce in evidence certain affidavits made in England which she professed to rely on by way of answer to an application to commit her for contempt, which has been made to this Court. These affidavits are of course not evidence for the purpose of this appeal. The defendant did not ask for a Commission to examine as witnesses the parties by whom the affidavits were made.

At the trial and on the hearing of this appeal several questions were discussed which bore more or less directly on the question of the welfare of the boys. There is the question as to what has been called the deification of the elder boy. This is raised in the 10th issue, "Has the defendant stated that the elder boy is or is going to be Lord Christ or Lord Maitreya ?" The finding of the learned Judge was in the affirmative. There can be no question, I think, that, in the first instance the two boys were taken charge of by Mr. Leadbeater and afterwards by the defendant for

1. (1893) 2 Q. B. 232.
2. (1880) I. L. R. 6 C. 19.

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educational purposes with a view to their being sent to an English University. I do not doubt that the plaintiff who had been a member of the Theosophical Society since 1882 and for some years had been a Secretary of the Esoteric Section of the Society contemplated that the education should be in accordance with the views and tenets of Theosophy. The idea that the boy was to become vested with extramundane at tributes was, I think, a later development.

With regard to this, Sir Subramania Aiyar, with reference to the plaintiff's consenting to the boys being taken to England, said in his evidence, p. 344:—"The great inducement, as I gathered, was that the boys were going to get an English University education which was beyond his (plaintiff's) power to give." In cross-examination he said in p. 346 "plaintiff was induced to sign the letter only for the sake of English University education. The English University education was the one thing which influenced him."

I do not think that the defendant questioned the finding of the Judge that, although the plaintiff was aware when he signed the letter of the 6th March 1910 (Exhibit A) that the defendant desired to bring up the boys in such a manner as to develop their spiritual powers, neither the plaintiff nor the defendant contemplated the development of the elder boy into "a vehicle" for the manifestation of supernatural powers or persons. The defendant denied in her evidence that she had ever said that the elder boy was or was to be, the Lord Christ or the Lord Maitreya ; but she admitted having said that she believed that "his body would be the vehicle" for his reincarnation. In cross-examination, in answer to the question "Do you believe his body will be used by the Lord Maitreya, she said "I do, I admit......that ; I do believe that the body will be used by Lord Maitreya some years hence." In an address by the defendant published in one of the Theosophical journals (Ex. P) we find a statement that " the body of the disciple Alcyone (*i.e.*, the elder boy) has been handed over to those who have come down with him through the ages, to be trained and made ready for a similar destiny," the destiny being the surrender of the body to Christ. The defendant met the argument that the fostering of such ideas as these in a boy of fifteen or sixteen years of age would necessarily be prejudicial to his moral and intellectual welfare, by the contention that the setting before him of this ideal would necessarily have a purifying and ennobling effect. There might be something in this if what was set before him was that this destiny might be in store for him if he proved worthy of it. But I understand the defendant's evidence, to be that the body of the boy had already been selected for the purpose of becoming the "Vehicle". In paragraph 12 of her

written statement the defendant says it is true that respectable people have prostrated themselves before him. He was made the head of an Order called the Star of the East (the proceedings at one of the meetings of the Order are described in an article in a Theosophic Journal Ex. C. published in February 1912) and he underwent two ceremonies of Initiation as to the nature of which there is no evidence. It may be said that all this, so far from stimulating the moral and intellectual qualities of the boy, might have an opposite effect. I do not profess to know how much there is in common between the tenets and beliefs of the Hindu Religion and the tenets and beliefs of Theosophy. I am prepared to assume a very great deal. I am also prepared to assume that the plaintiff is a pious Hindu and that he was, when he signed Ex. A, an ardent Theosophist. But there is all the difference between a man holding abstract views in a matter of this sort and being a consenting party to these views being given effect to in the person of his own son. A father may believe in the doctrine of reincarnation and may have given expression to that belief, but he may well be reluctant that the body of his own son should be the medium.

I do not think that the plaintiff when he signed Exhibit A contemplated that the boys were to be devoted to lives of poverty and celibacy. I do not suggest that the importance of an education at Oxford which I doubt not was the chief inducement of the father when he consented to the boys being taken to England was ever lost sight of by the defendant, but it was, I think, regarded by the defendant and by Mr. Leadbeater as subordinate to the main purpose to which the life of the elder boy was to be devoted. We find the defendant writing to a correspondent (Exhibit QQ) on the 4th June 1912, " Both Mr. Leadbeater and I are quite indifferent as to Krishna (the elder boy) taking a degree. A degree is of no value to a spiritual teacher and Nitya's (the younger boy's)degree, would bring no credit to us but only to his family."

I now pass to a topic which I desire to discuss as briefly as possible and that is,the connection of Mr. Leadbeater with the two boys. There can be no question that the defendant and Mr. Leadbeater were closely associated in Theosophical work and were in strong sympathy with each other. In this connection, I need only refer to Exhibits F. and G. Ex. F. is an extract from an article written by Mr. Leadbeater in the Adyar Album, a work which was on sale to the public in 1911 in which he says, speaking of the defendant, (p. 155) " Whether you understand or not, you will be wise to follow her implicity, just because she knows. This is no mere supposition on

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my part, no flight of the imagination; I have stood beside your President in the presence of the Supreme Director of Evolution on his globe, and I know whereof I speak. Let the wise hear my words, and act accordingly." In Ex. G. the defendant writing in the following year of Mr. Leadbeater in a Theosophist journal says, amongst other things, "By hard patient work he has won rewards, perfecting each faculty on plane after plane, gaining nothing without hard work, as he has often said, but gaining surely and steadily until he stands, perhaps the most trusted of his Master's disciples, "on the threshold of Divinity."

The finding of the learned Judge in paragraph 4 of his judgment seems to me to be supported by the evidence. The finding is "It is clear that the plaintiff's children were first selected as likely subjects for training in the tenets of the Society by Mr. Leadbeater, who professes to have peculiar powers in this respect, and that it was through his influence that the defendant was induced to take an interest in them, and that from the first Mr. Leadbeater desired to get the children under his own control and out of that of the plaintiff whom he regarded as an obstacle to his own purposes. (See Mr. Leadbeater's letter Exs. W2., W3., W4 dated December 1909 and Ex. Y, dated 3rd January 1910)" To the letters referred to by the learned Judge I may add Ex. Y5 dated 18th April 1910. I think I may fairly say that the defendant's regard for and trust in Mr. Leadbeater was unqualified except with regard to certain opinions which Mr. Leadbeater held in regard to boys. As regards these opinions, the defendant condemned them, as mischievous, and I do not doubt that the defendant implicitly believed Mr. Leadbeater's promise that he would not preach a practice which has been described as his 'unconventional' doctrines. Mr. Leadbeater's 'unconventional' views are to be found in Exhibit XVI a letter written by him to a Correspondent on the 27th Feb. 1906, in Exhibit H, a letter written by him to the defendant on the 30th June 1906 and in Ex. J, a letter written by him to the defendant on the 11th September 1906. The defendant's attitude in the matter is indicated in her circular letter (Exhibit XIV) and in her letter to Mr. Leadbeater of the 6th August 1907 (Exhibit XII), to which he replied by his letter dated the 30th August 1907 (Ex. XIII). In cross-examination with regard to this matter, certain answers were given by Mr. Leadbeater which are to be found at p. 377, lines 12 to 29. With regard to this part of the case, the learned Judge observed in paragraph 14 of his judgment, "Mr. Leadbeater admitted in his evidence that he has held and even now holds opinions which I need only describe as

certainly immoral and such as to unfit him to be the tutor of boys, and taken in conjunction with his professed power to detect the approach of impure thoughts render him a highly dangerous associate for children. It is true that both he and the defendant declared that he has promised not to express or practice those opinions, but no father should be obliged to depend upon a promise of this kind." I entirely agree.

It was contended by the defendant that in this matter the plaintiff acted 'with his eyes open' and was aware of the opinions entertained by Mr. Leadbeater when he consented to the arrangement which brought his sons into close relations with him. The plaintiff had been a member of the Theosophical Society since 1882. In 1906 there was an enquiry with reference to certain complaints which were made against Mr. Leadbeater, before an advisory Committee. A report was made, and Mr. Leadbeater resigned his membership of the Society. There was a subsequent investigation as the result of which Mr. Leadbeater was exonerated and he subsequently rejoined the Society. The plaintiff in examination-in-chief in speaking of a circular recommending the re-admission of Mr. Leadbeater into the Society (which I take is Exhibit XIV, said, that he voted for his admission because the defendant said that he was innocent and that he believed it at the time because he had faith in the defendant (p. 223). He denied (247) having received the letter or ever having seen it, and said that he did not know that Mr. Leadbeater had been acquitted by any Committee and that the General Council had said that he might rejoin if he wished (p. 248). He also said that he did not remember what the defendant stated in her Presidential Address at the Convention in 1908 and that he knew nothing about the scandals in 1906. In 1906 the plaintiff was not associated with the Esoteric Section of the Society, and, although I think it is extremely probable that he knew a great deal more about the charges against Mr. Leadbeater and the consequent proceedings than he was prepared to admit in the witness-box, his story that he voted for his (Leadbeater's) readmission because he (the plaintiff) had entire confidence in the defendant does not seem to be an unreasonable one. In connection with this question one of the defendant's witnesses who was examined on Commission in Bombay and who says that he joined the Theosophical Society nine or ten years ago said that he knew that Mr. Leadbeater had resigned the Society, that at the Convention held at Madras a resolution was passed asking him to rejoin the Society, that he did not know anything of any inquiry into the charges against Mr. Leadbeater, that he had not seen any records in connection with that enquiry and that he knew

about his resignation only at the time when the resolution for his reinstatement was passed.

Assuming that in March 1910 the plaintiff was willing 'with his eyes open' that the boys should be closely associated with Mr. Leadbeater, and signed the letter (Ex. A) knowing that they would be closely associated with him, I am not prepared to say that it was not within his rights as a parent to take up a different attitude later even if nothing had subsequently taken place which might afford ground for suspicion that the complaints made in 1906 were not without foundation.

I now pass to the specific charges of immorality brought by the plaintiff against Mr. Leadbeater. They are referred to in paragraph 5 of the plaint and are described in the particulars delivered in pursuance of the order of the learned Judge. As regards the second charge I doubt whether the statements of witnesses who speak to what Lakshman told them are evidence. It seems to me that this charge really depends upon the evidence of Lakshman who was called as a Court witness. His evidence is to be found at page 278 of the printed papers, (a previous statement in writing as to what he said he saw is to be found in Ex. VII) and it is quite clear that his evidence is insufficient to support a charge of an unnatural offence or any act of gross indecency on the part of Mr. Leadbeater. With regard to the first charge the plaintiff's evidence, if true, would establish that Mr. Leadbeater had been guilty of grossly indecent conduct in connection with the elder boy. The evidence given by the plaintiff in the examination-in-chief at the trial with regard to this is in accordance with the evidence of Mrs. Van Hook who was called by the defendant. It is also in accordance with the evidence of Mr. Bhagavan Das who was examined on Commission as to what the plaintiff told him. The defendant denied that, when she returned to Adyar in April 1910, the plaintiff told her anything about what he had seen himself. Much was said on the hearing of the appeal with regard to the alteration in the dates with reference to the charges. The evidence of the witnesses who spoke to the report made to them by Lakshman would fix the date of the incident, which is made the foundation of the charge of unnatural offence as prior to the date, when Ex. A was signed by the plaintiff. The plaintiff's case is that, although the evidence of these witnesses as to the character of Lakshman's report to them is true, their evidence is untrue with regard to the date when Lakshman said he witnessed the occurence and that the date when Lakshman said he witnessed the occurrence was subsequent to the signing of the agreement. I need not discuss this

question, because, assuming the statements of these witnesses with reference to what Lakshman told them are evidence at all which I doubt, the evidence is in my opinion altogether insufficient to establish the offence charged in paragraph 2 of the particulars. Although Mr. Leadbeater was not, and could not well be represented before us, the defendant has taken upon her shoulders the burden of his defence with regard to these charges. She discharged the task of defending him with extreme zeal and with great ability. She sought to show that, in view of the changes in the alleged dates and of the variation in the character of the alleged offence, no Court of Law would hold Mr. Leadbeater guilty either of an unnatural offence or of grossly indecent conduct in connection with the elder boy. One thing she did not do. She did not place before the Court the evidence of the boy himself. But speaking for myself, having regard to her strong affection for the boys which I do not doubt and to the nature of the charges, I do not think she can be blamed for not putting the boy into the witness box. Of course I do not overlook the fact that the defendant no doubt realised that by bringing the boys to Madras she would have sacrificed the advantageous position which she holds so long as the boys remain in England. I will say nothing more with regard to this part of the case because I am not prepared to differ from the conclusion of the learned Judge that for the reasons stated in paragraphs 5 to 12 of his judgment the 6th and the 7th issues should be answered in the negative. I am not, however, altogether in agreement with the view expressed by the learned judge that it was the plaintiff's knowledge that his surrender of the rights of guardianship contained in Ex. A was irrevocable which induced him to search for something which would influence the Court in revoking the agreement and so caused the revival of charges similar to those made against Mr. Leadbeater in 1906.

This brings me to the question as to how far the fact of these charges that were made by the plaintiff can be reconciled with good faith on his part and a simple-minded desire, whether mistaken or not, to do what was best for the welfare of his boys. The question as to how far the plaintiff acted in good faith is, of course, of the greatest importance with reference to the question of the boys' welfare, because it is obvious that their interests would be greatly prejudiced if they were handed over to the guardianship and custody of a man prepared to make charges of this character in connection with his boys knowing them to be false. It was pointed out that as regards the second charge the evidence, even if true, would only

establish indecent behaviour and this was relied on as showing that the charges were made wantonly and maliciously and with the knowledge they were false. It has been suggested that the plaintiff, is a tool in the hands of those who desire to injure the defendant. I may refer to the evidence of the plaintiff in pp. 239, and 273. I will assume that the plaintiff is, to some extent at any rate, being made use of by others who supply the sinews of war and who have their own ends to serve. This, in itself, is not incompatible with the plaintiff being actuated by an honest desire to do what he now conceives to be, although his views might formerly have been otherwise, for the best interests of his boys. Very great stress has been laid by the defendant upon the fact that the plaintiff made a criminal charge of a very revolting character in which his own son was involved. I am not impressed by this. If the father honestly believed that somethings have happened which would justify the second charge, he was placed in a terrible predicament. If he sought to bring the man to justice he exposed himself to the accusation that he was bringing a charge against the child; if for the sake of saving the child he did nothing, he exposed himself to the accusation of allowing a terrible crime to remain unpunished. From the very nature of the offence he could not do anything without implicating the boy. The plaintiff in cross-examination said (p. 245) " My accusation was against Mr. Leadbeater associating with the boys and not against the boy himself. I never said anything against my boy. My complaint was against Mr. Leadbeater."

It appears to me that there are undisputed facts which might not unreasonably have given rise to serious suspicions against Mr. Leadbeater. I do not say that his conduct was criminal; I do not say that acts of gross indecency have been proved; but I do say that, in my judgment, his behaviour in connection with these boys was unseemly and indecorous. In this matter I will take the evidence of Lakshman, the defendant's own servant, who is still in her service, and the evidence of the defendant's witnesses. According to Lakshman, he saw the elder boy and Mr. Leadbeater in the bath-room, the boy was naked and Mr. Leadbeater's coat was up to the waist and he had no pyjamas (witness apparently indicated the length of the shirt half-way down his thigh). In examination-in-chief, Mr. Leadbeater said (p. 367.) :—

Q.—Through that time, 1909, I want you just to remember the succession of events about the bath-room.. Where did the boys first bathe when you knew them?

A.—At a well in Vasantamantapam within the headquarters.

Q.—What did that lead you to do ?

A.—It eventually led me to offer the use of my bathroom in place of it.

Q.—So that they bathed in your bath-room for a time ?

A.—Yes.

Q.—Now, will you say please quite frankly, what changes were introduced in their bath ?

A.—I introduced carbolic soap and hot water for the hair, and taught them to bathe in the ordinary English way so as to be really clean.

Q.—And that means as regards the bather ?

A.—That he soaped himself all over.

Q.—Dressed or not ?

A.—Quite undressed, certainly.

Q.—Were you fully dressed ?

A.—I had nothing to do with it, except on two occasions when I went in and superintended." Mrs. Van Hook said in cross-examinatien (p. 329)" I know that Mr. Leadbeater took the boys into his bath-room and said that he should teach them how to bathe like gentlemen." It seems to me that it did not come within the province of Mr. Leadbeater, a gentleman of over 60 years of age, as tutor and spiritual adviser of these boys to superintend privately and personally their bathing arrangements.

The character of the suspicions—to put it no higher—which the plaintiff entertained against Mr. Leadbeater was such that it may well be that the plaintiff's mind was disturbed and thrown off its balance, and that he lost the power to see things and judge things in their true proportions, and to exercise a sound judgment with reference to any conclusion which he might come to. As I have said I think the plaintiff knew a great deal more about the nature of the charges brought against Mr. Leadbeater in 1906 than he was prepared to admit. This, in fact, is the defendant's case. With his knowledge of Mr. Leadbeater's history in this connection, it is scarcely extraordinary that a man whose mind had possibly become a little morbid by reason of the atmosphere of mystery and mysticism and alleged extraordinary happenings in which he lived, should have dwelt on something which he saw objectionable and indecent though not criminal, until he became obsessed with the idea that

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Mr. Leadbeter's conduct in connection with these boys, had be such as to warrant the charge of an unnatural offence. "Unnatu ofence" for the purpose of the Penal Code is a technical ter In its non-technical sense it only means something contrary nature.

One thing is clear, that although the plaintiff's feelings towa Mr. Leadbeater in 1910 were those of bitter hostility, he entertair for the defendant feelings of affection and esteem which remain unchanged till July 1912. On the 23rd January, 1912 we have a let from him to the defendant, Exhibit AA2 in which he says (page 1] "However unkind you may make your external attitude towards ı appear to be, I feel quite certain that you have inside the same lc and tenderness you have been showing me during the last three year . . . "I shall cling to you as a son to a mother. Once a motl you are a mother for ever." There can be no question that t plaintiff demanded the separation of the boys from Mr. Leadbeat at the end of 1911. The defendant refers to his having rushed to her room when they were at Benares crying and sobbing, a saying that the boys must be completely separated from Mr. Lea beater. When the defendant asked 'why' the plaintiff said he cou not tell her, that he had told Mrs. Van Hook. This no doubt to place about a year and 8 months after the date when the incide referred to in paragraph 1 of the particulars according to t plaintiff took place. Having regard to the nature of the alleg incident, the fact that the defendant was a lady, and the fact th the entertained feelings of respect and affection for Mr. Leadbeat and had placed implicit confidence in him—the delay on the part the plaintiff in making any communication in the matter to t defendant does not seem very extraordinary. His story that preferred to tell Mrs. Van Hook who is a Doctor does not seem to unnatural. The plaintiff seems to be a man of no particular streng of character, emotional, possibly somewhat hysterical, and sway one way or the other by the impulse of the moment. His temper ment would seem to be reticent and retiring. The difficulty whic according to the evidence, Mrs. Taylor experienced in obtaining tl data of the biographical notes which she desired to publish about tl elder boy shows the plaintiff was a man who did not desire to cou publicity or notoriety. The final rupture with the defendant mea the sacrifice of a friendship which he evidently greatly value the abandonment of all advantages, which he would naturally ho for from his boys going to an English University, and possib another scandal similar to that which appears to have shaken tl

society to its foundations in 1906. In these circumstances can it be wondered at that a man would hesitate before taking a final and irrevocable step.

A point was made that even if the plaintiff could not bring himself to make a communication to the defendant, he might have given information to Sir Subramania Aiyar, the Vice President of the Society. To my mind the plaintiff's explanation seems natural. Speaking of Sir Subramania Iyer, he said in answer to the question:—"Did you not know he would not tolerate such an offence?"

"He was no friend of mine nor a man much known to me. I knew he had a great friendship for Mr. Leadbeater and thought him a big man." He went on to say "I was not so much acquainted with him as to know that he would help me. I told him I had a grievance against Mr. Leadbeater."

The letter written by Mr. Leadbeater to the defendant on the 18th April 1910, Ex.Y5 a few days after the date when according to the plaintiff's evidence the episode described in paragraph (1) of the particulars occurred shows the existence of feelings of strong hostility as between the plaintiff and Mr. Leadbeater. We find Mr. Leadbeater writing:—"It is good that old Narayaniah has to work hard at Besant's Gardens for on the whole it keeps him out of some of his mischief and gives him less time to brood over imaginary wrongs." I do not find the explanation given by Mr. Leadbeater, in his evidence that some quarrel about the boys' food was the immediate cause of these feelings of hostility of all concerning. It is not disputed that just at this time, the plaintiff was extremely anxious to get the boys away. In all the circumstances, of this very unusual case, I am not prepared to hold that the plaintiff's conduct in connection with the charges against Mr. Leadbeater was of such a character as in itself to show that he is unfitted to be entrusted with the care and custody of the boys or that it would be detrimental to their interest if they should be restored to him.

I will deal quite shortly with the question whether in January 1912 the defendant gave an undertaking shortly before the boys were taken to England that they should be kept apart from Mr. Leadbeater. There can be no doubt that when the plaintiff demanded that the boys should be separated from Mr. Leadbeater at the end of 1911, when the plaintiff told the defendant that he had made a

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communication to Mrs. Van Hook, that the defendant refused the plaintiff's request. As to what happened on January 19, 1912 shortly before the boys were taken to England when the memorandum (Exhibit XI) was made by the defendant, with the separation of the boys from Leadbeater, the evidence is conflicting. The learned Judge was unable to hold that on that occasion the defendant declined to give the promise that the boys should never be brought into association with Mr. Leadbeater. I am not prepared to say that the Judge was wrong. Assuming that he was, it is clear that the plaintiff attached great importance to this question of separation from Mr. Leadbeater. The memorandum says—" Mrs. Besant said that he had met Mr. Narayaniah's wishes on both points (what the two points were is not clear) he had asked for, she had separated the boys from Mr. Leadbeater." It is also clear that, although at that time the defendant contemplated that the boys would be with Mr. Leadbeater, at any rate for a short period, she did not so inform the plaintiff. She stated that her reason for not doing so was that she did not desire the plaintiff to know where the boys were to be. For the purpose of withholding information from the father as to the whereabouts of the boys it was not necessary for her to refrain from mentioning the fact which would,no doubt,have greatly influenced the father in connection with the question of the boys going to England. As a matter of fact Mr. Leadbeater as well as the defendant was with the boys in Sicily early in February 1912, for the purpose of some initiation ceremony in connection with the elder boy.

The question whether, as things now stand, the relative advantages for the boys are on the side of their remaining where they are and continuing the course of training which has been laid out for them by the defendant, or on the side of their being restored to the care and custody of their father, is one of great delicacy and difficulty. As regards financial considerations—and in reference to this matter I accept the statements made by the defendant on the one hand, and the learned Vakil for the plaintiff on the other, adequate provision would seem to have been made for the maintenance and further education of the boys either in India or in England. I do not believe that there is anything in the personal character of the plaintiff which disqualifies him from having the care and custody of the boys. The defendant stated that there was some misunderstanding between the Judge and herself with regard to her case as to the personal unfitness of the father and his treatment of the boys when they were in his custody.

She said she did not intend by any admission she made to give up her case with regard to the personal unfitness of the plaintiff, or with regard to his treatment of the boys. The only conclusion I can draw, from the form of issues and the fact that the defendant did not cross-examine the plaintiff with regard to these matters, is that at the hearing it was not part of her case that, on general grounds, the plaintiff was personally unfit to be entrusted to the care and custody of the boys. An application was put in by the defendant for leave to adduce evidence on this question, but this application was not pressed. The plaintiff appears to be a respectable Hindu gentleman and he is a retired Government servant. He was deemed by the defendant to be fitted to fill the office of Assistant Corresponding Secretary of the Esoteric Section of the Theosophical Society. At one time he was in entire sympathy with the tenets and beliefs of the Society of which the defendant is the President. There is no evidence that he is not so still. On the other hand, I do not doubt that the physical training which the boys are now receiving in England is all that could be desired. I do not doubt that they have the best of tutors for the purpose of matriculating at Oxford. The defendant had stated that her intention is that the elder boy should, with certain restrictions, take part in the ordinary life of the ordinary under-graduate. If he is not to do this, if he is to lead a cloistered existence segregated from his fellows, there does not seem much object in sending him to Oxford. Whether his life at Oxford would be a useful or a happy one, I cannot undertake to say. As regards the younger boy, it is considered desirable that he should take his degree for the purpose of competing for the Indian Civil Service. It may be that a life of celibacy, which I understand to be an incident of the "initiation" that the younger boy has undergone, may not be incompatible with a successful career in the Indian Civil Service. How far a life of poverty, another incident of the "initiation" even using the word in the sense of "inner renunciation" in which the defendant has told us they are to be understood—how far this would aid or hinder a member of the Indian Civil Service, I do not feel in a position to express an opinion. In considering this question it is of course necessary to have regard to things as they stand now, not as they stood when the father purported to surrender the guardianship of his boys. One of the many difficulties which arises in this case lies in the fact that whereas the elder boy is now over 18 years of age, the younger boy is under sixteen. I do not think that in any order which we might make, we ought to distinguish between the cases of the two boys. It seems to me that, whatever is done, they ought to be allowed to remain together. With great eloquence and

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with great earnestness the defendant pressed upon us what she described as the miserable future which awaits the boys if they are to be restored to the custody of their father. There can be no question that the training which they are aow undergoing in England would make it difficult for them to re-adapt themselves to what was at one time at any rate their natural environment. Amongst other matters dwelt upon by the defendant it was suggested that ceremonies of a degrading character would have to be undergone before the boys were to be restored to caste. I fully realise all this, although I think the defendant has overstated the difficulties which will arise if the boys are restored to the custody of their father. As regards the question of the obtaining of a degree by the younger boy I should be the last to attempt to belittle the advantages of an Oxford degree, but there are Universities in India where academic distinction can be won and the Indian Civil Service is not the only career in which an Indian gentleman of character and ability may rise high in the service of the State. I do not overlook the fact that the defendant does not now insist upon her right to remain as guardian of the boys. She is willing that their care and custody should be entrusted to Mr. G. S. Arundale, a graduate of Cambridge and a former Principal of the Central Hindu College, who is in close sympathy with the defendant and her Theosophical work. We have been asked in the event of not setting aside the order of the learned Judge with regard to the guardianship of the boys, that for the order directing that the boys should be handed over to the plaintiff should be substituted an order that the defendant should be substituted an order that the defendant should be restrained from doing anything otherwise than in accordance with law to prevent the plaintiff from enforcing his rights as guardian. On the case as a whole, after long and anxious consideration, I have come to the conclusion that we ought not to disturb the order of the learned Judge appointing the father the guardian of the two boys, and that we ought not to interfere with the direction given for the handing over of the boys for the purpose of making the order effective.

The appeal is dismissed with costs. The defendant will pay the costs of the memorandum of objections. The parties will pay their own costs before *Bakwell*, J.

Time within which direction is to be carried out is extended to six weeks from this date.

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secution at the instance of either the Crown or any individual except that of Leadbeater, the principal offender, it is sufficient reason for restricting the enquiry to the question of good faith that otherwise no parent or guardian would take action except at the risk of losing the custody of his child or ward.

It had been observed that the learned judge dealt with that question only by implication and without separating it from the question whether the incidents alleged actually occurred. It is possible to deal shortly with one matter, which influenced him, the changes at different stages, in the way in which the incidents were described. Those incidents can be referred to conveniently as plaintiff's and Luxman's, since plaintiff or Luxman was the only eye witness in each case. The three stages in question are the original and amended plaints and the particulars given by the court's direction after issues had been framed. It should be noted that there is no question of any prejudice to the defendant, since the evidence went to establish, if anything, less, not more, than was alleged in the particulars the final form of the plaintiff's case. It is not necessary to set out the actual variations, since they will be clear on reference to the documents. No doubt it is remarkable that plaintiff, who had legal advice from the beginning, should have vacilated as he had done. But it does not follow that the conclusion as to his good faith must be affected. These changes in his case would, if they were due to concoction, in no way improve it. His incident had been described by him to Mrs. Van Hook (vide judge's notes for details) in December 1911, that is before the first plaint, and the description given there agrees with the particulars. As regards Luxman's incident we have not plaintiff's account of the earliest information he received, that given him by various defendant's witnesses at Adyar, because (rightly or wrongly) a question to him on the point was disallowed. But we have it from Bhagavan Das examined by plaintiff on commission that Luxman's replies to his questions in December 1911 involved that Leadbeater and Krishna were seen together in suspicious and indecent circumstances, though there was nothing amounting to an attempt to commit an unnatural offence. Bhagavan Das is not one of defendant's sympathisers, but she does not suggest that he would give false evidence intentionally. The point is that throughout the trial, when actual details have been in question, plaintiff has not claimed that a stronger case has been established than that to which he was committed by his own and Luxman's statements in December 1911 before his relations with defendant became strained, or his pleadings were drawn or the variations in them began. It is next material

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that even in cross-examination he attempted to maintain that his description of both incidents in the particulars was correct, when it must have been obvious at least to any person acquainted with the law, that such an attempt would be futile. And in these circumstances the simplest explanation and that which I accept is, not that these incidents have been intentionally described wrongly in a useless manner which could only frustrate any illegitimate object, but that plaintiff and his advisers really spoke of unnatural offences and of an attempt to commit one loosely and ignorantly. The fact that plaintiff had been a Magistrate does not make this improbable. During my own service as Session Judge and Magistrate, no charge of an offence of this description has come before my own Court or any Court subordinate to it; and such charges are so rare in Madras that plaintiff may very probably have never had to apply his mind to the law relating to them.

The question of the fact is not, whether plaintiff had evidence on which he could reasonably expect to convince a Court of the truth of his charges, but whether he honestly believed when he made them, that they were true. The defendant's case is that they are not true and that they may be founded on two occurrences, which took place on dates earlier than those given by plaintiff. Thus in the particulars the dates assigned for plaintiff's incident is the second week in April 910 and in argument an attempt has been made to fix it on the 16th. In the original plaint the date was given as March 1910. Defendant would identify the incident with that happened late in 1909. Lakshman's incident is referred to in the particulars as in December 1910. The first plaint fixes it indefinetely by reference to other facts as before August 1910 and the second is even more obscure. Defendant contends for December 1909. If the question were only directly of plaintiff's good faith, I should not consider the date or the changes in them important. It is not alleged and it is not likely that plaintiff keeps a diary or has other means of fixing the date of his own incident; the limits, within which his dates for it are contained, are not inordinately wide, for the vague recollection on which he had originally to rely. As regards Lukshman's incident he heard only secondhand, and could not obtain firsthand information. The importance of the dates is in connection with defendant's suggestion that plaintiff has deliberately postponed the incidents, until after he made her guardian of the minors under Exhibit A in order to avoid the necessity for explaining why he did so with full knowledge.

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Now it is material first that plaintiff has adduced all the evidence available to him. It is not likely that there will be much direct evidence as to what eye witnesses saw or might think that they saw in a case of this nature, since numerous eye witnesses are not likely to be available. From Lukshman no evidence of value can be expected, since he was and is defendant's servant and subject to her great influence. The circumstances involve no probability, that Leadbeater, the elder of the two principals, would make any admissions at the time, which would be admissible as evidence. Only denials could be expected from him in evidence, and cross-examination was not likely to be effective, when no second account from a witness on his side was available for comparison. Such a second account could have been given by the elder minor, Krishnamurthi, and to some extent, as regards plaintiff's incident by the younger also. But defendant opposed an adjournment of the trial in order that they might return to Madras to give evidence. I do not detail the reasons she gave in argument for this opposition, (because whatever their importance to her) they included no suggestion, that the minors could not be produced by her, no denial of the relevancy or importance of their evidence and no legal justification for her depriving plaintiff and the court of the assistance it would have afforded. It must therefore be recognised that plaintiff was in this respect disabled through no fault of his. Necessarily therefore the evidence available to him is only his own and that of persons who heard Lakshman's story at first hand or can speak to his and Lakshman's conduct as consistent with what each is alleged to have seen. Evidence of the best description he would not obtain easily since, it would be given by those, who were at Adyar at the time. If such witnesses left since, the suggestion would be that they had quarrelled with defendant, as it was in the case of one, whom plaintiff examined, S. V. Subramaniam. If they remained there till the trial, they would have been liable to the exercise of defendant's influence, to which I have already referred in connection with the understanding. In fact, of the eight witnesses on defendant's side, regarding this part of the case, five gave evidence in that connection, and one of the remaining three is a pariah butler who is still in her service.

Firstly, as regards plaintiff's incident one thing disclosed even by this evidence, to which the learned Judge seems to me to have paid insufficient attention, is that something of the importance of and consistent with, what plaintiff alleges happened at the time he referred to. In April 1910, defendant was absent from Adyar at

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Benares. During that month, as Leadbeater said, he sent a telegram to her "Antares giving trouble, come at once," Antares is the name by which plaintiff is known in Theosophy. The original has not been produced, and there is only Leadbeater's recollection that it was sent on the 19th. It is certain only that it was not received by defendant later than that date, since she replied to it by Ex. Y 6. On the 18th Leadbeater had in Ex. Y. 5 referred to plaintiff as having a bad fit of his insanity "two days earlier." It is on this that plaintiff suggests the 16th as the date of his incident; and it was only, when discovery of Ex. Y. 6 was given, that this date could be ascertained. Plaintiff's writing a "long and crazy letter" to the witness Wadia is also mentioned; but Wadia cannot remember receiving it. On the 20th in Ex. Y 6 Leadbeater told defendant that all was quiet again and referred to the assistance of Wadia and the Judge, Sir Subramania Iyer. On the 21st in Ex. Y. 8 he mentioned the recent "disturbance" and the gratitude of his superhuman guide for the help they and Clarke another Theosophist, had given. Three Indian residents at Adyar say that plaintiff had a cart ready on the 19th morning and was about to remove his sons, when Sir Subramania Iyer was brought by Clarke and pacified him, offering to take the boys to his own house and induced him to join in a telegram to defendant, that she need not be anxious. When so much is admitted, it is easy to accept the evidence of plaintiff's witness, Subramaniam, that he and others were asked to guard the boys' room at night on the 17th or 19th, though Wadia denies this. That something of considerable gravity, involving opposition to Leadbeater, took place about the 16th, is clear.

It is significant that though Leadbeater's letters to defendant are not alleged to be incomplete, they do not contain the explanation for what occurred on which defendent mainly relies here; nor, though defendant was asked in the telegram to take a three days' railway journey, is there anything definite as to the form, assumed by the disturbance, or as to the attempted removal. Ex. Y 5 refers to one of the explanations, on which defendant relies, as separately or cumulatively sufficient, plaintiff's discovery that the boys were taking milk in the morning. As Leadbeater says plaintiff had known of their doing so for some time, and it is inconceivable that this was his motive. Defendant admits that she was told nothing regarding the milk on her return. There is then the fact that Leadbeater had taken the boys to the Seven Pagodas, on a two days' excursion, starting on the 10th without plaintiff's permission. But that would not account for the strong measures taken by him or for

the explanaion not earlier than the 16th. The chief explanation suggested is an incident relating to the boys' evening meal on the 18th, described by Leadbeater in his evidence. But this again does not explain the fit of madness referred to in Ex. Y5, as having occurred on the 16th ; and, as Leadbeater describes it, it was wholly insufficient to account for what followed. In order to do so defendant thought it fair to ask this Court to assume that the boys were incited by Leadbeater to break their caste at their meal by eating improperly cooked food, a proceeding, at which plaintiff would naturally be indignant. It is astonishing that she should have done so when she had made no such suggestion before the learned Judge in evidence or otherwise, and when, as Mrs. Van Hook's evidence shows, the boys had already taken food cooked by her. Of the witnesses, Wadia and Sitarama Sastri referred, but only generally, to the Seven Pagodas and the evening meal ; and Subbiah Chetty, who mentioned neither, gave a different account, to which I shall return. Sir Subramania Iyer said that next day plaintiff complained to him only of not being allowed to take the boys to their meal, though he also may have said that they were too much with Leadbeater. There is, of course, no doubt that his evidence is correct ; and plaintiff's failure to impart his real grievance to Sir Subramaniam requires explanation. Sir Subramania Aiyar himself said, however, that from what he heard in his house he thought it was a very grave matter, but that, when he reached the spot, plaintiff had quieted down. It is possible that those on the spot induced plaintift not to discredit them and Leadbeater, by complaining to a superior, who would have insisted on full enquiry. It is further possible that a person of plaintiff's comparatively low standing feared to speak out to a gentleman, who had officiated as Chief Justice of this Presidency, but whose impartiality he may have ignorantly suspected owing to his association with defendant and his admitted friendship with Leadbeater since 1884.

To support the occurrence of an earlier incident, which defendant, suggests as the foundation for plaintiff's accusation, there is (1) the evidence of Wadia, Sitarama Sastri and Subbiah Chetti regarding his statements to them as to an occurrence on some date earlier than April, 1910, and Exhibit A, the letter of guardianship ; (2) defendant's own evidence of a conversation between her and plaintiff about February, 1910. As regards (1) the evidence of these witnesses is very general as to dates, and they took singularly little interest in the matter, no one thinking it necessary to tell Leadbeater what was being said against him. Sitarama Sastri was

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told by plaintiff of the incident, when it occurred. But his only action was, when consulted as an old friend regarding the draft of Ex. A, to advise him "to make Leadbeater's matter certain." He and Wadia say that they heard of the incident before Ex. A. But Subbiah Chetty, who admitted that he was told by plaintiff in April, 1910, (consistently with his case) of his having seen something nasty with Leadbeater, said once that plaintiff referred to it as on the previous night and afterwards that he referred to it as three or four months earlier. These witnesses made a point of plaintiff's having mentioned seeing the younger minor shivering in the verandah, this being consistent with a date in December. But this shivering has never been part of plaintiff's own account; and if the reference to it had not been introduced by the witnesses intentionally, it may be due to their mistaken adoption of "shivering" as the translation of some vernacular word in the conversations, which have probably taken place between them. It is material that the Tamil for shivering and trembling is the same. Evidence of this description from witnesses who are (as already observed) subject to defendant's influence and suggestions is useless. Defendant has relied also on the statement of plaintiff's witness, Bhagavan Das, that plaintiff told him of the incident as about two years before their conversation, which was not earlier than December, 1911. But this also is highly indefinite. So far the attempt to support any reference by plaintiff to a date earlier than Ex. A has failed. As regards (2), the conversation with defendant herself, it can be considered after Lakshman's incident, to which also it referred has been dealt with.

As regards that incident plaintiff is, of course, at a great disadvantage, because he heard of it only at second hand sometime after its occurrence, and because the fact that Lakshman was and is defendant's servant has been good reason for plaintiff's not obtaining information from him direct. The evidence as to what he saw, which has been available to plaintiff is therefore necessarily (in the absence of the minors) that of persons, who can say what Lakshman told them, either at the time of the incident or later, that is of those who may be called conveniently the Adyar and Benares witnesses, the latter referring to a statement alleged to have been made by Lakshman in March, 1912. Something was said in argument of the admissibility of each of these classes of evidence in plaintiff's favour. The incident alleged in plainsiff's particulars was in December 1909. The Adyar witnesses, it was suggested, spoke to Lakshman's previous statements only as to a different incident, one referred to by them as earlier than March of that year, a date

covered by Lakshman's present indefinite testimony; and it is accordingly argued that the evidence of these witnesses does not corroborate any testimony by Lakshman regarding the incident which plaintiff desired to prove, and is therefore not admissible under S. 157 Indian Evidence Act. The answer as regards these witnesses is that, whether the occurrence of the incident or plaintiff's good faith and information regarding it are in question, he relies, not on the date statedly given, but on his ability to show by reference to other parts of the depositions that it was given falsely, if not, that the date really entailed by other portions of this evidence is affirmatively consistent with his case. In the former event statements by Lakshman as to an exceptional incident, which is not alleged to have been repeated and which could not have been confounded with any other, would be available; and the data given being disproved and the question of the right date at least open, corroboration of some value would remain.

The Benares witnesses spoke to no statement by Lakshman at or about the time when the incident is alleged to have taken place, and therefore their evidence would not have been admissible with reference to its occurrence. It would, however, it seems to me, have been on the same footing as that of the Adyar witnesses with reference to plaintiff's good faith, the connection in which, it is to be supposed, the learned Judge required plaintiff to enumerate these witnesses in his particulars. It is not necessary to deal further with the evidence of the Benares witnesses, because the circumstances in which Lakshman's statements are alleged to have been made to them, render it intrinsically useless. In January 1912, defendant telegraphed to her Benares agent to exclude Lakshman from her bungalow, and Lakshman came in distress to one Upendra Babu, who was at the time with the witness, Miss Edgar, and told the former what the latter afterwards understood to be the story of his incident. Again, in March, 1912, he came to speak to Upendra in the presence of Miss Edgar and two other witnesses, Shanker and Biswas, on business, and again told them his story. Mis Edgar does not know the Vernacular in which Lakshman spoke. All of these persons are of the party opposed to defendant in the Theosophical Society. They made no record of what Lakshman said. In these circumstances their recollection is of insignificant value. I therefore do not detail the peculiarities of their version. They may be due to their or Lakshman's bad memory, or to an attempt by the latter to mislead the opponent of his mistress.

It is another of plaintiff's disabilities that, when he was under examination the question of his good faith appears to have been lost

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sight of and, presumably on that account, defendant's objection to his being asked what the Adyar witnesses told him was sustained. There is then on plaintiff's side only the evidence of Bhagvan Das, which is admissible in the same way as that of the Benares witnesses, though it must be distinguished from theirs as to credit. For his status is higher, and though he is sceptical as to recent theosophical developments under defendant's direction, he is not openly opposed to her, and his interview with Lakshman took place in December 1911, before plaintiff had become openly hostile. Lakshman, he says, told him that in the previous year he had seen, not any attempt to commit an unnatural offence, but Leadbeater and Krishnan in sufficiently indecent and suspicious circumstances. The date referred to, is, it should be noted, consistent with plaintiff's case. For further evidence, it has been pointed out, plaintiff must necessarily rely on persons, who are adherents of defendant, the Adyar witnesses already referred to in connection with his own incident and the understanding and Mr. Schwarz, Treasurer of the Society and a member of the Order of the Star of the East. All of them are accordingly in this matter also subject to defendant's influence, and such suggestion from her of any fact, of the truth of which she has persuaded herself, as one of them, Wadia, actually received regarding the understanding in the letter of 28th February, 1912, already referred to. And in these circumstances it is surprising how much is available from them in support of plaintiff's case as to the date and the facts.

It is no doubt the case that none of the witnesses, refers to any detailed statement as to facts by Lakshman and the fact that some of them did not know his language may be material. But on the other hand it is difficult to see why Lakshman should have refused details to Wadia, who did know it and asked for them especially if the incident was of the comparatively innocent nature, which (it will be seen) defendant suggests. And it is significant that none of the others hinted at any doubt as to the correctness of his understanding of what occurred. Wadia said that in November or December, 1909, Lakshman came and told him in the presence of Subbiah that a bad thing had happened, but would give no details. As Wadia could not get them from Lakshman, he went to Schwarz, who (he understood) had also been told. Wadia explained. "I have common sense and, when he said that a bad thing happened in Mr. Leadbeater's room, I connected with it both Mr. Leadbeater and the boys." Ranga Reddi's account is very short; he does not understand Hindustani, but recognised the word "karab" (bad) and he and Subbiah, who was with him, understood that Lakshman had seen

something bad of Mr. Leadbeater with the boys. He fixed the date as November or December, 1909, but gave no reason for doing so. According to Subbiah also at the same time Lakshman came and told him that the old gentleman (Leadbeater) did a bad thing, explaining what he meant that Krishnan was without his clothes in his room. He was clear that this could not have happened after June, 1910, because he was then transferred to another section of the Government Department in which he is employed. He admitted, however, that in the intervals between his tours he was at Adyar. It should then have been possible for him to show that he was not there at the time alleged by plaintiff for the incident by official records, but he has not done so. When plaintiff told him of his own incident in April, 1910, he told plaintiff of Lakshman's as similar to it. Schwarz, regarding whose ignorance of Hindustani there is nothing in evidence, thought that Lakshman spoke to him two or three years before he gave evidence in April 1913, but finally adopted the latter figure. He deposed that Lakshman told him of questionable conduct of Leadbeater with the boys and according to Wadia described the incident to him as something sexual. I have, as far as possible, adopted the actual words of the witnesses, because it is important that the great extent, to which they corroborate plaintiff's allegation of an immoral occurrence should be understood. As to the date their statements include nothing by which they can be checked and are of small value when the independence of the deponents cannot be assumed.

It is in Lakshman's own evidence that the clearest indication as to the date is to be found. He says that he told the witnesses just referred to what he had seen the day after. But their evidence contains no suggestion regarding such delay. If it took place, the fact only accentuates his opinion as to the gravity of what he saw. His account now is that Krishna was standing naked in front of Leadbeater, who was naked below his shirt, and had his knee on a chair and his hand on Krishnan's head, and differs only from the evidence of Bhagavan Das as to his statements in December, 1911, by the omission of the detail as to Leadbeater's hand. He could not give the year or month in which this happened. He also, however, said that he then thought this was a sinful action, and that it was so bad that he told Subbiah and the others. He then went on, and this is most important, " Krishna had great name and fame, and what would people think if they saw this? I thought they should not have been together in that room. I knew that Krishna was being brought up by defendant." Now, so far as Lakshman's

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presence at Adyar is concerned, he was there in December of both 1909 and 1910, and plaintiff's date is not more probable than defendant's. But this statement by Lakshman fixes the incident he saw as about the latter, since it entails that it cannot have been earlier than March, 1910. It was only in the course of December, 1909, that defendant first saw the boys on her return from her tour. Leadbeater had. no doubt already proposed to be responsible for their education in England. But, as he says, he merely thought that "they would be useful for any philanthropic work." There is nothing to show that Krishna's vocation was common knowledge until at least shortly before his initiation early in January. It was only in February that defendant discussed her proposal to be the guardian of the minors with plaintiff and only in March that she became guardian under Ex. A. It is therefore impossible for Lakshman to have regarded Krishna as having great fame or being brought up by defendant at the time, which she alleged, December, 1909. He must, therefore, have seen what he saw, as plaintiff contends, in December 1910. This is the only important fact in his evidence or in Ex. VII, a statement giving an account of the incident similar to that given above, except that Krishna's naked condition is not mentioned. It is very short and was made in defendant's presence on 29th January, 1912. The suggestions against its authenticity were not in my opinion established; but it added nothing to the case on either side.

I now turn to defendant's case that two innocent occurrences prior to March, 1910, are the foundation, on which plaintiff's complaints as to his own and Lakshman's incidents have been based. It is further part of her case that plaintiff spoke of those two incidents to her in February, 1910, in the course of a conversation as to her assuming the guardianship. She says that he described Lakshman's incident much as Lakshman does now, except that he did not say Leadbeater's hand was on Krishna's head and that he did not tell her what he had seen in Leadbeater's room but only that it was something nasty, which he would not particularise. In the end he said it was not necessary to question Leadbeater and signed Ex. A. without further demur. Plaintiff denies such a conversation in February, 1910, but admits one after her return in April, 1910. He then, he says, told her that he had seen Leadbeater doing something nasty with Krishna, that the former had a nasty sexual appetite and that he must be separated from the boys. Defendant in consequence promised that the boys should have separate bath-rooms and should study in her room or verandah.

Firstly as to the conversation. If the finding is that it took place in February, 1910, the prejudice to the plaintiff's case will no doubt be serious. The burden of proof of this date is on the defendant and there is no evidence except hers to set against the plaintiff's denial. She has produced no memorandum or entry, in her diary to show that such a conversation took place in February. The plaintiff no doubt is not alleged to have insisted on any reference to Leadbeater at the time. But, whatever his exact words as to Leadbeater's conduct, and I do not think there is much material difference between the defendant's version of them and his, it would have been natural for her to mention the matter to Leadbeater at once. Such mention, I should have supposed, would have been particularly admissible in view of Krishna's vocation and Leadbeater's past history, and it may be observed here that the admitted conduct not only of the defendant, but also of all the Adyar witnesses. In hearing allegations by the plaintiff and Lakshman regarding Leadbeater's relations with Krishna without taking any particular action must attract suspicion, if not censure since they all must have known of the former's expulsion from the Society and its cause. The defendant however is not alleged to have made enquiry of Leadbeater at the time or, as will be stated, until December, 1911. Lastly there is the fact that this conversation and its date were referred to first in the defendant's evidence. This is important, because in her original written statement, which was full and argumentative she referred to the plaintiff's objection to her taking over the boys, as based only on Leadbeater's growing influence over them ; and in her shorter amended written statement she said that he never complained of any impropriety on the part of Leadbeater or objected to his associating with his sons. Her explanation, that she did not connect the plaintiff's admitted reference to something nasty with any impropriety or indecency is weak. Her conduct in connection with the understanding showed that no presumption could be drawn in her favour, when the fate of the minors was in question. In the circumstances it is not possible to disregard the plaintiff's denial and find in favour of this conversation or its date on her evidence. The conversation in April 1910, which plaintiff alleges, is important in connection generally with his good faith and fitness for the guardianship, though not directly as evidence regarding the occurrence of the incidents. It may not be clear from the evidence whether it was or was not followed by a change, immediate or deferred, in the boys' bath room or the separation from Leadbeater during their studies, which plaintiff says that he obtained. The latter would probably have in any case followed on the defendant's return to Adyar to some

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extent. That a conversation, in which Leadbeater's connection with the boys was referred to, took place is admitted by the defendant. As to its terms only her statement and the plaintiff's are available and therefore no finding is possible except that it is consistent with the probability and the circumstances that the plaintiff's account is the nearer to the truth.

The defendant's explanation for the plaintiff's charges, that they are founded on two innocent incidents, which actually occurred, can be dealt with shortly. She says that later she asked Leadbeater what could have given rise to unpleasant ideas, and that, when he could suggest nothing, she asked whether he had ever washed the boys. She speaks of these enquiries as made after she heard of the plaintiff's complaint to Mrs. Van Hook and that is consistent with the date accepted bv Leadbeater, December 1911. But there is nothing to explain why she suggested this washing as the explanation. For Mrs. Van Hook's account of what the plaintiff said to her in no way indicates it and she does not refer to any other account as in her possession. Leadbeater admitted that he had twice washed Krishna in English fashion, that is naked, and had cleaned his head with carbolic soap; and this, it is urged, is really what the plaintiff and Lakshman saw. Now Mrs. Van Hook says that Leadbeater did take the boys into his bath room and he would teach them to bathe like gentlemen, though there is nothing to identify the occasion she spoke of, with either of the two, to which Leadbeater referred. But it is rather improbable that an English gentleman, aged sixty five like Leadbeater, would himself perform and not merely supervise, this menial and unpleasant work. And it is remarkable (1) that on each of the two occasions of his doing so he should have been interrupted by a person, who misconstrued what was going on ; (2) that he should have had nothing to say in evidence of either interruption and should have apparently not noticed it. If, however, this story is not a mere after thought, and if these washings really took place, it is still impossible to connect them with the plaintiff's and Lakshman's indignation. Manu, we have been told, forbade one man to bathe or appear naked in the presence of another; but we have been shown no reason for believing that that like others among his prohibitions, has not lost its original sanctity, or is at the present day regarded as more than a rule of good manners and ordinary decency. The breach of such a rule would so far as I am aware and so far as we have been shown, entail no caste or religious disability and would in the case of a boy of fifteen be met appropriately by a warning or slight correction. Certainly the

importance of the matter would be utterly incommensurate with the effect produced on Lakshman, a Sudra and not likely to be punctilious in such matters, who yet thought it necessary to give information, not only to the more important Hindus, in the compound, but also to Schwarz a European. There is the further improbability involved in his failure to inform the plaintiff, the fittest person to administer the warning above referred to, or to take the simple course of pointing out to Leadbeater that his proceedings were open to objection or asking some more important person to do so. This explanation, as a whole, in fact attracts additional suspicion to Wadia's statement that Lakshman would not particularise what he had seen, and to Lakshman's introduction into his otherwise extremely meagre evidence and statement, Ex. VII, of a reference to the position of Leadbeater's hand on Krishna's hair, as designed to corroborate the story that it was being cleaned:—If this part of the defendant's case is in any degree true, it is still impossible to connect it with either plaintiff's or Lakshman's incident.

That closes such detailed examination of the evidence as seems to me practicable or necessary. Other matters no doubt, weighed with the learned Judge, the exclusion by the routine in force at Adyar of the possibility that time could be available for the incidents and the publicity of Leadbeater's room. Something also has been said here of the impossibility of the plaintiffs having seen what he alleges from where he says that he was or with the light available. But all this comes to very little. The routine was spoken to as comprehensive. But it cannot be presumed that it was invariably observed with absolute or even comparative punctuality by every one. The incidents were short, and as regards one of them it was Leadbeater himself, who in the defendant's absence was responsible for strictness. Regarding the actual publicity of his room and the risk he would run at the time in question there is no definite evidence. The argument from the plaintiff's inability to see what he alleges appears to me to be available, only because insufficient attention was paid to the point at the trial. For his ability to see Leadbeater and the boy depended on exact position at or near the doorway, regarding which nothing is available or would be expected and when he maintained that, though the doors were shut, there was sufficient light, the matter was not cleared up by his being asked to reconcile the two statements, one possibility being that the doors he referred to were the wire doors, also mentioned.

There remains the argument against plaintiff's case and his good faith, that if he had had the knowledge he now alleges of both incidents it cannot be supposed that he would have allowed Leadbeater

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to continue to associate with his sons and would not have attempted to terminate the guardianship earlier, and in the alternative it is urged that if he acquiesced with full knowledge, he is unfit for the guardianship himself. It is no doubt possible that his consent has been in some degree foolish and weak. But I do not think that the conclusions proposed follow from what has been proved. It would have been useless earlier, as it has proved useless now, for him to make his charges against a person of Leadbeater's position with only his own evidence in support of one of them and only that of a hostile witness in support of the other. And it is to be doubted from such indications of the defendant's attitude, as this case affords, whether anything less than the formal establishment of the charges and even the order of a Court would have induced her to abandon the minors. It was only after the process of deification of Krishna had made progress and its effects and tendency made grew clear, that material of any practical value for a repudiation of Exhibit A and an attack on the defendant became available ; and it was on that process reaching the point indicated by the ceremony described in Exhibit C that the plaintiff took action by his disclosure to Mrs. Van Hook and conversation with the defendant. Before and after that he had to weigh advantages, those to be secured by acquiescence being considerable. Probably for sometime at least he was gratified at his sons' repudation and the respect he himself enjoyed. He had also to consider the great material advantages to the minors and himself from the defendant's assumption of responsibility for their future. Throughout on the occasions already referred to he had been asking for their separation from Leadbeater and he mentions others, on which he did so, though there is nothing specific regarding them. He obtained what he might fairly regard as equivalent to such separation, the defendant's protection of the minors by their constant association with her, except for short periods, from April 1910 until December 1911. It was such a separation, which he pressed for in January 1912 and which in qualified form he thought he had been promised. When he found that the defendant's promise had been broken in Sicily, he took action by his notice of the 11th July 1912 without I think, undue delay. His suit was brought in October. It is suggested in the judgment under appeal that his charges are merely a revival of those made in 1906 against Leadbeater in order to justify his repudiation of Exhibit A and were instigated by insterested persons, who have financed him. But this takes no account of the weakness of the available evidence for those charges and the impossibility of sustaining the case until (as observed above) more was available to support it ; or of the absence of evidence of any

communication between the plaintiff and his financial supporter before December 1911, when the charges were first made. It is not necessary to assume that the plaintiff is a person of particularly refined sentiment or decision of character, and it is not in my opinion difficult to conceive his acting as he did in spite of his knowledge, or necessary to hold that he disqualified himself for the guardianship by doing so.

We have no doubt dealt with the case at some disadvantage since we have not had the learned Judge's opportunity of hearing and seeing the witnesses. But that is of the less moment, because they were all, except Lakshman, educated persons of mature age and some position, and inference from their demeanour would be indecisive, and because it is on the admissions of the defendant's witnesses and on admitted facts that argument has mainly proceeded. In the absence of the minors the direct evidence of each incident, which the plaintiff could adduce, was limited, and in view of the defendant's influence and proved conduct unbiassed in direct corroboration could not be looked for. Yet, in support of his own evidence as to one incident he has shown that his conduct at the time was consistent, if not necessarily with his allegations in detail, yet only with some occurrence of equal gravity. As regards the other he could not be expected to rely on the only direct evidence, that of thedefendant's servant. Yet even that evidence included indications that what he saw was not merely grave but consisted in reprehensibly indecent conduct; and those indications were repeated more distinctly in the evidence of the unfavourable Adyar witnesses, the defendant's adherents. On the other hand the defendant's attempt to prove at other innocent occurrences on other dates before Exhibit A were the foundations, on which the plaintiff's charges were founded and her attempt to show that his subsequent conduct has been irreconcilable with his belief in the truth of those charges have failed. And, accordingly he must be held to have proved as much as the circumstances admitted of his proving and as the Court should require. So far as the materials available justify a conclusion, it is in the plaintiff's favour. He has established in my opinion that he acted on an honest belief, if not literally on the charges as they were made in the particulars, yet in a substantial foundation for them. And therefore I hold that grounds of appeal Nos. 27 and 28 have not been substantiated and that the learned Judge's order as to costs is not justified.

I would therefore concur in dismissing the appeal with costs and, allowing the memorandum of objections with costs, would modify the decree by making each party liable for his and her costs in the Court of first Instance.

NOTES OF RECENT CASES.

PRIVY COUNCIL.

[On appeal from the High Court at Madras.]

Present :—Lord Atkinson, Lord Parker, Sir Samuel Griffith, Sir John Edge and Mr. Ameer Ali.

Vaithinatha Pillai ... ... *Appellant.**

v.

The King-Emperor ... ... *Respondent.*

Appeal in criminal matters—Admission of inadmissible evidence—Absence of reliable evidence—Substantial and grave injustice—Costs to and from Crown.

The reception of wholly inadmissible evidence and the use made of that evidence when coupled with the absence of all reliable evidence of the appellant's guilt, constitute substantial and grave injustice and conviction based on them cannot stand.

In re Dillet[1] approved.

The crown neither pays nor receives costs except when provided by some local statute or under special circumstances.

Johnson v. *King*[2] approved.

Appeal from a judgment of the High Court at Madras dated June 19 and August 5, 1912 confirming a conviction and sentence of the Court of the Additional Judge of Tanjore dated April 1, 1912.

A young woman named Dhanam was murdered in the house of the Appellant who was her father-in-law, on the night of 22nd and 23rd of October at about 2 o'clock. The murder was committed with a sharp instrument and the body showed no fewer than thirteen wounds all on the left side. The case for the prosecution was that Dhanam was murdered by the Appellant and his dependants while Aiyasami was kept under restraint. The defence was that she was hacked to death by Aiyasami as narrated by Muttachi, Aiyasami's grand-mother and the Appellant's sister and mother-in-law. She stated that about 2 or 3 o'clock she was aroused by a 'thud' and on entering the room where Aiyasami and Dhanam slept, found Aiyasami standing over the body of his wife with a blood

*19th June 1913.

1. (1887) L. R. 12 A. C. 459. 2. (1904) L. R. A. C. 817.

stained arnval (bill-hook or hatchet) in his hand with which he was hacking at it and that she gave alarm whereupon the Appellant and servants came in. Aiyasami was thereupon arrested and charged with the murder. The Magistrate did not believe in Muttachi's story and discharged Aiyasami. The Appellant together with some other persons were arrested, Aiyasami having stated that Dhanam was killed by the order of the Appellant while she was held by a certain number of persons. The motive for this crime was suggested to have been that at the instigation of Dhanam, Aiyasami was claiming a partition of the family property. The Appellant was convicted and sentenced to be hanged by the Additional Sessions Judge of Tanjore which was confirmed on appeal by the Madras High Court.

The Appellant obtained special leave to appeal to His Majesty on December 16, 1912 and the Appeal was heard on June 16, 17, 18 and 19, 1913.

Sir R. Finlay K. C., Grey and *Swaminadhan* appeared for the Appellant.

Sir Erle Richards K. C., Brown and *Osborne* appeared for the Respondent.

Sir R. Finlay K. C. for the appellant contended that there was really no evidence on which a conviction could take place. All the circumstances proved that the overwhelming probability was that the poor girl was murdered by her husband in a fit of homicidal mania. There was no evidence against the appellant except that of the approver and Aiyasami. It was not putting it too high when he said that the approver was disbelieved by all the judges. There was every reason to believe that the approver was not at the house at all. Aiyasami was not corroborated in any way. A few days after his arrest Aiyasami made a statement before a Magistrate in reference to blood on his clothing, to the effect that, while several persons were holding his wife down in bed, the appellant cut her neck with one stroke that some of the blood spilted on to him, and that on his telling them to desist he was removed to another part of the house and tied to a pillar. The medical evidence showed that it was impossible, owing to a bad fracture of the right hand which he had sustained, that the appellant could have used the bill hook. The evidence of the approver whose story was entirely different from that told by Aiyasami, was to the effect that Dhanam was carried out into a yard and set down at the foot of an orange tree and held while two unknown men were ordered by appellant to do

"their business" and proceeded to butcher the struggling girl; Aiyasami having previously been removed to another part of the premises and tied to a pillar. There was no motive for the appellant to commit the murder. Of the three Judges of the High Court two were satisfied of the guilt while the third came to the opposite conclusion. There had been a grave miscarriage of justice in the matter and that neither the evidence itself nor the interpretation and inferences put upon it in the courts below sufficed to establish any complicity whatever in the murder on the part of the appellant. The contradictions in the evidence and the many inconsistencies in the witnesses' statements made it hopeless to establish any charge against him. To act upon such evidence would be impossible.

Grey followed.

Sir Erle Richards K. C.—On behalf of the Secretary of State, submitted that no sufficient case had been made out to warrant the Board to interfere with the decision of the courts below. The real question was whether there was reliable evidence on which conviction could be sustained. This was not the story of European life; family life in the East was very different from what it was here; our animosities were happily more controlled in a way in which family animosities were not controlled in the East. There they were dealing with family life in Madras where all lived together and the appellant was the master. The practice of the Board in allowing appeals in criminal cases has been confined to very limited occasions. Such appeals were matters of great importance to Indian and Colonial Governments and they were matters of vital importance to the administration. In this case the appeal rested on the evidence being unreliable.

[*Lord Atkinson*:—If evidence were illegally admitted could it be said that the Board could not set aside the conviction although the illegal evidence had been admitted and pressed and in the pressing of it grave injustice had been done to the accused—because it was a grave injustice to press evidence which was not admissible.] The Board had never gone so far as to interfere on the point of credibility of evidence. It had never yet allowed appeals because evidence was unreliable, that was for the courts below to judge.

Sir Robert Finlay was not called upon to reply.

The Judgment of their Lordships was delivered by

Lord Atkinson.—During the lengthened hearing of this case their Lordships have had full opportunity of making themselves

thoroughly familiar with the evidence and of giving all due consideration to the weighty arguments that have been addressed to them with great force and ability by the counsel on both sides. They have availed themselves of that opportunity and they have had no difficulty under these circumstances in making up their minds as to the advice which they feel it would be their imperative duty hereby to tender to His Majesty. As the appellant now lies under sentence of death their Lordships think it would only be humane and proper to announce at once the nature of what their advice will be. Their Lordships while fully alive to the great undesirability of disturbing the judgments of the criminal courts in India are clearly of opinion that in the present case owing in the main to the reception of wholly inadmissible evidence the use made of this evidence when admitted to the grave prejudice of the accused coupled with the absence of all reliable evidence of the appellant's guilt, substantial and grave injustice has been done in convicting him of the crime of which he had been convicted, and therefore that that conviction cannot stand. The case they think comes well within the principle laid down over 25 years ago in *Dillet's case*,[1] a principle by which the action of this Board has been guided ever since.

That is the nature of the advice which their Lordships will tender and on a future occasion they will give more at length the reasons which have led them to the conclusions which they have arrived at.

On the question of costs Lord Atkinson referred to *Johnson* v. *King*[2]. "In future the Board will adhere to the practice of the House of Lords and the rule as to costs in cases between the Crown and a subject will be that the Crown Minister neither pays nor receives costs unless the case is governed by some local statute or there are exceptional circumstances justifying a departure from the ordinary rule. It did not seem to him that this was such a case.

Solicitors for Appellant:—*T. L. Wilson and Co.,*

Solicitors for Respondent:—*India Office:*

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1. (1887) L. R. 12 A. C. 459. 2. (1904) A. C. 817.

NOTES OF RECENT CASES.

Miller J.
Sankaran Nair J.
1913, *July* 18.

C. R. P. 1044 of 1912.

Production and Inspection of documents—Order 11 r. 14. C. P. C.—When inspection may be ordered.

Under Order 11 rule 14 C. P. C. a Court cannot order inspection at the same time as the order for production is made. After production the Court may order inspection of such of the documents as it may think just under the circumstances of the case.

K. Srinivasa Aiyangar and *T. Ramachandra Row* for petitioner.

P. Narayanamurthi and *T. S. Raghunatha Row* for respondent.

Chief Justice
Oldfield J.
1913, *July* 22.

O. S. A. No. 85 of 1912.

Limitation Act, Art. 164—Application by legal representatives of defendant to set aside exparte decree.

When a decree is passed against the defendant and he dies, the limitation for his representatives to put in an application to set aside the exparte decree is that provided by Art. 164 of the Limitation Act.

A. Ramachandra Aiyar for appellant.

V. V. Srinivasa Aiyangar for respondent.

Miller J.
Sankaran Nair J.
1913, *July* 22.

S. A. No. 1408 of 1912.

Construction—Power of Attorney, construction—Power to manage and collect outstandings—Immoveable property purchased, can't be sold.

Where an agent had been authorised to manage the properties, collect the outstandings and do everything necessary for the management, *held* he was not authorised to sell an immoveable property purchased by him in discharge of a debt due to the principal four years after the purchase without any necessity.

C. V. Ananthakrishna Aiyar for appellant.

L. A Govindaraghava Aiyar for respondent.

Miller J.
Sankaran Nair J.
1913, *July* 22.

Ref. Cases 4 to 7 & 10 to 12 of 1911.

Reference—Appeal under the Estates Land Act—Not available.

In a case under the Estates Land Act where the District Court desired to remand and finding diffculty in determining the court to which the remand is to be made owing to redistribution of Districts.

Held: it was not a case in which reference could be made, there being an appeal provided by law against the decree that might be passed though there might be no appeal merely from the order of remand.

K. N. Aiya for the 1st party.

S. Srinivasa Iyengar for the 2nd party.

Miller J.
Sankaran Nair J.
1913, *July* 22.

Ref. Case 18 of 1912.

Madras City Municipality Act *(III of 1904) Schedule V classes III and VII—Professional tax on 'money-lenders—'Money-lender' no dealer.*

A money lender, who is not a banker or sowcar as described in class I of schedule V of the Madras City Municipal Act is not a 'dealer' within the meaning of classes III and VII of that schedule and cannot therefore be assessed to any professional tax.

G. S. Ramachandra Aiyar for petitioner.

P. Duraiswami Aiyangar for respondent.

Sadasiva Aiyar J.
Tyabji J.
1913, *July* 24.

S. A. No. 1593 of 1912.

Landlord and Tenant—Agricultural lands—Act antecedent to suit not necessary to enforce forfeiture—Joint lease—Division among lessors—Each can enforce forfeiture in respect of his share—T. P. A. Ss. 37 and 109.

In the case of agricultural leases executed subsequent to the Transfer of Property Act to which the Transfer of Property Act does not apply, an act antecedent to the suit indicative of the landlord's intention to terminate the lease on the ground of forfeiture is not necessary.

Where a lease is given by two persons (being joint owners) and subsequently they become divided, it is open to either of them to nominate the lease on the ground of forfeiture each in respect of his share.

The principle of Ss. 37 and 109 of the Transfer of Property Act is applicable to such cases. *Gopal Ram Mohuri* v. *Dakeshwar Pershad Narain Singh*[1] not followed ; *Sri Raja Simhadri Appa Rao* v. *Prattipati Ramayya*[2] followed.

B. Sitarama Rao for appellant.

K. Y. Adiga for respondent.

Sadasiva Aiyar J.
Tyabji J.
1913, *July* 25.

S. A. No. 111 of 1912.

Madras District Municipalities Act (IV of 1884) S. 3 clauses (27) and (28) S. 23 and S. 168—Street—What is encroachment —Onus of proof.

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1. (1908) I. L. R. 35 C. 807.
2. (1905) I. L. R. 29 M. 29.

Under S. 3 clause, (27) of the District Municipalities Act a 'street' which includes a lane extends up to the boundary of the adjacent owner who has thus to prove his title to what he claims not to be an encroachment on the street, either by purchase or adverse possession, as the same otherwise vests in the Municipality under S. 3 clause 28 and S. 23; and even possession for 30 years of a portion of the street is of no avail to him as the same can be removed under S. 168 of the Act as an encroachment on the street.

Basaveswaraswami v. *Bellary Municipality*[1] followed.

K. V. Krishnaswami Aiyar for appellant.

N. Ragagopalachari for respondent.

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1. (1912) 23 M. L. J. 479.

NOTES OF RECENT CASES.

PRIVY COUNCIL.

[On appeal from the High Court at Bombay.]

Present:—Lord Atkinson, Lord Parker, Sir Samuel Griffiths Sir John Edge and Mr. Ameer Ali.

Abdullah Mohammed Nanna and others ... *Petitioners.*

v.

Municipal Corporation of Bombay ...

Land Acquisition Act—Ss. 297 290, 301—Bombay Municipality Act S. 299—Letters Patent clause 39—Civil Procedure Code Ss. 109 and 110—Special leave to appeal to His Majesty.

When a Municipal Corporation had used the powers given to it by the Municipality Act to acquire land by compulsory purchase to avoid paying a larger sum under the Land Acquisition Act and when the High Court had refused leave to appeal either by virtue of the letters Patent clause 39 or by Civil Procedure Code Ss. 109 and 110.

Special leave to appeal to His Majesty was granted.

A petition heard *exparte* for special leave to appeal to His Majesty from a judgment of the High Court which had refused leave to appeal.

The whole point under consideration was whether the Municipality was absolute in acquiring land even though it misused its powers by using them for a purpose which was not really covered by the Municipality Act and to evade paying compensation under the Land Acquisition Act.

On December 22, 1902 the petitioners gave notice to the Municipal Commissioners that they intended to build certain shops on their lands abutting on the north side of a public street Elphinstone Row. The Municipality refused to allow to build on the said lands on the ground that it was required for building an overbridge and took possession of the same. They had acquired other lands under the Land Acquisition Act and transferred them to the Great Indian Peninsular Railway Company for building an overbridge. The

petitioners contended that their lands should also be acquired under the Land Acquisition Act and not under S. 299 of the Municipal Act. A case was instituted in the High Court for Rs. 33,000 by way of damages and for an order that the land in question should be bought under the Land Acquisition Act. On October 7,1911 the High Court dismissed the petition and failed to take notice of the fact that the Municipality was acquiring lands not for widening the street but for the Railway Co., deciding that under Ss. 297 of the Municipality Act, the Municipality was absolute in acquiring land for other purposes also and that if the plaintiffs suffered any damages at all by the conduct of the Commissioners under S. 299, they had remedy under S. 301. On appeal to the High Court on August 9,1912 the order of the Lower Court was in the main confirmed on the authority of *Essa Jacob* v. *Municipal Commissioners of Bombay*[1]. Leave to appeal to His Majesty was refused and hence the petition to the Judicial Committee.

De Gruyther K. C. (with him *Mohiuddin Nama*) contended that the result of the judgment of the High Court would be to deprive everybody of the advantages of the Land Acquisition Act. S. 297 was practically the same as the Buildings Act in England. The regular line in England was always a question of fact and not arbitrarily laid down as the Municipality claimed in the present case. The land in question was required for building a bridge. Land acquisition Act gave compensation which had already been assessed. The course which the corporation adopted was only to avoid paying compensation. They wished to pay only the value under the Bombay Municipality Act S. 299. (*Lord Parker*: you say they have used the power not bona fide.) The Corporation was bound to acquire land under the Land Acquisition Act. (*Lord Atkinson*: you say they have used this Municipal Act for an illegitimate purpose and to evade the provisions of the Land Acquisition Act.)

Special leave to appeal granted.

Solicitors for Appellants:—*E. Dalgado.*

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1. (1900) I. L. R. 25 B. 107.

Sadasiva Aiyar J.
Tyabji J.
1913, *July* 29.

S. A. No. 156 of 1912.

Evidence Act S. 35—Inam Statements in writing—Public documents, admissible without proof.

Statements in writing made by parties at the time of Inam settlements on the strength of which Inam title deeds were issued are public documents admissible under S. 35 of the Evidence Act, and do not require to be proved.

B. N. Sarma for appellant.

Respondent not represented.

Ayling J.
Sadasiva Aiyar J.
1913, *August* 4.

S. A. No. 1041 of 1912.

Hindu Law—Raising money by mortgage for purchase of immoveable property—Not binding.

The manager of a Hindu family (not being the father) has no power to raise money by mortgaging the family lands with a view to purchasing other lands for the family.

C. V. Anantakrishna Aiyar for appellant.

M. D. Devadoss and *E. S. Chidambara Pillai* for respondents.

Ayling J.
Sadasiva Aiyar J.
1913, *August* 5.

S. A. No. 778 of 1912.

T. P. A, S. 54—Equity of redemption, when mortgagor not in possession—Intangible property.

Where property is under usufructuary morgtage the equity of redemption can be transferred only by means of a registered instrument.

S. Srinivasa Aiyangar for appellant.

C. V. Ananthakrishna Aiyar for respondent.

Chief Justice
Oldfield J.
1913, *August* 7.

O. S. A. Nos. 59 & 60 of 1912.

Arbitration—Expiry of time for delivery of award—Decree without formal order of supersession—Validity of.

Where the time fixed by the court for the delivery of an award has expired and the court proceeds to trial and gives a decree without recording a formal order superseding the reference.

Held that the decree is not bad on that ground.

V. Visvanatha Sastry for appellant.

C. P. Ramaswami Aiyar for respondent.

NOTES OF RECENT CASES.

Sadasiva Aiyar J.
Tyabji J.
1913, *August* 12.

S. A. No. 614 of 1912.

Common Well—Divisibility of among Hindu brothers—View of commentators on Hindu law and custom contrary to Sruti and Smriti, when to be followed.

A common well could be divided among co-parceners under the Hindu Law. A contrary view to be found among Hindu law books is obsolete. Any view of the later commentators or a custom which is contrary to the Srutis and Smritis ought not to be followed.

Nathinbhai v. *Dhirajram*[1], not followed.

S. Swaminadhan for appellant.

S. Srinivasa Aiyar for respondent.

Sadasiva Aiyar J.
Tyabji J.
1913, *August* 12.

S. A. No. 1487 of 1911.

S. 3. Cl. (11) *and S. 189 Estates' Land Act—Rent—Pasture land—Ejectment from—Jurisdiction of Civil Courts.*

Land taken for pasture is not ryoti land, as agriculture does not include pasture. Money payable for pasture land is not 'rent.' Civil Courts have therefore jurisdiction to entertain a suit for ejectment from pasture land.

S. Subramania Aiyar for appellant.

P. Nagabhushanam for respondent.

Sankaran Nair J.
Ayling J.
1913, *August* 19.

A. S. Nos. 52 and 200 of 1911.

Land Acquisition Act S. 54—Decision of Agent to the Governor—Appealability—Agent, a Court.

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1. (1912) I. L. R. 36 B. 379.

An appeal lies to the High Court from the decision of the Agent to the Governor in a land acquisition dispute, the Agent being a Court within the meaning of S. 54 of the Land Acquisition Act.

V. Ramesam for appellant.

S. Srinivasa Aiyangar for respondent.

Chief Justice
Ayling J.
Oldfield J.
1913, *August* 19.

L. P. A. No. 167 of 1912.

Negotiable Instruments Act S. 28—Description as agent—Not indication that he signs as agent.

Where an agent signs a pronote in his own name but describes himself as agent of so and so, this is not sufficient indication that the agent signs as agent and the agent is personally liable.

S. Varadachariar for appellant.

B. Sitarama Rao for respondent.

Sankaran Nair J.
Ayling J.
1913, *August* 20.

C. M. S. A. No. 71 of 1912.

C. P. C. Order 16 r. 7—Discretion to examine person present.

The Court is not bound to examine a person present in Court on the application of a party to the suit. It is discretionary with the court to do so.

Dr. Swaminathan for appellant.

P. Doraiswami Aiyangar for respondent.

NOTES OF RECENT CASES.

Bakewell J.
1913, *August* 25. } Crl. R. C. 655 of 1912.

Chapter XVII Cr.P.C.—Case exclusively triable by Court of Sessions—Duty of the Magistrate not to decide finally questions of fact—Province of the jury—Commitment—Object of examination of accused by Magistrate.

In cases triable exclusively by the sessions a magistrate's duty under Chapter XVIII Cr. P. C, when there is *prima facie* evidence as to the guilt of the accused, is not to usurp the province of the jury and to decide the questions of fact going to establish the guilt of the accused. Under such circumstances the accused ought to be committed to the sessions. The object of the provision as to his examination of the accused is only to enlarge the scope of his enquiry and not to invest him with the powers of a trial Judge.

W. Barton for petitioner.

T. Richmond and *M. O. Parthasarathy Aiyangar* for accused.

Miller J.
Bakewell J.
1913, *August* 28. } Crl. R. C. 10 of 1913.

Crl. P. C. Ss. 110, 117 (2) and Ss. 256, 257.—Method of trial in cases of good behaviour.

The enquiry in cases of security for good behaviour should be in the manner of trials in warrant cases and the accused should be given an opportunity to further cross-examine the prosecution witnesses as per S. 256; the refusal of the Magistrate to give such opportunity is against S. 117 (2) Cr.P.C. and an adverse order after such refusal is illegal and should be set aside.

T. Rangachariar and *V. Venkatachariar* for accused.

J. C. Adam for *Public Prosecutor* contra.

Ayling J.
1913, *August* 28.

Crl. App. No. 172 of 1913.

Crl. P. C. S. 234—Exhibiting as evidence—Evidence taken in a connected case—Illegality of.

A conviction based upon evidence of witnesses each of whom stated "I heard what I stated yesterday in the connected case. I state that it is correct" is illegal and must be set aside as there is no warrant in the Crl. P. C. for taking evidence in such a manner or for exhibiting the depositions in the connected case as primary evidence for a conviction.

Accused unrepresented.

Public Prosecutor for the Crown.

Ayling J.
Sadasiva Aiyar J.
1913, *August* 29.

S. A. No. 1355 of 1912.

Lease—For building a satram—No provision for compensation—No period fixed—Presumption of permanency.

In this case, a lease was given for building a satram; no period was fixed in the lease and no provision was also made for the payment of any compensation in case the lessee was evicted. Held in the circumstances, the proper presumption to make was that the lease was permanent.

K. Parthasarathy Aiyangar for Appellant.

L. S. Veeraraghava Iyer for Respondent.

Chief Justice
Oldfield J.
1913, *August* 29.

C. R. P. No. 558 of 1913.

S. 10 of the Religious Endowments (Act XX of 1863)—Order of District Court, a judicial order revisable by High Court.

A revision petition to the High Court is maintainable against an order of a District Court under S. 10 of Act XX of 1863 holding an election held by a Temple Committee to be good, as that is a

not an order by a person designated but a judicial order by a Court. *Minakshi* v. *Subramanya*[1] *Gopala Iyer* v. *Arunachellam Chetty*[2] distinguished.

Sadasiva Aiyar J.
Tyabji J.
1913, *September* 2.

S. A. No. 1470 of 1911.

Mahomedan Law—Wakf—Mutawalliship-Succession-Modes of—Hereditary right—Presumption of lost grant.

Under the Mahomedan Law, succession to the office of Mutawalli is regulated in any, of the three modes viz., according to the rules laid down by the founder, nomination by the last holder of the office (or his executor in certain cases), and election by the congregation.

Hereditary right is looked on with disfavour by the Mahomedan Law.

The fact that the plaintiff's father and brother were holding the office of Mutawalli one after the other is not sufficient to found a presumption of lost grant in favour of the family of the plaintiff.

P. Somasundaram for appellant.

N. S. Narasimhachari for respondent.

Ayling J.
Tyabji J.
1913, *September* 2.

S. A. No. 1352 of 1912.

Regulation X of 1831—Minor's property—Sale for arrears of revenue—Exemption—Minor joint owner with a major.

Regulation X of 1831 which exempts from sale for arrears of revenue minor's property does not apply to a case where the property is held by the minor jointly with another who is a major the reason being that the property must be capable of being assumed charge of by the Court of Wards before this regulation could apply.

1. (1887) I. L. R. 11 M. 26. 2. (1902) I. L. R. 26 M. 85.

N. S. Narasimhachari for appellant.

P. Somasundaram for respondent.

Sadasiva Aiyar J.
Tyabji J.
1913, *September* 9.

S. A. No. 156 of 1912.

Evidence Act Ss. 74, 77—Inam statements—Public Documents —Admissibility of.

Inam statements filed before the Inam Commissioner are public documents within the meaning of S. 74 of the Evidence Act and certified copies of them are sufficient proof of such documents under S. 77.

The Hon'ble Mr. B. N. Sarma for appellant.

P. Somasundaram for *P. Narayanamurty* for respondent.

NOTES OF RECENT CASES.

PRIVY COUNCIL

[On appeal from the High Court at Bombay.]

Present :—Lord Chancellor, Lords Shaw, De Villiers and Moulton, and Sir Samuel Griffiths.

Petition.

Jehangir Byramji Murzban and others... *Appellants.**

v.

Nadirshaw Hormnazdajee Sukhia ... *Respondent.*

Libel—Previleged communication—Public interest.

The communication of certain facts which concerned the Parsi community only through the medium of a newspaper which was read both by Parsis and non-Parsis was (in effect) held to be not privileged and therefore libellous.

Certain articles appeared in the Jame Jamshed, a Parsi paper calling the respondent a mediocre and a person eager to take an active part in all meetings &c. He brought an action against all the appellant's for libel. The defence was that the communication was of public interest as the respondent had offered himself as a candidate for the trusteeship of the General Charitable Funds of the Parsi community. The High Court awarded Re. 1 by way of damages and according to Sec. 35 of C. P. C. of 1908 ordered the parties to pay their own costs. The Court further held that the article was not privileged, and that it was defamatory. On appeal to the High Court (Appellate side) the court delivered its judgment on June 20, 1913 and held that the communication in the article was not privileged as it was made to others who were not Parsis, the number of Parsi subscribers being 3500 out of 4300 and raised the amount of damages to Rs. 200 ordering the appellants to pay the costs of the respondent. Certificate for appeal to the P.C. being refused, this petition was submitted to the Judicial Committee for special leave to appeal.

Sir *R. Finlay* K. C. with him *Lowndes*, on behalf of the petitioners (appellants) contended that the judgment of the High Court was wrong both in law and on facts. It involved an important point of law of general interest: whether privilege attaching to the publication of a matter of general interest to a large and

* 6th June 1913.

important community amongst whom a newspaper circulates widely and for whom it is primarily intended, is lost merely by reason of its incidental publication therein to other persons not belonging to such Community.

Their Lordships rejected the petition.

Solicitors for appellants:—*T. L. Wilson and Co.*

PRIVY COUNCIL.

[On appeal from the High Court at Calcutta.]

Present:—Lord Chancellor, Lords Shaw, De Villiers and Moulton and Sir Samuel Griffiths.

Naffar Chandra Pal Chowdhry ... *Appellant.**

v.

Suker Sheik ... ... *Respondent.*

Bengal Tenancy Act (Act VIII of 1815 Sec. 10 (2) (b), Sec. 106, 109 a, 109 a (3).

This was a petition for special leave to appeal from a Judgment and Decree of the High Court.

In 1902 the Government of Bengal made an order for the preparation of a record of right under Sec. 10 (2) (*b*) in respect of eight villages in the district of Nadia. Being dissatisfied with the conclusions of the Settlement officer the appellant instituted suit under Sec. 106 before the Revenue officer who directed the record of right to be corrected in certain particulars. Being further dissatisfied he appealed to the District Judge of Nadia under Sec. 109 A who allowed his appeal as to the standard of measurement. The tenant then appealed to the High Court under the provisions of Sec 109 A (3) which allowed all the appeals of the tenants holding that the appellant had not sufficiently proved his allegation as to the measurement, certificate to appeal to P. C. being refused application for special leave to appeal was made to the Judicial Committee.

Lowndes, on behalf of the petition, contended that the result of the High Court's Judgment would be to establish a different standard from what is now the settled standard. There will be confusion throughout the parganah between the petitioner and his tenants which would lead to further litigation.

Special leave to appeal granted.

Solicitors for Appellants:—*W. W. Box and Co.*

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*13th June 1913.

Miller J.
Sankaran Nair J.
1913, *September* 10.

C. M. A. 277 of 1912.

Reg. V of 1816—Mortgage—Suit in a Panchayat court—No bar to—Subsequent suit in District Munsifs Court.

A suit instituted before the Village Panchayat under Regulation V of 1816 (a Regulation still in force) on a mortgage bond does not operate as a bar to the maintainability, another suit in the District Munsif's court for sale of the mortgaged properties the Panchayat court having had no Jurisdiction to entertain suits for sale of mortgaged property.

P. Chenchayya for *T. Prakasam*, for appellant.

P. Somasundaram for *P. Narayana Murthi* for Respondents.

Ayling J.
Sadasiva Aiyar J.
1913, *September* 15

S. A. No. 1713 of 1912.

Hindu Law—Widow—Sale by—Lapse of time—Recitals of necessity—Evidence—Mortgage by conditional sale.

Recitals of necessity contained in a sale-deed by a Hindu widow are evidence but the weight to be attached would depend upon the circumstances of each case.

When the sale took place 50 years ago, the sale-deed reciting necessity, their Lordships held that though such recitals and the lapse or time cannot be said to shift the onus, still the court will be satisfied with less proof than in the case of recent sales.

Part of the consideration for the sale by a widow was a mortgage by conditional Sale of part of the land by the husband to the Vendee dated 1856 giving 3 years' time for payment, in default, the property to become absolutely that of the mortgagee.

Held, if the sale deed was held not to be binding against the reversioner, the Vendee was entitled to fall back upon the original mortgage and the mortgage being one executed before 1858, the mortgage was entitled to the property absolutely according to the tenor of the document.

B. Sitarama Rao for appellant.

K. Y. Adiga for Respondent.

Ayling J.
Sadasiva Aiyar J.
1913, *September* 16.

S. A. 1368 of 1911.
S. A. 1398, 1400 & 1401 of 1911.

Madras Water Cess Act—VIII of 1865. S. 1—Engagement—Scope and operation of—Ratification of unauthorised act—Communication to the other party—Whether necessary to make act binding.

Per Ayling J.—The word 'engagement' in S. 1 of Madras Act VII of 1865 is not restricted in its scope and operation to an engagement at the time of the permanent settlement but can be proved to refer to an undertaking express or implied at any subsequent period.

That ratification of an unauthorised act of an agent is complete only when the fact is communicated to the other party to the contract. Till then the principal has an option to withdraw.

Per Sadasiva Aiyar J.—Agreeing with *Ayling J.* on the interpretation of the word 'engagement' *held* that an implied engagement can be inferred from the proceedings of the Government and the course of conduct of the officers of Government; also, that ratification is complete, the moment the principal elects to adopt the act of the agent as his own and no communication is needed to complete it and ratification once made is irrevocable.

The Hon'ble T. V. Seshagiri Iyer, V. Ramesam, V. Ramdoss, P. Narayanamurthi and *P. Somasundram* for Appellants.

Government Pleader for Respondents.

Chief Justice
Oldfield J.
1913, *September* 17.

O. S. No. 40 of 1913.

Per *Chief Justice*—1. The Guardian and Wards Act does not take away the pre-existing right of a guardian to maintain a suit for the custody of a child and to ask for a declaration of guardianship. In the absence of any section taking away the pre-existing right of suit, remedy by application provided in the act must be taken to be cumulative to and concurrent with the common law right of suit.

Re Manilal Hur Govind[1] followed.

Sham Dal v. *Bindo*[2] not followed.

1. (1900) I. L. R. 25 B. 353. 2. (1904) I. L. R. 25 All. 591.

2. The High Court has inherited the jurisdiction of the Supreme Court in respect of infants and it is that jurisdiction that is explained in S. 17 of the Letters Patent. The Supreme Court had the same jurisdiction to deal with infants in the Madras Presidency as the Court of Chancery in respect of Infants in England. The Court of Chancery could entertain applications in respect of English Infants, though at the time of the exercise of the jurisdiction, the infants might be resident outside the territorial limits of England. The Supreme Court could similarly exercise jurisdiction over all infants within the territories subordinate to the Government of Fort St. George though at the time of the exercise of the jurisdiction the infants might reside outside.

The High Court therefore as the successor of the Supreme court could exercise jurisdiction in respect of Indian (Presidency of Madras) infants resident outside the limits of the Presidency.

3. Even in cases which are called from Subordinate Courts in the exercise of its extraordinary powers the High Court could exercise the powers vested in it under clause 17 of the Letters Patent.

4. (*a*) The jurisdiction of an Indian Court cannot be attacked merely on the ground that to enforce the judgment, the aid of the foreign tribunal is necessary (*b*) The presence of the defendant within the jurisdiction is a material factor in considering the question of effectiveness for the defendant can be directly reached by the court that passes the judgment.

5. The provision of the Civil Procedure Code that no order passed against an infant is valid unless the minor is represented by a guardian *ad litem* has no application to a case where the minor is not a party to a suit or proceeding.

Oldfield J. agreed with proposition No. 1.

and *Held further*, 1. If there is a right of suit in the father as against a person who keeps the minor away from him the Court under the provisions of the Civil Procedure Code is concerned only with the residence of the defendant and not of the minor.

2. If the Chingleput Court had the jurisdiction to entertain the suit notwithstanding the fact that the minors were outside the territorial limit the High Court having withdrawn the case from the Chingleput Court must at least have the powers of the Chingleput Court and the construction of S. 17 of the Letters Patent does not arise.

On the question of effectiveness and the minor being represented by a guardian *ad litem* his Lordship adopted the arguments of the Chief Justice.

The appellant (Mrs. Besant in person).

C. P. Ramaswami Iyer, A. Krishnaswami Iyer, N. Chandrasekara Iyer and *M. Subbaraya Iyer* for Respondent.

Miller J.
Sadasiva Aiyar J.
1913, *September* 18.

C. M. P. 283 & 284 of 1913.

Privy Council, appeal to—C. P. C. (V of 1908) S. 109 (a) 'final'—Meaning of—Order of remand reversing dismissal by first Court under S. 43.

An order of the High Court reversing a decree made by the Lower Court to the effect that a suit was not maintainable by virtue of S. 43 C. P. C. (XIV of 1882) and remanding the suit to be tried on the merits is not a 'final' order within the meaning of S. 109 (*a*) C. P. C. as it does not decide any legal liability between the parties and is not therefore appealable to the Privy Council.

T. Rangachariar for petitioner.

K. Srinivasa Aiyangar for respondent.

NOTES OF RECENT CASES.

Miller J.
Tyabji J.
1913, *October* 1.

S. A. No. 1429 of 1912.

Hindu law—Sale by widow—Partly for legal necessity and partly not—Suit by reversioner to recover—Charge on the property for amount found not for binding purpose.

Where property was sold by a widow for Rs. 600 *bona fide* out of which Rs. 332 was found to be for binding purpose and the price was adequate.

Held:—That the sale must be upheld and on the defendant's concession their Lordships made a decree giving the plaintiff (reversioner) a charge for the amount found not to be for a binding purpose, a sale to follow if the amount was not paid within a specified time; *Telaram* v. *Bagalanand Banerjia*[1] followed.

T. V. Seshagiri Aiyar and *T. Ramachandra Rao* for Appellant.

K. Narain Rao for Respondent.

Sadasiva Aiyar J.
Spencer J.
1913, *October* 7.

S. A. No. 875 of 1912.

C. P. C. Or. 41 rule 27—Appellate Court—Additional Evidence—Evidence Act S. 167.

The reception of additional evidence in the Appellate Court without recording the reasons is illegal. But if there is other evidence on record sufficient to justify the finding the High Court will not interfere in Second Appeal having regard to S. 167 of the Indian Evidence Act.

T. Ramachandra Rao for Appellant.

B. Narasimha Rao for Respondent.

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1. (1910) 14 C. W. N. 895.

Sankaran Nair J.
Sadasiva Aiyar J.
1913, *October* 9.

S. A. Nos. 323, 433 & 434 of 1912.

Estates Land Act Ss. 210, 211—Limitation Act S. 6 Application of.

Where a suit is instituted by a landlord for arrears of rent after the Estates Land Act came into force the plaintiff cannot claim the benefit of S. 6 of the Limitation Act even with respect to causes of action that accrued before the Estates Land Act came into force and which would be barred by the application of Ss. 210, 211 before the 1st July 1908. (*Sadasiva Aiyar dissenting*).

P. Somasundaram for *P. Narayanamurthi* for Appellant.

B. Narasimha Rao and *N. S. Narasimhachari* for Respondents.

Sadasiva Aiyar J.
Spencer J.
1913, *October* 9.

S. A. Nos. 1205 & 1208 of 1910.

Estates Land Act S. 3—Ejectment—Onus—Both warams vested at the time of grant.

In a suit for ejectment the onus lies on the Inamdar to prove facts which will give him a right to eject *i. e.* he must prove that both the warams vested in him at the time of the grant.

Spencer J :—The 'word' acquire in the exception to S. 8 should not be construed so as not to include cases of surrender or abandonment by the tenant to the landlord.

(*Sadasiva Aiyar J.* dissenting).

Sankaran Nair J.
Tyabji J.
1913, *October* 9.

S. A. Nos. 1416-1419 of 1912.

Madras Regulation XV of 1802—Presumption—Lands held on Service tenure prior to the Settlement.

Where lands in a Zemindari were held from before the time of the permanent settlement on a tenure of rendering service such as attending on him, guarding his treasury etc., and the Government sought to resume them on the ground that they were presettlement inams.

Held per Sankaran Nair J.—That the services being private or personal to the Zemindar he was prima facie entitled to resume and that the burden of proving that the lands were excluded at the time of settlement from the Zemindary assets and that the right to resume belonged to Government lay on them. Further where services are rendered in addition to favourable quit rent, it cannot be said that the lands come within the last proviso to S. 4 *viz.*, land paying only favourable quit rent.

Rajah Venkatarangayya v. *Appalanarasu*[1] followed.

Per Tyabji J.—That the Government having special means of knowledge of the exclusion or otherwise at the settlement of the inams, the burden of proof lay upon them under S. 106 of the Evidence Act and that they not having produced the accounts in their possession, the presumption that if produced they would be unfavourable to them should be drawn. Also that the payment of rent to the Zemindar is prima facie an indication to whom the land belongs.

Sankaran Nair J.
Ayling J.
1913, *October* 9.

Cr. A. No. 447 of 1913.

Madras City Municipal Act—III of 1904—Prosecution under S. 188—Magistrate's duty.

In a prosecution under S. 188 of the Madras City Municipal Act, the Magistrate is bound to satisfy himself that the accused is a person liable to pay the assessment by reason of his being the owner or occupier of the land in respect of which the assessment is claimed.

J. C. *Adam* for Crown Prosecutor.

K. S. Ganesa Iyer for Accused.

Sadasiva Aiyar J.
Spencer J.
1913, *October* 10.

S. A. Nos. 1757 to 1781 of 1912.

The words at the time of any letting after the passing of the Act in S. 3 cl. 7 (*e*) of the Estates Land Act of 1908, could only

1. (1910) 20 M. L. J. 728.

refer to a letting into possession after 28th June 1908 when the Act received the assent of the Governor-General and became law. No local Act could have any validity until it receives the assent of the Governor General under S. 40 of the Indian Councils Act of 1861.

Mr. P. Narayana Murty and *Mr. V. Ramdoss* for Appellant.

Mr. P. Somasundaram for Respondents.

Miller J.
Spencer J.
1913, *October* 10.

S. A. Nos. 2280 to 2284 of 1912.

Estates Land Act Ss. 78, cl. 2 and S. 112—Delivery of—Demand Notice to tenant—Affixing to house on refusal—Whether proper service.

Where a landlord tendered to the tenant notice of the demand of arrears due and it was refused by the tenant being aware of its contents and it was consequently affixed to the house of the tenant, held it was not proper service as under the act the notice should be served on the ryot and affixed on the land (holding) to which it refers.

C. P. Ramaswami Aiyar, A. Durasami Aiyar and *M. Subbaraya Aiyar* for Appellants.

V. Visvanatha Sastri for Respondents.

NOTES OF RECENT CASES.

Sankaran Nair J.
Ayling J.
1913, *October* 3.

C. M. S. A. No. 65 of 1911.

Attachment before judgment—Inoperative on dismissal of suit.

An attachment before judgment ceases to be operative on dismissal of suit by the first court. A fresh attachment is necessary as a preliminary to any execution sale in case of success on appeal. *Ramchand* v. *Pitammal*[1] followed.

M. D. Devadoss for appellant.

M. Krishnamachari for respondent.

Sankaran Nair J.
Ayling J.
1913, *October* 14

L. P. A. No. 79 of 1913.

Letters Patent Appeal—Cr. Pr. Code Ss. 435, 439 and 476—Order refusing to set aside order under S. 476—Not appealable.

An order by a single Judge rejecting a petition for revising an order under S. 476 Cr. Pr. Code made by a Magistrate is an order in a Criminal trial and no Letters Patent Appeal lies therefrom.

A. Sundaram for appellant.

S. Swaminathen for *the Public Prosecutor.*

Miller J.
1913, *October* 16.

S. A. No. 2567 of 1912.

Oaths act—Oath as to title in suit for rent—Conclusive effect of in suit for rent of subsequent year—Death pending appeal—Representative not brought on record—Decree reversed and suit remanded in their absence—Subsequently brought on record in first court—Waiver of irregularity.

In a suit for rent, the question of title of the plaintiff was decided on the oath taken by one of the parties. *Held* that the oath was conclusive evidence as to title in the suit for subsequent year's rent.

1. (1888) I L. R. 10 A. 506.

Held also, where pending appeal from a decree in favour of three parties, one died but his representatives were not brought on record and the appeal, was allowed and the case remanded to the Lower Court and there the representatives were brought on record without objection.

Held that it was too late for the representatives in second appeal to object to the order of remand being taken to bind them as they by their conduct must be taken to have waived the irregularity.

S. Soundararaja Aiyangar for appellant.

Tyabji J.
1913, *October* 16. } C. R. P. No. 510 of 1912.

A Sovereign Prince such as the Raja of Cochin cannot be sued in Courts of British India even in respect of his trusteeship of a temple situated in British India and owning lands in British India except in conformity with the provisions of S. 86 C. P. C.

T. R. Ramachandra Aiyar and *N. A. Krishna Aiyar* for petitioner.

C. V. Ananthakrishna Aiyar for respondent.

Tyabji J.
1913, *October* 17. } C. R. P. No. 677 of 1911.

C. P. C. Order 21 R. 89 (1)—Unsigned applications good.

What is the essential under Or. 21 R. 89 (1) is the deposit within 30 days. An unsigned application is still a good application, as especially an oral application is sufficient under the rule. The order rejecting the application for want of signature is a judicial and not an administrative order, hence an appeal lies and then a revision.

M. Narayanaswami Aiyar for petitioner.

V. Ramaswami Aiyangar for respondent.

NOTES OF RECENT CASES.

Sadasiva Aiyar J.
Spencer J.
1913, *October* 22.

C. M. A. No. 273 of 1912.

Evidence—Registration Act S. 49—Unregistered sale-deed.

An unregistered sale deed cannot be given in evidence to prove the nature of possession of by the vendee after the date of sale.

Timmagamma v. *Abdulla Sahib*[1], followed.

N. S. Narasimhachari for appellant.

Chenchia for respondent.

Full Bench
Chief Justice
Sankaran Nair J.
Oldfield J.
1913, *October* 23.

S. A. No. 1414 of 1912.

S. 19 of Malabar Tenant's Improvement Act—Contract prior to 1886—Effect of as regards rates.

A contract made prior to 1886 does not take away the benefit given by the Malabar Tenants Improvement Act of 1900 to a tenant as regards rates of compensation, who can adopt either the rates of the Act or of the contract as it suits him *Koshikot Padia Kovilagath Sreemanavikruma* v. *Ananda Pattar*[2], and *Parikamma* v. *Moothuran*[3], are not inconsistent with *Randupurayil Kunhisore* v. *Nerothikunhikannan*[4].

K. Govinda Marar for appellant.

K. P. M. Menon for respondent.

Miller J.
1913, *October* 27.

C. R. P. No. 663 of 1912.

Legal Practitioner—Rule 277 Civil Rules of Practice—Possession case and subsequent connected Civil suit—Pleader appearing in the former cannot appear in latter without giving option to former client.

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1. (1907) 17 M. L. J. 369.
2. (1910) I. L. R. 34 M. 61.
3. (1911) 22 M. L. J. 221.
4. (1908) I. L. R. 32 M. 1.

Rule 277 of the Civil Rules of Practice prevents a pleader who appears in a possession case for a client to appear later on without giving him an option to retain him in the Civil suit that arises out of those proceedings.

T. R. Ramachandra Aiyar for Petitioner.

T. R. Venkatrama Sastry for Respondent.

Sadasiva Aiyar J.
Spencer J.
1913, *November* 3.

S. A. No. 717 of 1912.

Madras Surveys and Boundaries Act S. 13—Whether controlled by S. 42 of the Specific Relief Act.

S. 13 of the Surveys and Boundaries Act confers a special right of suit. It is not therefore governed or controlled by S. 42 of the Specific Relief Act. A suit therefore lies for a mere declaration that the title to certain properties with respect to which an order was made under that Act vests in the plaintiff though possession is found to be with the defendant and no relief is asked for in respect of the same *Ambu* v. *Ketililamma*[1], *Krishnam Soorayya* v. *Pathmabee*[2], *Neti Ramjogiah* v. *Venkatacharlu*[3] followed.

K. Raja Aiyar for *S. Srinivasa Iyengar* for Appellant.

V. Ramesam for Respondent.

Sankaran Nair J.
Oldfield J.
1913, *November* 3.

S. A. No. 421 of 1912.

Mortgage Discharge of whole claimant entitled to subrogation to the extent of payment.

To be entitled to subrogation it is not necessary that the claimant himself should have discharged the whole mortgage debt. If the debt has anyhow been discharged he is entitled to subrogation to the extent of the payment.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for Appellant.

M. K. Ramaswamy Aiyar for Respondent.

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1. (1890) I. L. R. 14 M. 23.
2. (1905) I. L. R. 29 M. 151.
3. (1902) I. L. R. 26 M. 450.

NOTES OF RECENT CASES.

Sadasiva Aiyar J.
Spencer J.
1913, *November* 5.
C. M. A. No. 155 of 1912.

C. P. C. Order XXI r. 16—*Application merely to recognise transfer—Not maintainable.*

An application merely for recognising the transfer of a decree does not lie and an order recognising transfer was accordingly set aside in appeal.

B. Sitarama Row for appellant.

K. Raja Aiyar for respondent.

Sadasiva Aiyar J.
Spencer J.
1913, *November* 7.
L. P. A. No. 66 of 1913.

Unstamped promissory note—Suit for consideration of the note—Maintainability of.

Where money is advanced and as part of the same transaction a promissory note is given, action is not maintainable apart from the promissory note if it cannot be sued upon not being stamped.

S. Varadachariar for appellant.

Jayarama Aiyar for respondent.

Sankaran Nair J.
Bakewell J.
1913, *November* 10.
S. A. No. 1221 of 1912.

Limitation Act of 1909—S.31—Mortgage—Security for mesne profits—Transfer of Property Act S, 58—*Not within the definition of.*

Security furnished for mesne profits in case the suit terminated in favour of the plaintiff is not mortgage within the meaning of either the Transfer of Property Act or S. 31 of the Limitation Act of 1909.

T. Narasimha Aiyangar for appellant.

V. Viswanatha Sastry for respondent.

Sankaran Nair J.
Bakewell J.
1913, *November* 10.

S. A. No. 1224 of 1912.

Maintenance—Provision that possession should be given in the event of default in payment—Not penalty.

A provision in a deed of maintenance that the lady (Hindu) is to be put in possession of some land in the event of default in payment is not a penalty.

T. Rangachariar for appellant.

C. V. Ananthakrishna Aiyar for respondent.

Sadasiva Aiyar J.
Spencer J.
1913, *November* 11.

C. M. A. No. 23 of 1913.

Res judicata—Prior suit for possession—Subsequent suit for maintenance—No bar.

The first suit was brought by the plaintiff against the donee's husband to recover property on the ground that the gift executed by the plaintiff in favour of the foster-daughter, with a condition of maintaining her lapsed on account of the donee's death and the second suit was brought by the same plaintiff against the same defendant for recovery of maintenance provided for in the deed.

Held the subsequent suit is not barred by res judicata nor by Or. 2 r. 2.

V. Ramesam for appellant.

P. Somasundaram for respondent.

Sankaran Nair J.
Bakewell J.
1913, *November* 12.

S. A. No. 2245 of 1912.

Public Revenue—Assignee of—Not entitled to charge—Limitation Act, Art. 120.

The Assignee of Public Revenue due on certain land (a temple) in lieu of the Tasdik due from the Government is not entitled to a charge on the land, his claim being only a personal one governed by Art. 120.

Kasturi Gopala Aiyangar v. *Ananta Ram Thiwadi*[1] followed.

B. Sitarama Rao for appellant.

K. P. Madhava Rao and *K. P. Laxmana Rao* for respondent.

Sankaran Nair J.
Bakewell J.
1913, *November* 12.

S. A. 1517 of 1912.

Land Encroachment Act—Suit for declaration of title—On levy of penalty.

The action of a person from whom penalty is levied under the Encroachment Act for a declaration that the land belongs to him is governed by the limitation of six months provided in the Land Encroachment Act.

G. Venkatramiah for appellant.

Govt. Pleader (*C. F. Napier*) for respondent.

Sadasiva Aiyar J.
Spencer J.
1913, *November* 13

C. M. S. A. No. 12 of 1913.

Rules of Practice—Vakil's fee—" Amount realised by the execution application "—Meaning of.

Where after notice of an application by the transferee of a decree for money and on the day on which arrest was ordered on the

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1. (1902) I. L. R, 26 M. 730,

application but before the warrant was actually issued, the judgment debtor paid in the money.

Held, the amount was amount realised by the execution application within the meaning of the rules and Vakil's fee ought to be allowed on the amount.

Sadasiva Aiyar J.
Spencer J.
1913, *November* 14.

C. M. A. No. 85 of 1912.

Limitation Act (Act IX 1908)—S. 31—Special period of two years—Expired on a Sunday—Suit instituted on next Monday—Within time.

The special period of limitation for suits for foreclosure or sale by a mortgagee prescribed by S. 31 of the Indian Limitation Act expired on a Sunday.

Held that a suit instituted on the following Monday was within time.

Hira Singh v. *Mussamat Amarti*[1] followed.

Shedar Daulatram Marwadi v. *Narayan Valad Asaji*[2] dissented from.

L. S. Veeraraghava Iyer for appellant.

S. Swaminathan for respondent.

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1. (1912) I. L. R. 34 All. 375.
2. (1911) I. L. R. 36 B. 268.

NOTES OF RECENT CASES.

Sadasiva Aiyar J.
Spencer J.
1913, *November* 10.

C. M. A. No. 118 of 1913.

General Clauses Act S. 9—Lunacy Act—Proceedings initiated under the old, after the new Act came into force—A man of feeble intellect unable to manage big affairs.

A man of feeble intellect, unable to manage big affairs, cannot be said to be a lunatic.

Proceedings taken under the repealed Lunacy Act after the new Act came into force, are valid if there is no difference between the two Acts.

K. R. Subramania Sastri for Appellant.

C. Madhavan Nair for Respondent.

Sadasiva Aiyar J.
Spencer J.
1913, *November* 17

C. M. A. No. 87 of 1913.

Estates Land Act Ss. 131, 189—Suit to set aside a rent sale for fraud—Civil Courts—Jurisdiction of.

A suit to set aside a sale for arrears of rent on the ground of fraud is not cognisable by a Revenue Court, but is cognisable only by a Civil Court, since Order 21 r. 90 is not included in S. 131 of the Estates Land Act.

A. Srinivasa Aiyangar for Appellant.

K. S. Jayaram Aiyar for Respondent.

Sadasiva Aiyar J.
Spencer J.
1913, *November* 17

C. M. S. A. No. 84 of 1912.

Partial execution of decree—Step in aid.

An application for partial execution of a decree though irregular as being only for a part of a decree is good as a step in aid of execution.

Applications for execution of executable portions of the decree which fixed only the liability for mesne profits are steps in aid of execution to recover the amount of mesne profits when they are ascertained.

V. Ramadoss for Appellant.

V. Ramesam for Respondent.

Oldfield J.
1913, *November* 18. } C. R. P. No. 390 of 1911.

Decree against deceased person, void and not voidable—Impeachable collaterally i.e., in execution etc.

A decree against a person passed after his death which occurred before the hearing of the suit is not voidable but void and can be attacked collaterally i. e. in execution or by suit.

An application for execution of such a decree, presented more than six months after death cannot be treated as one for rehearing the suit.

S. V. Padmanabha Aiyangar for Petitioner.

N. Rajagopalachari for Respondent.

Sadasiva Aiyar J.
Spencer J.
1913, *November* 19. } L. P. A. No. 38 of 1913.

Conditional tender—Costs, judgment as to.

A judgment of a single judge of the High Court reversing the decree of a Sub-Judge as to costs is a judgment under Sec. 15 of the Letters Patent and is appealable thereunder.

A tender of money by a debtor due to a creditor, coupled with a requisition for a receipt in full discharge of all claims is not a proper one which the creditor is bound to accept and such a tender will not excuse the debtor from the liability to costs in a suit for the amount.

The fact that the creditor applied for arrest before judgment and obtained an order for arrest, though it was not executed, is one which can be taken by the Court into consideration in the matter of costs. In a case where both the facts abovementioned existed, it was held reversing the judgments of all the Courts below, that

the proper order as to costs was that each party should bear his costs throughout.

T. M. Krishnaswami Aiyar for Appellants.

Venugopal Naidu for Respondent.

Miller J.
1913, *November* 20. } C. R. P. No. 586 of 1912.

Estates Land Act, S. 2 (d)—Presumption—Inams.

For the purpose of section 2 (d) of the Estate Land Act the presumption is that the Melvaram alone was granted.

With reference to the question whether the grant was to a person who did not own the kudivaram, the presumption is one of fact in each case to be raised according to the purpose and not the motive of the grant.

In the case of a grant to a temple or for services the presumption is that the grantee was not the owner of kudivaram and that the grant was not of waste land and the burden of proof is on the Inamdar who sues for rent in a Civil Court that it is not an estate.

G. Venkataramier for Petitioner.

V. Ramesam for Respondents.

Miller J.
1913, *November* 20. } Cri. R. C. No. 481 of 1913.

Conviction under Sec. 186. I. P. C.—Abusing public servant —Whether obstruction.

Where the accused roughly asked a public servant who went to distrain his property for arrears of revenue to go away and abused him and the public servant had come away without effecting the destraint, *Held* this would not amount to an obstruction within the meaning of Sec. 186 I. P. C.

T. M. Krishnaswami Aiyar for Petitioner.

The Public Prosecutor for the Crown.

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INDIAN EXTRADITION (AMENDMENT) ACT, 1913.

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 27TH FEBRUARY 1913.

ACT NO. I OF 1913.

An Act to amend the Indian Extradition Act, 1903.

WHEREAS it is expedient to amend the Indian Extradition Act, 1903; It is hereby enacted as follows:—

Short title.

1. This Act my be called the Indian Extradition (Amendment) Act, 1913.

Amendment of section 7, Act XV, 1903.

2. (*1*) In sub-section (*1*) of section 7 of the Indian Extradition Act, 1903, after the words "such person is believed to be," the words "or if such person is believed to be in any Presidency-town to the Chief Presidency Magistrate of such town" shall be inserted.

(*2*) In sub-section (*2*) of the same section after the words "accused person when arrested shall" the words "be produced before the District Magistrate or Chief Presidency Magistrate, as the case may be, who shall record any statement made by him; such accused person shall then" shall be inserted.

(*3*) In sub-section (*3*) of the same section after the words "District Magistrate", the words "or Chief Presidency Magistrate" shall be inserted.

Addition of new section after section 8, Act XV, 1903.

3. After section 8 of the said Act the following section shall be inserted, namely:—

Power to report case for orders of Local Government.

"8A. Notwithstanding anything contained in section 7, sub-section (*2*) or in section 8, when an accused person arrested in accordance with the provisions of section 7 is produced before the District Magistrate or Chief Presidency Magistrate, as the case may be, and the statement (if any) of such accused person has been recorded, such Magistrate may, if he thinks fit, before proceeding further report the case to the Local Government and, pending the receipt of orders on such report, may detain such accused person in custody or release him on his executing a bond with sufficient sureties for his attendance when required."

THE OFFICIAL TRUSTEES ACT, 1913.

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 27TH FEBRUARY 1913.

ACT NO. II OF 1913.

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An Act to consolidate and amend the Law constituting the office of Official Trustee.

WHEREAS it is expedient to consolidate and amend the law constituting the office of the Official Trustee; It is hereby enacted as follows:—

PART I.

PRELIMINARY.

Short title, extent and commencement

1. (*1*) This Act may be called the Official Trustees Act, 1913.

(*2*) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, and applies also to all British and Indian subjects of His Majesty in the territories of Native States in India.

(*3*) It shall come into force on such date as the Governor General in Council, by notification in the Gazette of India, may direct.

Interpretation clause.

2. In this Act unless there is anything repugnant in the subject or context,—

(*1*) "Government" means the Governor General in Council, so far as the Act relates to the Presidency of Bengal, and the Local Goverments of Madras and Bombay, respectively, so far as the Act relates to those Presidencies:

(*2*) "High Court" means His Majesty's High Courts of Judicature at Fort William in Bengal, Madras and Bombay, respectively in the exercise of their original civil jurisdiction.

(*3*) "Official Gazette" means, in the case of the Presidency of Bengal, the Gazette of India, in the case of the Presidency of Madras, the Fort St. George Gazette, and in the case of the Presidency of Bombay, Government Gazette:

(*4*) "Prescribed" means prescribed by rules under this Act:

(*5*) (*a*) "Presidency of Bengal" includes the territories for the time being under the government of the Governor of Fort William in Bengal in Council, the United Provinces of Agra and Oudh, the Provinces of the Punjab, Burma, Bihar and Orissa, the Central Provinces, Assam, the North-West Frontier Province, the Province of Delhi, Ajmer and Merwara, the Andaman and Nicobar Islands, and such of the territories of any Native State as the Governor General in Council may by notification in the Gazette of India direct,

(b) " Presidency of Bombay " includes the territories for the time being under the government of the Governor of Bombay in Council, the Province of British Baluchistan, and such of the territories of any Native State as the Governor General in Council may by notification in the Gazette of India direct,

(c) " Presidency of Madras " Includes the territories for the time being under the government of the Governor of Fort St. George in Council, the Province of Coorg, and such of the territories of any Native State as the Governor General in Council may by notification in the Gazette of India direct.

(6) " Presidency " means any of the Presidencies in clause (5).

Extent of jurisdiction of High Courts.

3. For the purposes of this Act the High Court at a Presidency-town shall have jurisdiction throughout the Presidency.

PART II.

THE OFFICE OF OFFICIAL TRUSTEE.

Official Trustees.

4. (1) In each of the Presidencies of Bengal Madras and Bombay, the Government shall appoint an Official Trustee.

(2) No person shall be appointed to the office of Official Trustee of any of the said Presidencies who is not—

(a) a Barrister; or

(b) an Advocate, Attorney or Vakil enrolled by a High Court; or

(c) a person holding the office of Deputy Administrator General at the commencement of this Act.

(3) The said Official Trustees shall be called respectively, the Official Trustee of Bengal, the Official Trustee of Madras and the Official Trustee of Bombay.

Appointment and powers of Deputy Official Trustee.

5. The Government may appoint a Deputy or Deputies to assist the Official Trustee; and any Deputy so appointed shall, subject to the control of the Government and the general or special orders of the Official Trustee, be competent to discharge any of the duties and exercise any of the powers of the Official Trustee,

and when discharging such duties or exercising such powers shall have the same privileges and be subject to the same liabilities as the Official Trustee.

Official Trustee to be corporation sole, to have perpetual succession and official, and to sue and be sued in his corporate name.

6. The Official Trustee shall be a corporation sole by the name of the Official Trustee of the Presidency for which he is appointed and, as such Official Trustee, shall have perpetual succession and an official seal, and may sue and be sued in his corporate name.

PART III.

Rights, Powers, Duties and Liabilities of Official Trustee.

General powers and duties of Official Trustee.

7. (*1*) Subject to, and in accordance with, the provisions of this Act and the rules made thereunder, the Official Trustee may, if he thinks fit,—

(*a*) act as an ordinary trustee;

(*b*) be appointed trustee by a Court of competent jurisdiction.

(*2*) Save as hereinafter expressly provided, the Official Trustee shall have the same powers, duties and liabilities and be entitled to the same rights and privileges and be subject to the same control and orders of the Court as any other trustee acting in the same capacity.

(*3*) The Official Trustee may decline, either absolutely or except on such conditions as he may impose, to accept any trust.

(*4*) The Official Trustee shall not accept any trust under any composition or scheme of arrangement for the benefit of creditors, nor of any estate known or believed by him to be insolvent.

(*5*) The Official Trustee shall not, save as provided by any rules made under this Act, accept any trust for a religious purpose or any trust which involves the management or carrying on of any business.

(*6*) The Official Trustee shall not administer the estate of a deceased person, unless he is expressly appointed sole executor of, and sole trustee under, the will of such person.

(*7*) The Official Trustee shall always be sole trustee, and it shall not be lawful to appoint the Official Trustee to be trustee along with any other person.

Official Trustee may with consent be appointed trustee of settlement by grantor.

8. (*1*) Any person intending to create a trust other than a trust which the Official Trustee is prohibited from accepting under the provisions of this Act may by the instrument creating the trust and with the consent of the Official Trustee, appoint him by that name or any other sufficient description to be the trustee of the property subject to such trust:

Provided that the consent of the Official Trustee shall be recited in the said instrument and that such instrument shall be duly executed by the Official Trustee.

(*2*) Upon such appointment the property subject to the trust shall vest in such Official Trustee, and shall be held by him upon the trusts declared in such instrument.

Appointment of Official Trustee as trustee by will.

9. When the Official Trustee has by that name or any other sufficient description been appointed trustee under any will, the executor of the will of such testator or the administrator of his estate shall, after obtaining probate or letters of administration, notify in the prescribed manner the contents of such will to such Official Trustee; and, if such Official Trustee consents to accept the trust, then upon the execution by such executor or administrator of an instrument in writing transferring the property subject to the trust to the Official Trustee, such property shall vest in such Official Trustee, and shall be held by him upon the trusts expressed in the said will:

Provided that the consent of the Official Trustee shall be recited in the said instrument and that such instrument shall be duly executed by the Official Trustee.

Power of High Court to appoint Official Trustee to be trustee of property.

10. (*1*) If any property is subject to a trust other than a trust which the Official Trustee is prohibited from accepting under the provisions of this Act, and there is no trustee within the local limits of the ordinary or extraordinary original civil jurisdiction of the High Court willing or capable to act in the trust, the High Court may on application make an order for the appointment of the Official Trustee by that name with his consent to be the trustee of such property.

(*2*) Upon such order such property shall vest in the Official Trustee and shall be held by him upon the same trusts as the same was held previously to such order, and the previous trustee or trustees (if any) shall be exempt from liability as trustees of such property save in respect of acts done before the date of such order.

(3) Nothing in this section shall be deemed to affect the provisions of the Trustees' and Mortgagees' Powers Act, 1866, or the Indian Trusts Act, 1882.

Power of private trustees to appoint Official Trustee to be trustee of property.

11. (*1*) If any property is subject to a trust other than a trust which the Official Trustee is prohibited from accepting under the provisions of this Act, and all the trustees or the surviving or continuing trustee or trustees and all persons beneficially interested in the trust are desirous that the Official Trustee shall be appointed in the room of such trustee or trustees, it shall be lawful for such trustee or trustees, by an instrument in writing to appoint the Official Trustee by that name or any other sufficient description with his consent to be the trustee of such property :

Provided that the consent of the Official Trustee shall be recited in the said instrument and that such instrument shall be duly executed by him.

(*2*) Upon such appointment such property shall vest in the Official Trustee and shall be held by him upon the same trusts as the same was held previously to such appointment, and the previous trustee or trustees shall be exempt from all liability as trustees of such property save in respect of acts done before the date of such appointment.

Executor or administrator may pay to Official Trustee legacy, share, etc., of infant or lunatic.

12. (*1*) If any infant or lunatic is entitled to any gift, legacy or share of the assets of a deceased person, it shall be lawful for the person by whom such gift is made, or executor or administrator by whom such legacy or share is payable or transferable, or any trustee of such gift, legacy or share, to transfer the same by an instrument in writing to the Official Trustee by that name or any other sufficient description with his consent :

Provided that the consent of the Official Trustee shall be recited in the said instrument and that such instrument shall be duly executed by the Official Trustee.

(*2*) Any money or property transferred to the Official Trustee under this section shall vest in him and shall be subject to the same provisions as are contained in this Act as to other property vested in such Official Trustee.

Official Trustee not to be required to give bond or security.

13. (1) No Official Trustee shall be required by any Court to enter into any bond or security on his appointment in any capacity under this Act.

(2) No Official Trustee or Deputy Official Trustee shall be required to verify otherwise than by his signature any petition presented by him under the provisions of this Act, and if the facts stated in any such petition are not within the Official Trustee's personal knowledge, the petition may be verified and subscribed by any person competent to make the verification.

Entry of Official Trustee not to constitute notice of a trust.

14. The entry of the Official Trustee by that name in the books of a company shall not constitute notice of a trust; and a company shall not be entitled to object to enter the name of the Official Trustee on its register by reason only that the Official Trustee is a corporation; and, in dealing with property, the fact that the person dealt with is the Official Trustee shall not of itself constitute notice of a trust.

Liability of Government.

15. (1) The revenues of the Government of India shall be liable to make good all sums required to discharge any liability which the Official Trustee, if he were a private trustee, would be personally liable to discharge, except when the liability is one to which neither the Official Trustee nor any of his officers has in any way contributed or which neither he nor any of his officers could by the exercise of reasonable diligence have averted, and in either of those cases the Official Trustee shall not, nor shall the revenues of the Government of India, be subject to any liability.

(2) Nothing in sub-section (1) shall be deemed to render the revenues of the Government of India or any Official Trustee appointed under this Act liable for anything done by or under the authority of any Official Trustee before the commencement of this Act.

Notice of suit not required in certain cases.

16. Nothing in section 80 of the Code of Civil Procedure, 1908, shall apply to any suit against the Official Trustee in which no relief is claimed against him personally.

PART IV.

FEES.

Fees.

17. (*1*) There shall be charged in respect of the duties of the Official Trustee such fees, whether by way of percentage or otherwise, as the Government may prescribe :

Provided that in the case of a trust accepted by the Official Trustee before the commencement of this Act the fees prescribed under this section shall not exceed the fees leviable in respect of such trust under the Official Trustees Act, 1864, as subsequently amended.

(*2*) The fees under this section may be at different rates for different properties or classes of properties or for different duties, and shall, so far as may be, be arranged so as to produce an amount sufficient to discharge the salaries and all other expenses incidental to the working of this Act (including such sum as Government may determine to be required to insure the revenues of the Government of India against loss under this Act.)

Disposal of fees.

18. (*1*) All expenses which might be retained or paid out of the trust fund, if the Official Trustee were a private trustee, shall be so retained or paid, and any fees leviable under this Act shall be retained or paid in like manner as and in addition to such expenses.

(*2*) The Official Trustee shall transfer and pay to such authority and in such manner and at such times as the Government may prescribe, all fees received by him under this Act, and the same shall be carried to the account and credit of the Government of India.

PART V.

AUDIT.

Auditors to be appointed to examine Official Trustee's account etc., and to report to Government.

19. (*1*) The accounts of the Official Trustee shall be audited at least once annually and at any other time if the Government so direct by the prescribed person and in the prescribed manner.

(*2*) The auditor shall examine such accounts, and shall forward to Government a statement thereof in the prescribed form, together with a report thereon and a certificate signed by him showing—

(*a*) whether the accounts contain a full and true account of everything which ought to be contained therein, and

(*b*) whether the books, which by any rules made under this Act are directed to be kept by the Official Trustee, have been duly and regularly kept, and

(*c*) whether the trust funds and securities have been duly kept and invested and deposited in the manner prescribed by this Act or any rules made thereunder;

or (as the case may be) that such accounts are deficient, or that the Official Trustee has failed to comply with this Act or the rules made thereunder, in such respects as may be specified in such certificate.

Auditor's power to summon witnesses and to call for documents.

20. (*1*) Every auditor shall have the powers of a Civil Court under the Code of Civil Procedure, 1908,

(*a*) to summon any person whose presence he may think necessary to attend him from time to time, and

(*b*) to examine any person, on oath to be by him administered, and

(*c*) to issue a commission for the examination on interrogatories or otherwise of any person, and

(*d*) to summon any person to produce any document or thing, the production of which appears to be necessary for the purposes of such audit or examination.

(*2*) Any person who when summoned, refuses, or without reasonable cause neglects to attend or to produce any document or thing or attends and refuses to be sworn, or to be examined, shall be deemed to have committed an offence within the meaning of, and punishable under, section 188 of the Indian Penal Code, and the auditor shall report every case of such refusal or neglect to Government.

Costs of audit, etc., how paid.

21. The cost of and incidental to every such audit and examination shall be determined in accodance with rules made by the Government and shall be defrayed in the prescribed manner.

Right of beneficiary to inspection and copies of accounts.

22. Every beneficiary under a trust which is being administered by the Official Trustee shall, subject to such conditions and restrictions as may be prescribed, be entitled, at all reasonable times, to inspect the accounts of such trust, and the report

and certificate of the auditor and, on payment of the prescribed fee to be furnished with copies thereof or extracts therefrom and nothing in the Indian Trusts Act, 1882, shall affect the provisions of this section.

PART VI.

MISCELLANEOUS.

Transfer to Government of accumulations in the hands of Official Trustee.

23. When any moneys payable to a beneficiary under a trust have been in the hands of any Official Trustee for a period of twelve years or upwards whether before or after the commencement of this Act in consequence of the Official Trustee having been unable to trace the person entitled to receive the same, such moneys shall be transferred in the prescribed manner to the account and credit of the Government of India:

Provided that no such moneys shall be so transferred if any suit or proceeding is pending in respect thereof in any Court.

Mode of proceeding by claimant to recover money so transferred.

24. (*1*) If any claim is made to any moneys so transferred and such claim is established to the satisfaction of the prescribed authority, the Government of India shall pay to the claimant the amount in respect of which the claim is established.

(*2*) If such claim is not established to the satisfaction of the prescribed authority, the claimant may without prejudice to his right to take any other proceedings for the recovery of such moneys, apply by petition to the High Court against the Secretary of State for India in Council, and after taking such evidence as it thinks fit, such Court shall make such order on the petition in regard to the payment of such moneys as it thinks fit and such order shall be binding on all parties to the proceedings.

(*3*) The Court may further direct by whom all or any part of the costs of such proceedings shall be paid.

Power of High Court to make orders in respect of property vested in Official Trustee.

The High Court may make such orders as it thinks fit respecting any trust property vested in the Official Trustee, or the interest or produce thereof.

Who may apply for order under Act.

26. Any order under this Act may be made, on the application of any person beneficially interested in any trust property, or of any trustee thereof.

Order of Court to have effect of a decree.

27. Any order made by a High Court under this Act shall have the same effect as a decree.

General powers of administration.

28. The official Trustee may, in addition to and not in derogation of any other powers of expenditure lawfully exercisable by him, incur expenditure—

(a) on such acts as may be necessary for the proper care and management of any property belonging to any trust administered by him; and

(b) with the sanction of the High Court on such religious, charitable and other objects and on such improvements as may be reasonable and proper in the case of such property.

Transfer of trust property by Official Trustee to original trustee or any other trustee.

29. (1) Nothing in this Act shall be deemed to prevent the transfer by the Official Trustee of any property vested in him to—

(a) the original trustee (if any); or

(b) any other lawfully appointed trustee; or

(c) any other person if the Court so directs.

(2) Upon such transfer such property shall vest in such trustee, and shall be held by him upon the same trusts as those upon which it was held prior to such transfer, and the Official Trustee shall be exempt from all liability as trustee of such property except in respect of acts done before such transfer:

Provided that, in the case of any transfer under this section, the Official Trustee shall be entitled to retain out of the property any fees leviable in accordance with the provisions of this Act.

Rules.

30. (1) The Government shall make rules for carrying into effect the objects of this Act and for regulating the proceedings of the Official Trustee in the discharge of his duties.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the accounts to be kept by the Official Trustee and the audit and inspection thereof;

(b) the safe custody, and deposit of the funds and securities which come into the hands of the Official Trustee;

(c) the remittance of the sums of money in the hands of the Official Trustee in cases in which such remittances are required;

(*d*) the statements, schedules and other documents to be submitted by the Official Trustee to Government or to any other authority and the publication of such statements, schedules or other documents;

(*e*) the realisation of the cost of preparing any such statements, schedules or other documents;

(*f*) subject to the provisions of this Act, the fees to be paid thereunder and the collection and accounting for any fees so fixed;

(*g*) the manner in which and the person by whom the costs of and incidental to any audit under the provisions of this Act are to be determined and defrayed;

(*h*) the manner in which summonses issued under the provisions of section 20 are to be served and the payment of the expenses of any persons summoned or examined under the provisions of this Act and of any expenditure incidental to such examination;

(*i*) the acceptance by the Official Trustee of trusts for religious purposes and trusts which involve the management or carrying on of business; and

(*j*) any matter in this Act directed to be prescribed.

(3) Rules made under the provisions of this section shall be published in the official Gazette, and shall thereupon have effect as if enacted in this Act.

Division of Presidency into Provinces.

31. (*1*) Notwithstanding anything in the foregoing provisions of this Act, the Governor General in Council may, by notification in the Gazette of India,—

(*a*) remove any of the territories included in the Presidency of Bengal from such Presidency and constitute the same into provinces for the purposes of this Act;

(*b*) direct that for the purposes of this Act any of the territories of any Native State in India shall be included in any Province so constituted; and

(*c*) Appoint any person qualified in accordance with the provisions of sub-section (2) of section 4, or who holds office under Government to be an Official Trustee for any such Province, to be called the Official Trustee of the Province,

and subject to the provisions of this section the following consequences shall thereupon ensue, namely:—

THE SCHEDULE.

ENACTMENTS REPEALED.

(See section 33.)

Year.	No.	Short title.	Extent of repeal.
1864 ..	XVII	The Official Trustees Act. 1864.	So much as has not already been repealed.
1890 ..	II	The probate and Administration Act, 1890.	So much of the title and preamble as relates to the Official Trustees Act, 1864, and sections 1 to 8.
1902 ..	V	The Administrators General and Official Trustees Act, 1902.	So far as it refers to the office of Official Trustee, or Deputy Official Trustee.

THE ADMINISTRATOR GENERAL'S ACT, 1913.

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 27TH FEBRUARY 1913.

ACT NO. III OF 1913.

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12. Grant of probate or letters of administration to persons appearing in the course of proceedings taken by Administrator General under sections 9, 10 and 11.

13. Grant of administration to Administrator General in certain cases.

14. Administrator General not precluded from applying for letters within one month after death.

(b) *Estates of Persons subject to the Army Act.*

15. Act not to affect Regimental Debts Act, 1893.

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SECTIONS.

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THE SCHEDULE.—ENACTMENTS REPEALED.

An Act to consolidate and amend the law relating to the office and duties of Administrator General.

WHEREAS it is expedient to consolidate and amend the law relating to the office and duties of Administrator General; It is hereby enacted as follows:—

PART I.

PRELIMINARY.

Short title, extent and commencement.

1. (*1*) This Act may be called the Administrator General's Act, 1913.

(*2*) It extends to the whole of British India, including the Sonthal Parganas and British Baluchistan, and applies also to all British and Indian subjects of His Majesty in the territories of Native States in India.

(3) It shall come into force on such date as the Governor General in Council may, by notification in the Gazette of India, direct.

Interpretation clause.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*1*) "assets" means all the property, moveable and immoveable, of a deceased person, which is chargeable with, and applicable to, the payment of his debts and legacies, or available for distribution among his heirs and next-of-kin:

(*2*) "exempted person" means an Indian Christian, a Hindu, Muhamadan, Parsi or Buddhist, or a person exempted under section 332 of the Indian Succession Act, 1865, from the operation of that Act:

(*3*) "Government" means the Governor General in Council, so far as the Act relates to the Presidency of Bengal and the Local

Governments of Madras and Bombay respectively, so far as the Act relates to those Presidencies:

(4) "Indian Christian" means a Native of India who is or in good faith claims to be of unmixed Asiatic descent, and who professes any form of the Christian religion;

(5) "Letters of Administration" includes any letters of administration, whether general or with a copy of the will annexed, or limited in time or otherwise:

(6) "next-of-kin" includes a widower or widow of a deceased person, or any other person who by law would be entitled to letters of administration in perference to a creditor or legatee of the deceased:

(7) "Official Gazette" means, in the case of the Presidency of Bengal, the Gazette of India, and in the cases of the Presidencies of Madras and Bombay, the Fort St. George and Bombay Government Gazettes, respectively:

(8) "Prescribed" means prescribed by rules under this Act:

(9) (a) "Presidency of Bengal" includes the territories for the time being under the government of the Governor of Fort William in Bengal in Council, the United Provinces of Agra and Oudh, the provinces of the Punjab, Burma, Bihar and Orissa, the Central Provinces, Assam, the North-West Frontier Province, the province of Delbi, Ajmer and Merwara, the Andaman and Nicobar Islands, and such of the territories of Native States aforesaid as the Governor General in Council may, by notification in the Gazette of India, direct:

(b) "Presidency of Bombay" includes the territories for the time being under the government of the Governor of Bombay in Council, the Province of British Baluchistan, and such of the territories of Native States aforesaid as the Governor General in Council may, by notification in the Gazette of India, direct:

(c) "Presidency of Madras" includes the territories for the time being under the government of the Governor of Fort St. George in Council, the province of Coorg, and such of the territories of Native States aforesaid as the Governor General in Council may, by notification in the Gazette of India, direct.

(*10*) "Presidency" means any of the Presidencies mentioned in clause (9).

PART II.

THE OFFICE OF ADMINISTRATOR GENERAL.

Appointment and designation of the Administrators General in the three Presidencies.

3. (*1*) In each of the Presidencies of Bengal, Madras and Bombay, the Government shall appoint an Administrator General.

(*2*) No person shall be appointed to the office of Administrator General of any of the said Presidencies who is not—

(*a*) a Barrister; or

(*b*) an Advocate, Attorney or Vakil enrolled by a High Court or

(*c*) a person holding the office of Deputy Administrator General at the commencement of this Act.

(3) The said Administrators General shall be called respectively the Administrator General of Bengal, the Administrator General of Madras, and the Administrator General of Bombay.

Appointment and powers of Deputy Administrator General.

4. The Government may appoint a Deputy or Deputies to assist the Administrator General; and any Deputy so appointed shall, subject to the control of the Government and the general or special orders of the Administrator General, be competent to discharge any of the duties and to exercise any of the powers of the Administrator General, and when discharging such duties or exercising such powers shall have the same privileges and be subject to the same liabilities as the Administrator General.

Administrator General to be a corporation sole, to have perpetual succession and official seal, and to sue and be sued in his corporate name.

5. The Administrator General shall be a corporation sole by the name of the Administrator General of the Presidency for which he is appointed and, as such Administrator General, shall have perpetual succession and an official seal, and may sue and be sued in his corporate name.

PART III.

Rights, Powers, Duties and Liabilities of the Administrator General.

(a) Grants of Letters of Administration and Probate.

As regards Administrator General High Court at Presidency town to be deemed a Court of competent jurisdiction for the purpose of granting probate or letters of administration.

6. So far as regards the Administrator General of any Presidency, the High Court at the Presidency town shall be deemed to be a Court of competent jurisdiction for the purpose of granting probate or letters of administration under any law for the time being in force wheresoever within the Presidency the estate to be administered is situate.

Administrator General entitled to letters of administration, unless granted to next-of-kin.

7. Any letters of Administration, which are granted after the commencement of this Act by the High Court at any Presidency-town, shall be granted to the Administrator General of the Presidency, unless they are granted to the next-of-kin of the deceased.

Administrator General entitled to letters of administration in preference to creditor, nonuniversal legatee or friend.

8. The Administrator General of the Presidency shall be deemed by all the Courts in the Presidency to have a right to letters of administration other than letters *pendente lite* in preference to that of—

(*a*) a creditor; or

(*b*) a legatee other than an universal legatee; or

(*c*) a friend of the deceased.

When Administrator General is to administer estates of persons other than exempted persons.

9. If any person, not being an exempted person, has died leaving within any Presidency assets exceeding the value of one thousand rupees,

and if no person to whom any Court would have jurisdiction to commit administration of such assets has, within one month after his death, applied in such Presidency for probate of his will, or for letters of administration of his estate,

the Administrator General of the Presidency in which such assets are shall, subject to any rules made by the Government, within a reasonable time after he has had notice of the death of such

person, and of his having left such assets, take such proceedings as may be necessary to obtain from the High Court at the Presidency-town letters of administration of the estate of such person.

Power to direct Administrator General to apply for administration.

10. Whenever any person has died leaving assets within the local limits of the ordinary original civil jurisdiction of the High Court at a Presidency-town, the Court, on being satisfied that danger is to be apprehended of misappropriation, deterioration or waste of such assets unless letters of administration of the estate of such person are granted, may upon the application of the Administrator General or of any person interested in such assets or in the due administration thereof, make an order, upon such terms as to indemnifying the Administrator General against costs and other expenses as the Court thinks fit, directing the Administrator General to apply for letters of administration of the estate of such person :

Provided that, in the case of an application being made under this section for letters of administration of the estate of an exempted person, the Court may refuse to grant letters of administration, if it is satisfied that such grant is unnecessory for the protection of the assets ; and in such case the Court shall make such order as to the costs of the application as it thinks fit.

Power to direct Administrator General to collect and hold assets until right of succession or administration is determined.

11. (1) Whenever any person has died leaving assets within the local limits of the ordinary original civil jurisdiction of any of the said High Courts,

and such Court is satisfied that there is no person immediately available, who is legally entitled to the succession to such assets, or that danger is to be apprehended of misappropriation, deterioration or waste of such assets, before it can be determined who may be legally entitled to the succession thereto, or whether the Administrator General is entitled to letters of administration of the estate of such deceased person,

the Court may, upon the application of the Administrator General or of any person interested in such assets, or in the due administration thereof, forthwith direct the Administrator General to collect and take possession of such assets, and to hold, deposit, realize, sell or invest the same according to the directions of the Court, and in default of any such directions according to the provisions of this Act so far as the same are applicable to such assets,

(2) Any order of the Court made under the provisions of this section shall entitle the Administrator General,

(*a*) to maintain any suit or proceeding for the recovery of such assets, and

(*b*) if he thinks fit, to apply for letters of administration of the estate of such deceased person, and

(*c*) to retain out of the assets of the estate any fees chargeable under rules made under this Act, and to reimburse himself for all payments made by him in respect of such assets which a private administrator might lawfully have made.

Grant of probate or letters of administration to person appearing in the course of proceedings taken by Administrator General under sections 9, 10 and 11.

12. If, in the course of proceedings to obtain letters of administration under the provisions of section 9, section 10, or section 11, any person appears and establishes his claim—

(*a*) to probate of the will of the deceased ; or

(*b*) to letters of administration as next-of-kin of the deceased, and give such security as may be required of him by law,

the Court shall grant probate of the will or letters of administration accordingly, and shall award to the Administrator General the costs of any proceedings taken by him, under those sections to be paid out of the estate as part of the testamentary or intestate expenses thereof.

Grant of administration to Administrator General in certain cases.

13. If, in the course of proceedings to obtain letters of administration under the provisions of section 9, section 10 or section 11, no person appears and establishes his claim to probate of a will, or to a grant of letters of administration as next-of-kin of the deceased, within such period as to the Court seems reasonable,

or if a person who has established his claim to a grant of letters of administration as next-of-kin of the deceased fails to give such security as may be required of him by law,

the Court may grant letters of administration to the Administrator General.

Administrator General not precluded from applying for letters within one month after death.

14. Nothing in this Act shall be deemed to preclude the Adminstrator General from applying to the Court for letters of administration in any case within the period of one month from the death of the deceased.

(b) Estates of persons subject to the Army Act.

Act not to affect Regimental Debts Act 1893.

15. Nothing in this Act shall be deemed to affect the provisions of the Regimental Debts Act, 1893.

Letters of administration not necessary in respect of small estates administered by Administrator General in accordance with the Regimental Debts Act, 1893.

16. It shall not be necessary for the Administrator General to take out letters of administration of the estate of any deceased person which is being administered by him in accordance with the provisions of the Regimental Debts Act, 1893, if the value of such estate does not on the date when such administration is committed to him exceed rupees one thousand, but he shall have the same power in regard to such estate as he would have had if letters of administration had been granted to him.

Power to grant Administrator General letters limited to purpose of dealings with asset in accordance with the Regimental Debts Act, 1893.

17. If the Administrator General applies, in accordance with the provisions of the Regimental Debts Act, 1893, for letters of administration of the estate of any person subject to the Army Act, the Court may grant to him letters of administration limited to the purpose of dealing with such estate in accordance with the provisions of the Regimental Debts Act, 1893.

(c) Revocation of Grants.

Recall of Administrator General's administration and grant of probate, etc., to executor or next-of-kin.

18. If an executor or next-of-kin of the deceased, who has not been personally served with a citation or who has not had notice thereof in time to appear pursuant thereto establishes to the satisfaction of the Court a claim to probate of a will or to letters of administration in preference to the Administrator General, any letters of administration granted in accordance with the provisions of this Act to the Administrator General may be revoked, and probate or letters of administration may be grantad to such executor or next-of-kin as the case may be :

Provided that no letters of administration granted to the Administrator General shall be revoked for the cause aforesaid, except in cases in which a will of the deceased is proved in the Presidency, unless the application for that purpose is made within six months after the grant to the Administrator General and the Court is satisfied that there has been no unreasonable delay in mak-

ing the application, or in transmitting the authority under which the application is made.

Cost of obtaining administration, etc., may, on revocation, be ordered to be paid to Administrator General out of assests

19. If any letters of administration granted to the Administrator General in accordance with the provisions of this Act are revoked, the Court may order the costs of obtaining such letters of administration, and the whole or any part of any fees which would otherwise have been payable under this Act, together with the costs of the Administrator General in any proceedings taken to obtain such revocation, to be paid to or retained by the Administrator General out of the estate :

Provided that nothing in this section shall affect the provisions of clause (c) of sub-section (2) of section 11.

After revocation, letters granted to Administrator General to be deemed as to him to have been voidable only.

20. If any letters of administration granted to the Administrator General in accordance with the provisions of of this Act are revoked, the same shall, so far as regards the Administrator General and all persons acting under his authority in pursuance thereof, be deemed to have been only voidable, except as to any act done by any such Administrator General or other person as aforesaid, after notice of a will or of any other fact which would render such letters void :

Provided that no notice of a will or of any other fact which would render any such letters void shall affect the Administrator General or any person acting under his authority in pursuance of such letters unless, within the period of one month from the time of giving such notice, proceedings are commenced to prove the will, or to cause the letters to be revoked, and such proceedings are prosecuted without unreasonable delay.

Payments made by Administrator General prior to revocation.

21. If any letters of administration granted to the Administrator General in accordance with the provisions of this Act are revoked, upon the grant of probate of a will, or upon the grant of letters of administration with a copy of the will annexed, all payments made or acts done by or under the authority of the Administrator General in pursuance of such letters of administration, prior to the revocation, which would have been valid under any letters of administration lawfully granted to him wlth a copy of such will annexed shall be deemed valid notwithstanding such revocation.

(*d*) *General.*

Administrator General's petition for grant of letters of administration.

22. Whenever any Administrator General applies for letters of administration in accordance with the provisions of this Act, it shall be sufficient if the petition required to be presented for the grant of such letters states,

(*i*) the time and place of the death of the deceased to the best of the knowledge and belief of the petitioner,

(*ii*) the names and addresses of the surviving next-of-kin of the deceased if known,

(*iii*) the particulars and value of the assets likely to come into the hands of the petitioner,

(*iv*) particulars of the liabilities of the state if known.

Probates or letters to be granted to Administrator General by his name of office, and powers of that officer in cases in which probate or letters of administration have been granted to the Ecclesiastical Registrar.

23. (1) All probates or letters of administration granted to any Administrator General shall be granted to him by that name, and all probates or letters of administration heretofore granted to the Ecclesiastical Registrar, or to the Administrator General of any Presidency shall authorise the Administrator General of the same Presidency to act as executor or administrator, as the case may be of the estate to which such probate or letters relate.

(2) All probates and letters of administration granted to the Ecclesiastical Registrar of any of the late Supreme Courts shall have the same effect in all respects as to any act hereafter done or required to be done under this Act as if they had been granted to the Administrator General.

Effect of probate or letters granted to Administrator General.

24. Probate or letters of administration granted by the High Court at any Presidency town to the Administrator General of any Presidency shall have effect over all the assests of the deceased throughout such Presidency, and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding such assests, and shall afford full indemnity to all debtors paying their debts and all persons delivering up such assets to such Administrator General :

Provided that the High Court may direct, by its grant, that such probate or letters of administration shall have like effect throughout one or more of the other Presidencies.

Whenever a grant is made by a High Court to the Administrator General with such effect as last aforesaid, the Court shall send to the other High Court a certificate that such grant has been made, and such certificate shall be filed by the Courts receiving the same.

Transfer by private executor or administrator of interest under probate or letters.

25. (1) Any private executor or administrator may, with the previous consent of the Administrator General of the Presidency in which any of the assets of the estate, in respect of which such executor or administrator has obtained probate or letters of administration, are situate, by an instrument in writing under his hand notified in the official Gazette, transfer the assets of the estate vested in him by virtue of such probate or letters to the Administrator General by that name or any other sufficient description.

(2) As from the date of such transfer the transferor shall be exempt from all liability as such executor or administrator, as the case may be, except in respect of acts done before the date of such transfer, and the Administrator General shall have the rights which he would have had, and be subject to the liabilities to which he would have been subject, if the probate or letters of administration, as the case may be, had been granted to him by that name at the date of such transfer.

Distribution of assets.

26. (*1*) When the Administrator General has given the prescribed notice for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets or any part thereof in discharge of such lawful claims as he has notice of.

(2) He shall not be liable for the assets distributed to any person of whose claim he had not notice at the time of such distribution.

(3) No notice of any claim which has been sent in and has been rejected or disallowed in part by the Administrator General shall affect him unless proceedings to enforce such claim are commenced within one month after notice of the rejection or disallowance of such claim has been given in the prescribed manner and unless such proceedings are prosecuted without unreasonable delay.

(4) Nothing in this section shall prejudice the right of any creditor or other claimant to follow the assets or any part thereof in the hands of the persons who may have received the same respectively.

(5) In computing the period of limitation for any suit, appeal or application under the provisions of any law for the time being in force, the period between the date of submission of the claim of a creditor to the Administrator General and the date of the final decision of the Administrator General on such claim shall be excluded.

Appointment of official Trustee as trustee of assets after completion of administration.

27. (1) When the Administrator General has, so far as may be, dircharged all the liabilities of an estate administered by him, he shall notify the fact in the official Gazette, and he may, by an instrument in writing, with the consent of the Official Trustee and subject to any rules made by the Government, appoint the Official Trustee to be the trustee of any assets then remaining in his hands.

(2) Upon such appointment such assets shall vest in the Official Trustee as if he had been appointed trustee in accordance with the provisions of the Official Trustees Act, 1913, and shall be held by him apon the same trusts as the same were held immediately before such appointment.

Power for High Court to give directions regarding administration of estate.

28- (1) The High Court at the Presidency Town may, on application made to it, give to the Administrator General of the Presidency any general or special directions as to any estate in his charge or inregard to the administration of any such estate.

(2) Applications under sub-section (*1*) may be made by the Administrator General or any person interested in the assets or in the due administration thereof.

No security nor oath to be required from Administrator General.

29. (*1*) No Administrator General shall be required by any Court to enter into any administration-bond, or to give other security to the Court, on the grant of any letters of administration to him by that name.

Manner in which petitions to be verified by Administrator General and his Deputy.

(2) No Administrator General or Deputy Administrator General shall be required to verify, otherwise than by his signature, any petition presented by him under the provisions of this Act, and, if the facts stated in any such petition are not within the Administrator General's own personal knowledge, the petition may be subscribed and verified by any person competent to make the verification.

(3) The entry of the Administrator General by that name in the books of a Company shall not constitute notice of a trust, and a Company shall not be entitled to object to enter the name of the Administrator General on its register by reason only that the Administrator General is a corporation and in dealing with assets the fact that the person dealt with is the Administrator General shall not of itself constitute notice of a trust.

Entry of Administrator-General not to constitute notice of a trust.

30. The Administrator General may, whenever he desires, for the purposes of this Act, to satisfy himself regarding any question of fact, examine upon oath (which he is hereby authorised to administer) any person who is willing to be so examined by him regarding such question.

Power to examine on oath.

(e) *Grant of Certificates.*

31. Whenever any person has died leaving assets within any Presidency, and the Administrator General of such Presidency is satisfied that such assets, excluding any sum of money deposited in a Government Savings Bank, or in any Provident Fund to which the provisions of the Provident Funds Act, 1897, apply, did not at the date of death exceed in the whole one thousand rupees—in value, he may, after the lapse of one month from the death if he thinks fit, or before the lapse of the said month if he is requested so to do by writing under the hand of the executor or the widow or other person entitled to administer the estate of the deceased, grant to any person, claiming otherwise than as a creditor to be interested in such assets, or in the due administration thereof, a certificate under his hand entitling the claimant to receive the assets therein mentioned left by the deceased, within the Presidency to a value not exceeding in the whole one thousand rupees:

In what case Administrator General may grant certificate.

Provided that no certificate shall be granted under this section—

(*i*) where probate of the deceased's will or letters of administration of his estate has or have been granted, or

(*ii*) in respect of any sum of money deposited in a Government Savings Bank or in any Provident Fund to which the provisions of the Provident Funds Act, 1897, apply.

Grant of certificate to creditors and power to take charge of certain estates.

32. If, in cases falling within section 31, no person claiming to be interested otherwise than as a creditor in such assets or in the due administration thereof obtains, within three months of the death of the deceased a certificate from the Administrator General under the same section, or probate of a will or letters of administration of the estate of the deceased, and such deceased was not an exempted person, or was an exempted person who has left assets within the ordinary original civil jurisdiction of the High Court, or within any area notified by the Government in this behalf in the official Gazette, the Administrator General may administer the estate without letters of administration, in the same manner as if such letters had been granted to him;

and if he neglects or refuses to administer such estate, he shall, upon the application of a creditor, grant a certificate to him in the same manner as if he were interested in such assets otherwise than as a creditor,

and such certificate shall have the same effect as a certificate granted under the provisions of section 31, and shall be subject to all the provisions of this Act which are applicable to such certificate:

Provided that the Administrator General may, before granting such certificate, if he thinks fit, require the creditor to give reasonable security for the due administration of the estate of the deceased.

Administrator General not bound to grant certificate unless satisfied of claimant's title etc.

33. The Administrator General shall not be bound to grant any certificate under section 31 or section 32, unless he is satisfied of the title of the claimant and of the value of the assets left by the deceased within the presidency, either by the oath of the claimant, or by such other evidence as he requires.

Effect of certificate.

34. The holder of a certificate granted in accordance with the provisions of section 31 or section 32 shall have in respect of the assets specified in such certificate the same powers and duties, and be subject to the same liabilities as he would have had or been subject to if letters of administration had been granted to him:

Provided that nothing in this section shall be deemed to require any person holding such certificate,

(a) to file accounts or inventories of the assets of the deceased before any Court or other authority, or

(b) save as provided in section 32 to give any bond for the due administration of the estate.

Revocation of certificate.

35. The Administrator General may revoke a certificate granted under the provisions of section 31 or section 32 on any of the following grounds, namely:—

(i) that the certificate was obtained by fraud or misrepresentation made to him,

(ii) that the certificate was obtained by means of an untrue allegation of a fact essential in law to justify the grant though such allegation was made in ignorance or inadvertently.

Surrender of revoked certificate.

36. (1) When a certificate is revoked in accordance with the provisions of section 35, the holder thereof shall, on the requisition of the Administrator General, deliver it up to such Administrator General but shall not be entitled to the refund of any fee paid thereon.

(2) If such person wilfully and without reasonable cause omits to deliver up the certificate, he shall be punishable with imprisonment which may extend to three months, or, with fine which may extend to one thousand rupees, or with both.

Administrator General not bound to take out administration on account of assets for which he has granted certificate.

37. The Administrator General shall not be bound to take out letters of administration of the estate of any deceased person on account of the assets in respect of which he grants any certificate, under section 31 or section 32, but he may do so if he revokes such certificate under section 35 or ascertains that the value of the estate exceeded one thousand rupees.

Transfer of certain assets from British India to executor or administrator in country of domicile for distribution.

38. Where a person not having his domicile in British India has died leaving assets in any Presidency and in the country in which he had his domicile at the time of his death, and proceedings for the administration of his estate with respect to assets in any such Presidency have been taken under section 31 or section 32, and there has been a grant of administration in the country of domicile with respect to the assets in that country,

the holder of the certificate granted under section 31 or section 32, or the Administrator General, as the case may be, after having given the prescribed notice for creditors and others to send in to him their claims against the estate of the deceased, and after having discharged, at the expiration of the time therein named, such lawful claims as he has notice of, may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of British India who are entitled thereto, transfer, with the consent of the executor or administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.

(*f*) *Liability*.

Liability of Government.

39. (*1*) The revenues of the Government of India shall be liable to make good all sums required to discharge any liability which the Administrator General, if he were a private administrator, would be personally liable to discharge, except when the liability is one to which neither the Administrator General nor any of his officers has in any way contributed, or which neither he nor any of his officers could, by the exercise of reasonable diligence have averted, and in either of those cases the Administrator General shall not, nor shall the revenues of the Government of India, be subject to any liability.

(*2*) Nothing in sub section (*1*) shall be deemed to render the Government of India or the Administrator General liable for anything done before the commencement of this Act, by or under the authority of the Administrator General.

Creditors' suits against Administrator General.

40. (*1*) If any suit be brought by a creditor against any Administrator General, such creditor shall be liable to pay the costs of the suit unless he proves that not less than one month previous to the institution of the suit he had applied in writing to the Administrator General, stating the amount and other particulars of his claim and had given such evidence in support thereof as, in the circumstances of the case, the Administrator General was reasonably entitled to require.

(*2*) If any such suit is decreed in favour of the creditor, he shall, nevertheless, unless he is a secured creditor, be only entitled to payment out of the assets of the deceased equally and rateably with the other creditors.

Notice of suit not required in certain cases.

41. Nothing in section 80 of the Code of Civil Procedure, 1908, shall apply to any suit against the Administrator General in which no relief is claimed against him personally.

PART IV.

FEES.

Fees.

42. (*1*) There shall be charged in respect of the duties of the Administrator General such fees, whether by way of percentage or otherwise, as may be prescribed by the Government:

Provided that, in the case of any estate, the administration of which has been committed to the Administrator-General before the commencement of this Act, the fees prescribed under this section shall not exceed the fees leviable in respect of such estate under the Administrator General's Act, 1874, as subsequently amended:

Provided further that, in respect of the duties of the Administrator General under the Regimental Debts Act, 1893, the fees prescribed in this section shall be determined in accordance with the provisions of that Act.

(2) The fees under this section may be at different rates for different estates or classes of estates or for different duties, and shall so far as may be, be arranged so as to produce an amount sufficient to discharge the salaries and all other expenses incidental to the working of this Act (including such sum as Government may determine to be required to insure the revenues of the Government of India against loss under this Act).

Disposal of fees.

43. (*1*) Any expenses which might be retained or paid out of any estate in the charge of the Administrator General, if he were a private administrator of such estate, shall be so retained or paid and the fees prescribed under section 42 shall be retained or paid in like manner as and in addition to such expenses.

(2) The Administrator General shall transfer and pay to such authority, in such manner and at such time as the Government may prescribe, all fees received by him under this Act, and the same shall be carried to the account and credit of the Government of India.

PART V.

AUDIT OF THE ADMINISTRATOR GENERAL'S ACCOUNTS.

Audit of Administrator General's accounts.

44. The accounts of every Administrator General shall be audited at least once annually, and at any other time if the Government so direct, by the prescribed person and in the prescribed manner.

Auditors to examine accounts and report to Government.

45. The auditors shall examine the accounts and forward to the Government a statement thereof in the prescribed form, together with a report thereon and a certificate signed by them showing—

(a) whether they contain a full and true account of everything which ought to be inserted therein,

(b) whether the books which by any rules made under this Act are directed to be kept by the Administrator General, have been duly and regularly kept, and

(c) whether the assets and securities have been duly kept and invested and deposited in the manner prescribed by this Act, or by any rules made thereunder,

or (as the case may be) that such accounts are deficient, or that the Administrator General has failed to comply with this Act or the rules made thereunder, in such respects as may be specified in such certificate.

Power of auditors to summon and examine witnesses, and to call for documents.

46. (1) Every auditor shall have the powers of a civil Court under the Code of Civil Procedure, 1908,

(a) to summon any person whose presence he thinks necessary to attend him from time to time; and

(b) to examine any person on oath to be by him administered; and

(c) to issue a commission for the examination on interrogatories or otherwise of any person; and

(d) to summon any person to produce any document or thing the production of which appears to be necessary for the purpose of such audit or examination.

(2) Any person who when summoned refuses, or without reasonable cause, neglects to attend or to produce any document or thing or attends and refuses to be sworn, or to be examined, shall be deemed to have committed an offence within the meaning of, and

punishable under, section 188 of the Indian Penal Code, and the auditor shall report every case of such refusal or neglect to Government.

Costs of audit, etc.

47. The costs of and incidental to such audit and examination shall be determined in accordance with rules made by the Government, and shall be defrayed in the prescribed manner.

PART VI.

MISCELLANEOUS.

General powers of Administration.

48. The Administrator General may, in addition to, and not in derogation of, any other powers of expenditure lawfully exerciseable by him, incur expenditure—

(a) on such acts as may be necessary for the proper care and management of any property belonging to any estate in his charge; and

(b) with the sanction of the High Court at the Presidency-town on such religious, charitable and other objects, and on such improvements, as may be reasonable and proper in the case of such property.

Power of person beneficially interested to inspect Administrator General's accounts, etc., and take copies.

49. Any person interested in the administration of any estate which is in the charge of the Administrator General shall, subject to such conditions and restrictions as may be prescribed, be entitled at all reasonable times to inspect the accounts relating to such estate and the reports and certificates of the auditor, and on payment of the prescribed fee, to copies thereof and extracts therefrom.

Power to make rules.

50. (1) The Government shall make rules for carrying into effect the objects of this Act and for regulating the proceedings of the Administrator General.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the accounts to be kept by the Administrator General and the audit and inspection thereof,

(b) the safe custody, deposit and investment of assets and securities which come into the hands of the Administrator General,

(*c*) the remittance of sums of money in the hands of the Administrator General, in cases in which such remittances are required,

(*d*) subject to the provisions of this Act, the fees to be paid under this Act, and the collection and accounting for any such fees,

(*e*) the statements, schedules and other documents to be submitted to the Government or to any other authority by the Administrator General, and the publication of such statements, schedules or other documents,

(*f*) the realization of the costs of preparing any such statements, schedules or other such documents,

(*g*) the manner in which and the person by whom the costs of and incidental to any audit under the provisions of this Act are to be determined and defrayed,

(*h*) the manner in which summonses issued under the provisions of section 46 are to be served and the payment of the expenses of any persons summoned or examined under the provisions of this Act and of any expenditure incidental to such examination, and

(*i*) any matter in this Act directed to be prescribed.

(*3*) All rules made under this Act shall be published in the official Gazette and, on such publication, shall have effect as if enacted in this Act.

False evidence.

51. Whoever, during any examination authorised by this Act, makes upon oath a statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed to have intentionally given false evidence in a stage of a judicial proceeding.

Assets unclaimed for twelve years to be transferred to Government.

52. All assets in the charge of the Administrator General which have been in his custody for a period of twelve years or upwards whether before or after the commencement of this Act without any application for payment thereof having been made and granted by him shall be transferred, in the prescribed manner, to the account and credit of the Government of India:

Provided that this section shall not authorise the transfer of any such assets as aforesaid, if any suit or proceeding is pending in respect thereof in any Court.

Mode of proceeding by claimant to recover principal money so transferred.

53. (1) If any claim is hereafter made to any part of the assets transferred to the account and credit of the Government of India under the provisions of this Act, or any Act hereby repealed, and if such claim is established to the satisfaction of the prescribed authority, the Government of India shall pay to the claimant the amount of the principal so transferred to its account and credit or so much thereof as appears to be due to the claimant.

(2) If the claim is not established to the satisfaction of the prescribed authority, the claimant may, without prejudice to his right to take any other proceedings for the recovery of such assets, apply by petition to the High Court at the Presidency-town against the Secretary of State for India in Council, and such court, after taking such evidence as it thinks fit, shall make such order in regard to the payment of the whole or any part of the said principal sum as it thinks fit, and such order shall be binding on all parties to the proceeding.

(3) The Court may further direct by whom the whole or any part of the cost of each party shall be paid.

District judge in certain cases to take charge of property of deceased persons, and to report to Administrator General.

54. (1) Whenever any person, other than an exempted person, dies leaving assets within the limits of the jurisdiction of a District judge, the District judge shall report the circumstance without delay to the Administrator General of the Presidency, stating the following particulars so far as they may be known to him:—

(a) the amount and nature of the assets,

(b) whether are not the deceased left a will and, if so, in whose custody it is,

(c) the names and addresses of the surviving next-of-kin of the deceased,

and on the lapse of one month from the date of the death,

(d) whether or not any one has applied for probate of the will of the deceased or letters of administration of his estate.

(2) The District Judge shall retain the assets under his charge or appoint an officer under the provisions of section 239 of the Indian Succession Act, 1865, to take and keep possession of the same until the Administrator General has obtained letters of administration, or until some other person has obtained probate of such letters or a certificate from the Administrator General under the

provisions of this Act, when the assets shall be delivered over to the holder of such probate, letters of administration or certificate:

Provided that the District Judge may, if he thinks fit, sell any assets which are subject to speedy and natural decay, or which for any other sufficient cause he thinks should be sold, and he shall thereupon credit the proceeds of such sale to the estate.

(*3*) The District Judge may cause to be paid out of any assets of which he or such officer has charge, or out of the proceeds of such assets or of any part thereof, such sums as may appear to him to be necessary for all or any of the following purposes, namely :—

(*a*) the payment of the expenses of the funeral of the deceased and of obtaining probate of his will or letters of administration of his estate or a certificate under this Act,

(*b*) the payment of wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan or domestic servant,

(*c*) the relief of the immediate necessities of the family of the deceased, and

(*d*) such acts as may be necessary for the proper care and management of the assets left by the deceased,

and nothing in section 279, section 280 or section 281 of the Indian Succession Act, 1865, or in any other law for the time being in force with respect to rights of priority of creditors of deceased persons shall be held to affect the validity of any payment so caused to be made.

Succession Act and Companies Act not to affect Administrator General, and saving of provisions of Presidency Police Acts as to petty estates.

55. (*1*) Nothing contained in the Indian Succession Act, 1865, or the Indian Companies Act, 1882, shall be taken to supersede or affect the rights, duties and privileges of any Administrator General.

(2) Nothing contained in the Indian Succession Act, 1865, or in this Act, shall be deemed to affect, or to have affected, any law for the time being in force relating to the moveable property under two hundred rupees in value of persons dying intestate within any of the Presidency-towns or in the town of Rangoon, which shall be or has been taken charge of by the police for the purpose of safe custody.

Order of Court to be equivalent to decree.

56. Any order made under this Act by any Court shall have the same effect as a decree.

Provision for administration by Consular Officer in case of death in certain circumstances of foreign subject.

57. Notwithstanding anything in this Act, or in any other law for the time being in force, the Governor General in Council may, by general or special order, direct, that, where a subject of a foreign State dies in British India, and it appears that there is no one in British India, other than the Administrator General, entitled to apply to a Court of competent jurisdiction for letters of administration of the estate of the deceased, letters of administration shall, on the application to such Court of any Consular Officer of such foreign State, be granted to such Consular Officer on such terms and conditions as the Court may, subject to any rules made in this behalf by the Governor General in Council by notification in the Gazette of India, think fit to impose.

Division of Presidency into Provinces.

58. (1) Notwithstanding anything in the foregoing provisions of this Act, the Governor General in Council may, by notification in the Gazette of India,—

(a) remove any of the territories included in the presidency, of Bengal from such presidency, and constitute the same into provinces for the purposes of this Act;

(b) direct that for the purposes of this Act any of the territories of any Native State in India shall be included in any province so constituted; and

(c) appoint any person qualified in accordance with the provisions of sub-section (2) of section 3, or who holds office under Government to be an Administrator General for any such Province to be called the Administrator General of the Province,

and, subject to the provisions of this section, the following consequences shall thereupon ensue, namely:—

(i) the Administrator General of a Province shall by that name have the like rights, powers, privileges and liabilities, and perform the like duties, in the Province as the Administrator General of the Presidency within which such territories were included had and performed as Administrator General therein and shall be deemed to be his successor in office:

(ii) the powers and duties of the Government under this Act shall, as regards the Province, be excercised and discharged by the Governor General in Council or by

such Local Government as the Governor-General in Council may, by notification in the Gazette of India, appoint in this behalf; and the Gazette of the Government exercising and discharging such powers and duties shall be the official Gazette of the Province for the purposes of this Act:

(iii) the powers and duties assigned by the foregoing provisions of this Act to the High Court shall be exercised and discharged in respect of such province by such Court as the Governor General in Council may, by notification in the Gazette of India, appoint in this behalf; and probate or letters of administration granted to the Administrator General of the Province, by the Court so appointed shall have the same effect throughout the Province, or, if the Court so directs, throughout the Presidencies of Bengal, Bombay and Madras, or any part thereof, as probate or letters of administration granted to the Administrator General by the High Court at a Presidency-town would or might have had:

(iv) in the foregoing provisions of this Act the word "Presidency" shall be deemed to include a Province, and the expression "Presidency-town" the place of sitting of the Court appointed by the Governor General in Council under clause *(iii)* of this sub-section:

(v) generally, the provisions of the foregoing sections of this Act with respect to the High Court at a Presidency-town and the provisions of those sections or of any other enactment with respect to the Administrator General of a Presidency shall, in relation to a province be construed, so far as may be, to apply to the Court and Administrator General, respectively, appointed for the Province under this section.

(2) Any proceeding which was commenced before the publication of the notification constituting the Province and, to or in which the Administrator General of any Presidency within which any of the territories constituted into a Province were situate was a party or was otherwise concerned, shall be continued as if the notification had not been published.

(3) If, by reason of the constitution of Provinces for the purposes of this Act, it appears to the Governor General in Council

that any property vested in the Administrator General of any Presidency should be vested in the Administrator General of a province he may direct that the property shall be so vested, and thereupon it shall vest in the Administrator General of the Province, as fully and effectually for the purposes of this Act as if probate or letters of administration had been granted to him originally.

(4) If in accordance with the provisions of this section territories have been removed from the Presidency of Bengal and constituted a Province for the purposes of this Act, the Governor General in Council may, by notification in the Gazette of India, direct that as regards the Presidency of Bengal excluding the territories so removed, the powers and duties of the Government under this Act shall be exercised and discharged by the Local Government of Bengal, and that the official Gazette shall be the Calcutta Gazette.

(5) Upon the rescission of a notification constituting a Province under sub-section (1), the territories comprised therein shall again form part of the Presidency within which they were originally included, the office of Administrator General of the Province shall determine and all properties vested in and all proceedings by or against such Administrator General pending at the date of the rescission shall vest in and be carried on by or against such Administrator General or Administrators General as the Governor-General in Council may direct.

Saving of provisions of Indian Registration Act 1908.

59. Nothing in this Act shall be deemed to affect the provisions of the Indian Registration Act, 1908.

Repeals.

60. The enactments specified in the Schedule are hereby repealed to the extent specified in the third column thereof;

Provided that any administration, by or in pursuance of any Act hereby repealed, committed to any Administrator General at the commencement of this Act shall be deemed to be committed to the Administrator General under this Act.

THE SCHEDULE.

ENACTMENTS REPEALED.

(*See Section 60.*)

Number and year.	Short title.	Extent of repeal.
II of 1874 ..	The Administrator General's Act, 1874.	So much as has not been repealed.
IX of 1881..	The Administrator General's Act, 1881.	Ditto.
II of 1890 ..	The Probate and Administration Act, 1890.	So much of the Title and Preamble as relates to the Administrator General's Act, 1874 and sections 10 to 15.
XII of 1891 .	The Amending Act, 1891.	So much as relates to Act II of 1874.
VII of 1901 .	The Native Christian Administration of Estates Act, 1901.	In the Preamble the words "to exempt them from . . . are exempted" and section 4.
V of 1902 ..	The Administrators General and Official Trustees Act, 1902.	So far as it relates to Administrators General and Deputy Administrators General.

THE SIR CURRIMBHOY EBRAHIM BARONETCY ACT, 1913.

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 27TH FEBRUARY 1913.

ACT NO. IV OF 1913.

An Act for settling certain properties belonging to Sir Currimbhoy Ebrahim, Baronet, so as to accompany and support the title and dignity of a Baronet lately conferred on him by His Majesty King George V to hold to him and the heirs male of his body lawfully begotten and to be begotten, and for other purposes connected therewith.

WHEREAS by Letters Patent KING GEORGE V by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King Defender of the Faith, Dated at Westminister the 20th day of July 1911 in the First Year of His Reign and by Warrant under the King's Sign Manual His said Majesty made known that He of His Special Grace certain

knowledge and mere motion had erected appointed and created His trusty and well-beloved Sir Currimbhoy Ebrahim of Bombay Knight to the dignity state and degree of a BARONET and him the said Sir Currimbhoy Ebrahim for himself his heirs and successors he did erect appoint and create a Baronet of the United Kingdom of Great Britain and Ireland by the said Letters Patent to hold the said dignity state and degree of Baronet unto him the said Sir Currimbhoy Ebrahim and the heirs male of his body lawfully begotten and to be begotten AND WHEREAS the said Sir Currimbhoy Ebrahim is desirous of settling in perpetuity such property on himself and the heirs male of his body who may succeed to the title of Baronet canferred by the said Letters Patent as shall be adequate to support the dignity of the title conferred on him and them as aforesaid AND WHEREAS the said Sir Currimbhoy Ebrahim is seized of and otherwise well and sufficiently entitled to the hereditaments described in Part I of the First Schedule hereunder written situate in the Island of Bombay and the hereditaments described in Part II of the said First Schedule situate at Poona in the Presidency of Bombay AND WHEREAS the hereditaments particularly described in the Second Schedule hereunder written were respectively by the several leases particularly specified in the Third Schedule hereunder written demised unto the said Sir Currimbhoy Ebrahim his heirs executors administrators and assigns with the appurtenances thereof respectively To Hold the same unto the said Sir Currimbhoy Ebrahim his heirs executors administrators and assigns from the respective days therein respectively mentioned for the respective terms thereby granted subject to the payment of the rents thereby respectively reserved and the performance and observance of the covenants on the part of the Lessee and conditions therein respectively contained AND WHEREAS the said Sir Currimbhoy Ebrahim is desirous of settling the said hereditaments and premises particularly described in the First and Second Schedules hereunder written (all which are assessed to be of the aggregate market value of Rupees (20,00,000) Twenty Lacs UPON the trusts and for the purposes hereinafter declared and contained concerning the same premises AND WHEREAS the said Sir Currimbhoy Ebrahim is desirous that heirs male of his body to whom the said title of Baronet conferred by the said Letters Patent shall descend shall at the time of such descent upon them respectively take and bear the name of "Currimbhoy Ebrahim" in lieu of any other name or names whatever which they respectively may bear at the time of such descent on them respectively AND he is also desirous that the Accountant General, Bombay, the

Collector of Bombay, the Chief Presidency Magistrate of Bombay all for the time being and the person in the actual enjoyment of the title of Baronet conferred by the said Letters Patent for the time being shall be the Trustees of the said hereditaments and premises and be likewise the Trustees for carrying into execution the general purposes and powers and provisions of this Act with relation to the said hereditaments and premises AND WHEREAS the said Sir Currimbhoy Ebrahim is desirous of settling the said hereditaments and premises so intended to be settled by him as aforesaid for the purposes of supporting the dignity of the said Baronetcy upon the trusts and for the purposes hereinafter limited and declared concerning the same AND WHEREAS it is expedient that the said trusts should be declared and the said purposes should be effected by an Act of the Council of the Governor General for making laws and regulations. It is hereby enacted as follows:

Short tittle

1. This Act may be called "The Sir Currimbhoy Ebrahim Baronetcy Act, 1913."

In corporation of Trustees.

2. Arthur Montagu Brigstocke, Esq., the Accountant General of Bombay, Edward Little Sale, Esquire, the Collector of Bombay, Arthur Henry Southcote Aston, Esqr., the Chief Presidency Magistrate of Bombay and the said Sir Currimbhoy Ebrahim, Baronet and their successors, the Accountant General of Bombay, the Collector of Bombay, the Chief Presidency Magistrate of Bombay, all for the time being and the heir male of the body of the said Sir Currimbhoy Ebrahim to whom the said tittle and dignity of Baronet conferred by the said Letters Patent shall for the time being descend shall be and they are hereby created a Corporation with prepetual succession and a common seal under the style and title of "The trustees of the Sir Currimbhoy Ebrahim Baronetcy" and the said Arthur Montagu Brigstocke, Esqr, Edward Little Sale, Esqr, Arthur Henry Southcote Aston, Sqr., and Sir Currimbhoy Ebrahim, Bart and their said successors (hereinafter styled "the Corporation") shall be and they are hereby constituted as such Coporation the Trustees for executing the trusts powers and purposes of this Act.

Heirs of Sir Currimbhoy Ebrahim to take his name

3. The heirs male of the body of the said Sir Currimbhoy Ebrahim to whom the said title and dignity shall descend pursuant to the limitations of the Letters Patent whereby the said title and dignity have been granted shall take upon themselves respectively the names of "Currimbhoy Ebrahim" in lieu and place of any other name or names whatever; and such heirs male severally

and successively shall be called by the names of "Currimbhoy Ebrahim" and by these names shall name style and write themselves repectievely upon all occasions whatever.

Devolution of interest where beneficiary refuses, neglects or discontinues to use the names "Currimbhoy Ebrahim"

4. In case any person to whom for the time being the said title of Baronet shall have descended shall for the space of one whole year thereafter or being then under age shall for the space of one whole year after he shall attain the age of eighteen years refuse or neglect to use the names of "Currimbhoy Ebrahim" as hereinbefore enacted or in case any such person having so used these names shall for the space of one whole year discontinue to use the said names then in any or either of the said cases the estate or interest in the said hereditaments and premises hereby settled and in the hereditaments and moneys which shall hereafter become vested in the said Corporation by virtue of this Act upon the trusts and for the purposes herein declared and contained, of the person who shall so refuse or neglect to use are having used shall so discontinue to use the said names shall during the remainder of his natural life be suspended and that during any and every such suspension the benefits and trusts hereby created for the heir male of the body of the said Sir Currimbhoy Ebrahim who shall use these names shall devolve on and belong to the heir male of the body of the said Sir Currimbhoy Ebrahim who would have succeeded to the said title of Baronet conferred by the said Letters Patent on the said Sir Currimbhoy Ebrahim in case the heir male of the body of the said Sir Currimbhoy Ebrahim so refusing or neglecting to use or discontinuing to use the said name had departed this life ; and if there shall not be at such time any such male heir of the body of the said Sir Currimbhoy Ebrahim then the hereditaments and premises hereby settled as also the hereditaments and moneys, which shall hereafter become vested in the said Corporation by virtue of this Act shall be retained by the said Corporation and accumulated for the benefit of the male issue of the said Baronet that may subsequently be born and succeed to the said title and in default of any such male issue the whole of the said property shall devolve upon such person as would be entitled to the same if there had been a total failure of issue male of the said Sir Currimbhoy Ebrahim.

Vesting of settled property and trusts in respect thereof.

5. Immediately upon the passing of this Act by force and virtue thereof the hereditaments and premises particularly described in the first Schedule hereunder written shall be vested in the said Corporation upon the trusts and for the purposes and with and subject

to the powers provisions and declarations hereinafter declared and expressed and the hereditaments and premises particularly described in the Second Schedule hereunder written shall be vested in the said Corporation for all the respective residues of the respective terms granted by the said leases respectively to come and unexpired at the date of the passing of this Act upon the trusts and for the purposes and with and subject to the powers provisions and declarations hereinafter declared and expressed that is to say upon trust to permit the said Sir Currimbhoy Ebrahim for and during the term of his natural life and from and immediately after his decease to permit during the respective terms of their natural lives the successive male heirs of the body of the said Sir Currimbhoy Ebrahim who shall succeed to the title of Baronet conferred by the said Letters Patent (if he or they shall so desire) to use and occupy free of rent as their residence the hereditaments and premises particularly described in the Second part of the First Schedule hereunder written and also to use and occupy as his residence free of rent any one of the said hereditaments and premises particularly described in the First part of the First and in the Second Schedules hereunder writtten and to demise all or any of the remaining hereditaments and premises for any term of years not exceeding seven years to take effect in possession within three months from the date of the lease.

Payment of rates, taxes, etc., by Corporation.

6. Out of the income of the premises particularly described in the First and the Second Schedules hereunder written (other than the premises which shall for the time being be used and occupied as a residence by the said Sir Currimbhoy Ebrahim or the heir male of his body to whom the said title of Baronet conferred by the said Letters Patent shall have descended) the said Corporation shall pay the rents and perform and observe the covenants by the Lessee and conditions by and in the said several indentures of lease reserved and contained and pay all rates taxes assessments dues and duties in respect of the said hereditaments and premises particularly described in the First and Second Schedules hereunder written and all buildings and erections standing thereon respectively and defray the cost of all ordinary repairs required for the purpose of maintaining such buildings in a habitable condition and of insuring the same against fire and all other outgoings of every nature whatsoever.

Raising of the "Sinking Fund" and the "Repairs Fund."

7. The said Corporation shall out of the income referred to in section 6 hereof remaining after making the payments in the same section mentioned form for the purposes hereinafter mentioned two funds to the credit of one of which (hereinafter referred to as the "Sinking Fund") the said Corporation shall carry every six months an amount which shall be equal to 00-61 per cent. calculated on the said sum of Rupees (20,000,000) Twenty Lacs and in the event of other hereditaments being vested in the said Corporation upon the trusts and for the purposes by and in this Act declared and contained under and by virtue of the provisions of S. 25 of this Act on the aggregate of the said sum of Rupees (20,00,000) Twenty Lacs and the value of the additional hereditaments so vested and to the credit of the other of which (hereinafter referred to as the "Repairs Fund") the said Corporation shall carry every six months an amount which shall be equal to 3·72 per cent. calculated on a Capital sum of Rupees (2,00,000) Two Lacs until such fund shall amount to the sum of Rupees (2,00,000) Two Lacs.

Payment of the residue of the income to the Baronet for the time being.

8. The residue of the income referred to in S. 6 hereof remaining after the payments mentioned in the same section are made and after the several sums are carried to the credit of the said Sinking Fund and the said Repairs Fund respectively as provided in S. 7 hereof shall be paid to the said Sir Currimbhoy Ebrahim and the heir male of his body who shall for the time being have succeeded to and be in the enjoyment of the title of Baronet conferred by the said Letters Patent and shall be of full age for his own absolute use and benefit.

Investment of sums set apart for formation of Funds

9. The sums which shall from time to time under the provisions of this Act be set aside for the formation respectively of the Sinking Fund and the Repairs Fund (as also the interest of the securities in which the same respectively shall be invested) shall be invested by the said Corporation in or on any stocks funds or other securities of or the principal and interest of which is guaranteed by the Government of the United Kingdom of Great Britain and Ireland or the Government of India and the said Corporation shall be at liberty as often as the same shall be necessary or thought proper by them to alter vary and change such stocks funds and securities for others of the same or like nature.

Devolution of properties mentioned in Schedule II on full amount of Sinking Fund being raised.

10. When and as often as the said Sinking Fund shall amount to the sum of Rs. (20,00,000) Twenty Lacs and in the event of additional hereditaments having been vested in the said Corporation upon the trusts and for the purposes by and in this Act declared and contained under and by virtue of the provisions of S. 25 of this Act to the sum which shall be equal to the said sum of Rs. (20,00,000) Twenty Lacs and the value of the additional hereditaments so vested the said Corporation shall by force and virtue of this Act be divested of the hereditaments which shall then be vested in the said Corporation by force and virtue of this Act and such of them as shall be of a freehold tenure shall by force and virtue of this Act become vested absolutely and such of them as are of a leasehold tenure shall become vested for all the residues then unexpired of the several terms for which the same may be dismissed by the respective leases relating to them for his own use and benefit in the heir male of the body of the said Sir Currimbhoy Ebrahim who shall then have succeeded him in the title of Baronet conferred by the said Letters Patent.

Investment of Sinking Fund.

11. When and as often as the said Sinking Fund shall amount to the said sum of Rs. (20,00,000) Twenty Lacs and in the event of such further hereditaments having been added as mentioned in the last section to the sum which shall represent the aggregate of the said sum of Rs. (20,00,000) Twenty Lacs and the value of such additional hereditaments the said Corporation shall with all convenient despatch invest the same in the purchase of land and hereditaments situate in the Presidency of Bombay of a freehold or of a leasehold tenure provided that in the event of the purchase of premises of a leasehold tenure the leases in respect of such premises shall be renewable in perpetuity reserving a nominal rent and without any onerous conditions and covenants on the part of the Lessee.

Income of Sinking Fund to be added to Fund in certain cases.

12. From and after the time that the capital of the said Sinking Fund shall amount to the said sum of Rs. (20,00,000) Twenty Lacs and in the event mentioned in section 10 hereof to the sum which shall represent the aggregate of the said sum of Rs. (20,00,000) Twenty Lacs and the value of the additional hereditaments so vested as aforesaid the income thereof or of such part thereof as shall not be so invested as aforesaid shall be credited to the said Sinking Fund and invested as directed by S. 9 hereof and shall not form part of the capital sum on which the same accrues.

13. The said Repairs Fund shall be applied by and at the discretion of the said Corporation to the extraordinary structural repair of the buildings or building standing upon the said hereditaments and premises particularly described in the First and Second Schedules hereunder written or upon any other the hereditaments which may by virtue and operation of this Act at any time become vested in the said Corporation.

Application of Repairs Fund.

14. If and so soon as any part of the said Repairs Fund shall have been applied for any of the purposes mentioned in S. 13 hereof the same shall be made up again to the said sum of Rs. 2,00,000 by setting aside and carrying to the credit thereof every six months out of the income of the hereditaments and premises which shall at any such time be vested in the said Corporation by virtue of this Act remaining after making the payments mentioned in S. 6 hereof an amount which shall be equal to 3·72 per cent. calculated on a Capital sum of Rs. (2,00,000) Two Lacs and also by setting aside and carrying to the credit of such fund the income of the part thereof which shall not have been so applied as directed by S. 13 hereof until such fund shall again amount to the said sum of Rs. 2,00,000.

Repairs Fund to be kept up to the sum of Rs. 2,00,000.

15. As often as the said Repairs Fund shall amount to the said sum of Rs. 2,00,000 and so long as the same or any part thereof is not applied to any of the purposes to which it is directed by S. 13 hereof to be applied the income thereof shall be applied in defraying the cost of all ordinary repairs which may be required to the hereditaments which may for the time being be vested in the said Corporation by force and virtue of this Act and all outgoings in respect of such premises.

Application of income of Repairs Fund.

16. The said Corporation shall be at liberty to sell the said premises particularly described in the First and Second Schedules hereunder written and also any other hereditaments for the time being vested in them by force and virtue of this Act or any of them with the consent of the person entitled to and in the actual enjoyment of the title of Baronet conferred by the said Letters Patent and with the approval of the Governor of Bombay in Council to be notified by a Resolution of the Government of Bombay published in the Bombay Government Gazette and also with the like consent and approval to exchange them or any of them

Power of Corporation to sell or exchange the premises described in the Schedules.

for other lands and hereditaments in the Presidency of Bombay of a freehold or leasehold tenure and upon any such exchange to give or receive any money for equality of exchange, provided always that the leases if any, in respect of the premises proposed to be taken in exchange are renewable in perpetuity reserving a nominal rent without any onerous covenants on the part of the lessee and conditions.

Powers of Corporation as regards sale or exchange.

17. Any such sale as aforesaid may be made either by public auction or private contract and the said Corporation shall be at liberty to make any stipulations as to title or evidence or commencement of title or otherwise in any conditions of sale or contract for sale or exchange of the hereditaments proposed to be sold or exchanged and may buy in or rescind or vary any contract for sale or exchange.

Investment of sale-proceeds.

18. In the event of a sale of any of the hereditaments for the time being vested in the said Corporation by force and virtue of this Act or an exchange thereof the net sale-proceeds or the moneys received for equality of exchange shall with all convenient despatch be invested in the purchase of lands and hereditaments of a freehold or leasehold tenure in the Presidency of Bombay. Provided always that in the event of the purchase of premises of a leasehold tenure the leases in respect of such premises are renewable in perpetuity reserving a nominal rent without any onerous covenants on the part of the lessees and conditions. Until so invested the same shall be invested in any of the securities mentioned in S. 9 hereof and the income hereof shall be applied as directed by Ss. 6 and 7 hereof.

Vesting of lands and hereditaments in Corporation.

19. The lands and hereditaments so to be purchased as directed by section 11 hereof and the lands and the hereditaments which may be taken in exchange under the liberty in that behalf reserved to the said Corporation by S. 16 hereof or which may be purchased under the liberty in that behalf reserved to the said Corporation by Ss. 18 and 26 hereof shall from and immediately after the completion of the purchase or exchange vest in the said Corporation upon the trusts and for the purposes by and in this Act declared and contained of and concerning the said hereditay ments and premises particularly described in the First and Second Schedules hereunder written or such of them as may then be subsisting and capable of taking effect and subject to the powers provisions and declarations in this Act contained concerning the same in the same manner and to the same effect as if such hereditaments

had been expressly vested by this Act in the said Corporation upon the trusts and for the purpose in this Act declared and contained.

Application of income during minority of Baronet.

20. The said Corporation during the minority of any heir male of the body of the said Sir Currimbhoy Ebrahim for the time being entitled to and in the enjoyment of the title of Baronet conferred by the said Letters Patent shall pay and apply for and towards the maintenance education and benefit of such Baronet during his minority so much only of the income of the hereditaments which shall be vested in them for the purposes and upon the trusts by and in this Act declared and contained, which by section 8 hereof is directed to be paid to the heir male of the body of the said Sir Currimbhoy Ebrahim entitled to and in the enjoyment of the title of Baronet conferred by the said Letters Patent who shall be of full age as the said Corporation shall in their discretion think proper and shall from time to time invest the residue thereof upon the securities specified in S. 9 hereof and shall upon such Baronet attaining his age of majority pay over assign and transfer to him or as he shall direct and for his absolute benefit such investments and all accumulations thereof and in the event of the death of such Baronet before attaining his age of majority the said Corporation shall stand possessed of such investments and the accumulations thereof upon trust for the heirs of such Baronet absolutely.

Power of Baronet to appoint jointures in lieu of maintenance and other claims.

21. It shall be lawful for the said Sir Currimbhoy Ebrahim and for any heir male of his body on whom the title of Baronet conferred by the said Letters Patent shall from time to time descend of full age and when in the actual enjoyment of the said title and who shall not refuse or neglect or discontinue to use for the period hereinbefore in that behalf mentioned the said names of "Currimbhoy Ebrahim" as hereinbefore enacted either before or after his marriage with any woman or women by any deed or will (but subject and without prejudice to the annuity or annuities if any which shall then be subsisting and payable by virtue of any appointment made under and in pursuance of this present power) to limit and appoint unto any woman or women whom he shall marry for her or their life or lives and for her or their maintenance to jointure or jointures in bar of any legal or customary right to maintenance or any other claim whatsoever, any annuity or annuities not exceeding in all the sum of Rs. 10,000 to commence and take effect immediately after the decease of the Baronet limiting or appointing the same to be issuing and

payable out of the said income payable under this Act for his own absolute use and benefit to the heir male of the body of the said Sir Currimbhoy Ebrahim on whom the said title of Baronet conferred by the said Letters Patent shall have descended and who shall be of full age and to be paid and payable by equal half-yearly payments the first of such half-yearly payments to be made on the first half-yearly day after the decease of the Baronet who shall have appointed such annuity; PROVIDED ALWAYS that in case any person on whom such title shall descend shall have refused or neglected to use the said names of "Currimbhoy Ebrahim" or shall discontinue to use such names for a year during his life every such limitation and appointment either previously or afterwards made shall be and become inoperative and invalid and no such annuity thereby created or appointed shall take effect and be payable.

Limit of total amount of such jointures chargeable on income.

22. Provided always that such income as aforesaid shall not at one and the same time be subject to the payment of more than the yearly sum of Rs. 20,000 for or in respect of any jointure or jointures which shall be made in pursuance of the power hereinbefore contained, so that if by virtue of or under the same power the said income would in case this present provision had not been inserted be charged at any one time with a greater yearly sum for jointures in the whole than the yearly sum of Rs. 20,000 the yearly sum which shall occasion such excess or such part thereof as shall occasion the same shall during the time of such excess abate and not be payable.

Provision for widow of Baronet dying under age.

23. If any heir male of the body of the said Sir Currimbhoy Ebrahim shall succeed to the title of Baronet conferred by the said Letters Patent while he is still a minor under the age of Eighteen years and shall thereafter die without attaining the age of majority leaving a widow him surviving the said Corporation shall out of the said income during the minority of such widow apply for and towards the maintenance education and benefit of such widow while she continues to be a widow such sum not exceeding Rs. 500 per month as the said Corporation in their discretion think proper and shall after such widow shall attain her age of majority and so long as she continues to be a widow pay to her for her own absolute use and benefit the yearly sum of R10,000 payable half-yearly the first of such half-yearly payments to be made on the 1st half-yearly day after she shall attain her age of majority.

Amount payable under S. 23 to be deemed a jointure, for purposes of S. 22.

24. In estimating for the purposes of section 22 hereof the total amount payable out of the said income for jointure the amount directed to be paid by section 23 hereof shall be deemed to be a jointure settled under section 21 hereof.

Vesting in Corporation of lands and herditaments other than those described in the Schedules.

25. If at the time when the said Sinking Fund shall first amount to the sum of Rs. (20,00,000) Twenty Lacs (but not afterwards) the heir male of the body of the said Sir Currimbhoy Ebrahim who shall then have succeeded to the said title of Baronet conferred by the said Letters Patent shall be desirous of vesting in the said Corporation other lands and hereditaments upon the trusts and for the purposes herein declared and contained concerning the said hereditaments and premises particularly described in the First and Second Schedules hereunder written and subject to the powers provisions and declarations herein contained and for that purpose and with that intent shall at his own expense vest in the said Corporation such lands hereditaments and premises then the said Corporation may with the previous consent of the Governor of Bombay in Council notified as aforesaid accept such lands hereditaments and premises and the same shall thenceforth be held by the said Corporation upon the same trusts and for the same purposes and subject to the same powers provisions and declarations as are by and in this Act declared and contained with regard to the said hereditaments and premises particularly described in the First and Second Schedules hereunder written or upon such of them as shall then be subsisting and capable of taking effect in the same manner and to the same effect as if such hereditaments had been expressly vested by this Act in the said Corporation upon the trusts and for the purposes in this Act declared and contained. PROVIDED ALWAYS that the total value of the additional premises so vested in the said Corporation shall not exceed R. (20,00,000) Twenty Lacs. PROVIDED ALSO that if at such date the person who shall then have succeeded to the said title be a minor under the age of 18 years then he shall be entitled to exercise the liberty hereby reserved at any time before the expiration of one year after he shall have attained his age of majority.

Application of insurance moneys in respect of properties destroyed or damaged by fire.

26. In case any of the hereditaments which shall at any time be vested in the said Corporation shall be destroyed or damaged by fire the moneys received in respect of such insurance shall in case the premises so destroyed or damaged or any of the here-

ditaments and premises particularly described in the Second Schedule hereunder written or are comprised in any indenture of lease be applied in accordance with the provisions in that behalf contained in the lease by which the same are demised and in case of any other premises be applied either in rebuilding or reinstating the premises so destroyed or damaged by fire or upon the application of the person for the time being entitled to and in the enjoyment of the said title of Baronet and with the consent of the Governor of Bombay in Council notified as aforesaid may be laid out in the purchase of other hereditaments in the Presidency of Bombay of a freehold or of a leasehold tenure provided that the leases in respect of such premises are renewable in perpetuity reserving a nominal rent without any onerous covenants on the part of the lessee and conditions. In the event of such purchase the hereditaments so purchased shall immediately from and after the completion of the purchase thereof vest in the said Corporation upon the trusts and for the purposes by and in this Act declared and contained of and concerning the hereditaments and premises particularly described in the First and Second Schedules hereunder written or such of them as may then be subsisting and capable of taking effect and subject to the powers provisions and declarations in this Act contained concerning the same in the same manner and to the same effect as if such hereditaments had expressly been vested by this Act in the said Corporation upon the trust and for the purposes in this Act declared and contained. Until such insurance moneys shall be so laid out the said Corporation shall invest the same in one or more of the securities specified in section 9 hereof and the income thereof shall be applied as the income of the premises so destroyed or damaged.

Ultimate trust in favour of heir on extinction of Baronetcy.

27. Upon failure and in default of heirs male of the body of the said Sir Currimbhoy Ebrahim to whom the same title of Baronet may descend the said Corporation shall stand possessed of the said hereditaments and premises particularly described in the First Schedule hereunder written and of any other hereditaments of a freehold tenure and of the funds which may then be vested in them by virtue and operation of this Act upon trust for the heirs of the last Baronet absolutely and shall also stand possessed of the said hereditaments and premises particularly described in the Second Schedule hereunder written or such of them as may then be still vested in the said Corporation and any other hereditaments of a leasehold tenure which may then be vested in the said Corpora.

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tion by virtue of this Act upon trust for the heirs of the last Baronet for all the then residues of the terms granted by the leases by which the same are demised.

Reimbursement of expenses of Corporation.

28. It shall be lawful for the said Corporation out of any moneys which shall come to their hands by virtue of the trusts and provisions of this Act to retain and reimburse themselves all costs expenses and damages which they shall or may sustain expend or disburse in or about the execution of the trusts powers and provisions herein contained or in relation thereto.

Management of hereditaments vested in Corporation.

29. The actual management of the hereditaments for the time being vested in the said Corporation including the collection of rents and carrying out repairs shall be in the hands of the person in the actual enjoyment for the time being of the said title of Baronet conferred by the said Letters Patent being of full age, subject nevertheless to the control and supervision of the said Corporation.

Saving of existing rights.

30. SAVING ALWAYS to the King's Most Excellent Majesty, his heirs and successors and to all and every other person and persons bodies politic and corporate and his her and their respective heirs executorst and administrators and successors and every of them (other than and except the said Sir Currimbhoy Ebrahim his devisees and heirs and assigns) all such estate right title interest claim and demand whatsoever of into out of or upon the said hereditaments and premises particularly described in the First and Second Schedules hereunder written or any part or parts thereof respectively as they every or any of them had before the passing of this Act and would could or might have had held or enjoyed in case this Act had not been passed.

THE FIRST SCHEDULE.

PART I.

First:—All that piece or parcel of land or ground with the messuage tenement or bungalow standing thereon situate living and being on the Western side of Pedder Road Cumballa Hill near Mahalaxmi in the Island of Bombay in the Sub-District of the Registrar of Bombay and containing by admeasurement two thousand one hundred and forty-seven square yards or thereabouts be the same little more or less and bounded as follows that is to say on or towards the North by a loose stone Gudya and beyond that the vacant land of Trimbuck Jugonnath on or towards the East by

the Government Ground and beyond that by the said Pedder Road on or towards the West and South by a loose stone Gudya and beyond that by the vacant land belonging to Nowroji Jehangir Gamadia registered by the Collector of Land Revenue under Old No. 616 New No. 2861 Old Survey No. 81 New Survey Nos. 7073, 7118, 7119 and assessed by the Municipality under Street Nos. 102, 112 Ward No. 3494.

Secondly:—All that piece of Government ground with the messuage or dwelling house standing thereon situate on the East side of Shamjee Hassajee Street now called Samuel Street in the Registration Sub-district of Bombay containing by admeasurement two hundred and eighteen square yards or thereabouts assessed under Ward B No. 1667 and Street Nos. 165—167 and registered in the books of the Collector of Land Revenue under Old No. 1023 and New No. 6751 Old Survey No. 198 and New Survey No. 2788 and bounded on the East by a Sweeper's passage on the West by Shamji Hassaji Street or Samuel Street on the North by the property formerly of Khan Mahomed Habibbhoy but now of Ebrahim Hassam and on the South by the property formerly of Cassum Natha but now of Currimbhoy Ebrahim.

PART II.

All that piece or parcel of vacant land or ground situate lying and being in the Civil Lines of Poona in the Registration Sub-District of Haveli containing by admeasurement three acres twenty-eight Gunthas and forty-one square yards being equal to seventeen thousand nine hundred and forty-nine square yards or thereabouts being portion of land registered in the Books of the Collector under Old Survey No. 94 and the New No. 126 and which said land is bounded as follows that is to say on or towards the East partly by the land belonging to K. B. Dastoor Hoshang Jamaspa and partly by the road leading from Bund garden to the City on or towards the West by the land belonging to Narayan bin Raghoji Dhala on or towards the North by the property of Hari Rowji and on or towards the South by the road leading to Record Hall and beyond that by the property of Desai Hari Prasad together with bungalow and buildings standing thereon.

THE SECOND SCHEDULE.

First:—All that piece of land situate on the Wodehouse Road Estate of the Improvement Trust at the junction of the Wodehouse Road and Colaba Causeway on the Esplanade in the City and

Island and Sub-Registration District of Bombay which has been computed to contain an area of Three thousand four hundred and seventy-six square yards or thereabouts and which is bounded on the West by Wodehouse Road aforesaid on the East by Colaba Causeway on the North by the junction of the said two roads and on the South by the land known as Plots Nos. 11A and 11C on the said Improvement Trust Estate which said piece of land is known as Plot No. 11B Wodehouse Road And which said premises are assessed by the Collector of Land Revenue under New Survey No. 9561 and are assessed by the Municipality under Ward No. 886 (1-3) Street Nos. 16, 16B Together with the buildings now erected and built thereon and known as Hotel Majestic.

Secondly:—All that piece of Leasehold Land situate on the East side of a New Road on the Esplanade in the City and Island and Sub-Registration District of Bombay which has been computed to contain the total area of one thousand five hundred and seventeen square yards or thereabouts and which is bounded on the North by a passage on the East by vacant land of the Bombay Improvement Trust on the South by Plot No. 6 Wellington Lines and on the West by a New Road and which said piece of land is known as plot No. 7 Wellington Lines and which premises are assessed by the Collector of Land Revenue under part of New Survey Nos. 90562 and 90563 and are assessed by the Municipality under Ward No. 1301 (7) Street No. 3 Together with the buildings and premises erected and built thereon and which premises are known as Meher Mansions.

Thirdly:—All that piece of Land situate on the East side of a New Road on the Esplanade in the City and Island and Sub-Registration District of Bombay which has been computed to contain a total area of one thousand and five hundred square yards or thereabouts and which is bounded on the North by Plot No. 4 Wellington Lines on the East by the land of the Bombay Improvement Trust proposed to be laid out as a central garden on the South by Plot No. 2 Wellington Lines and on the West by the New Road aforesaid which said piece of land is known as Plot No. 3 Wellington Lines and which said premises are assessed by the Collector of Land Revenue under New Survey No. 9562 and are assessed by the Municipality under Ward No. 1301 (3) Street No. 3 B Together with the buildings and premises now erected and built thereon.

Fourthly:—All that piece of Leasehold land situate on the Colaba reclamation in the Lower Colaba Division of A Ward in the

City and Island and Subs-Registration District of Bombay which piece of land has been computed to contain a total area of two thousand four hundred and forty-nine square yards or thereabouts be the same more or less and which is bounded on the North-East by Fazal Road on the South-East by a 40 Feet Road and on the South-West by Plots Nos. 5 and 6 belonging to Fazalbhoy Currimbhoy Ebrahim and on the North-West by Cuffee Parade which said piece of land is known as Plots Nos. 6 and 7 on the Colaba Reclamation and which said premises are assessed by the Collector of Land Revenue under New Survey No. 9765 and are assessed by the Municipality under Ward Nos. 120,225 (11) Street No. 12 J Together with all buildings and premises now erected and built thereon.

Fifthly:—All that piece of land situate on the Colaba Reclamation in the Lower Colaba Division of A Ward in the City and Island and Sub-Registration District of Bombay which piece of land has been computed to contain a total area of 2452 square yards or thereabouts and bounded on the North-East by Plots Nos. 6—7 on the South-East by a 40 Feet Road on the South-West by Khatoo Road and on the North-West by Cuffe Parade which said piece of land is known as Plots Nos. 5—6 on the Colaba Reclamation and which said premises are assessed by the Collector of Land Revenue under New Survey No. 9765 and are assessed by the Municipality under Ward No. 225 (10) Street No. 12 I Together with all buildings and premises now erected and built thereon.

THE WHITE PHOSPHORUS MATCHES PROHIBITION ACT, 1913.

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 7TH MARCH 1913.

ACT NO. V OF 1913.

An Act to prohibit the importation, manufacture and sale of matches made with white phosphorus.

WHEREAS it is expedient to prohibit the importation, manufacture and sale of matches made with white phosphorus; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (*1*) This Act may be called the White Phosphorus Matches Prohibition Act, 1913.

(*2*) It extends to the whole of British India; and

(3) It shall come into force on the first day of July, 1913, with the exception of section 6, which shall come into force on the first day of July, 1914.

Definition.

2. In this Act, "white phosphorus" means the substance commonly known as white or yellow phosphorus.

Prohibition of importation by addition to section 18, Act VIII of 1878.

3. To section 18 of the Sea Customs Act 1878, the following clause shall be added, namely:—

"(g) matches made with white phosphorus."

Prohibition of use of white phosphorus in manufacture of matches.

4. (1) No person shall use white phosphorus in the manufacture of matches.

(2) Any person who uses, or permits the use by any person under his control of, white phosphorus in the manufacture of matches, shall be punishable with fine which may extend to two hundred rupees.

Power of Inspector of Factories to take samples of material used in manufacture.

5. (1) Every person who manufactures matches shall allow an Inspector of Factories appointed under the Indian Factories Act, 1911, at any time to take for analysis sufficient samples of any material in use, or mixed for use, in such manufacture:

Provided that any such person may, at the time the sample is taken, and on providing the necessary appliances, require the Inspector to divide the sample so taken into two parts, and to mark, seal and deliver to him one part.

(2) Any person who refuses to permit any such Inspector of Factories as aforesaid to take a sample, in accordance with the provisions of sub-section (1), shall be punishable with fine which may extend to two hundred rupees.

Prohibition of sale.

6. (1) No person shall sell, or offer or expose for sale, or have in his possession for the purposes of sale, any matches made with white phosphorus.

(2) Any person who contravenes the provisions of sub-section (1) may, on complaint to a *Presidency* Magistrate, *Subdivisional Magistrate or Magistrate of the first class*, be ordered to forfeit any such matches in his possession, and any matches so forfeited shall be destroyed or otherwise dealt with as the Magistrate may direct.

THE MUSSALMAN WAKF VALIDATING ACT, 1913.

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 7TH MARCH 1913.

ACT NO. VI OF 1913.

An Act to declare the rights of Mussalmans to make settlements of property by way of "wakf" in favour of their families, children and descendants.

WHEREAS doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes; and whereas it is expedient to remove such doubts; It is hereby enacted as follows:—

Short title and extent.

1. (*1*) This Act may be called the Mussalman Wakf Validating Act, 1913.

(*2*) It extends to the whole of British India.

Definitions.

2. In this Act unless there is anything repugnant in the subject or context,—

(*1*) "Wakf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussulman law as religious, pious or charitable.

(*2*) "Hanafi Mussalman" means a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi school of Mussalman law.

Power of Mussalmans to create certain wakfs.

3. It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes:—

(*a*) for the maintenance and support wholly or partially of his family, children or descendants, and

(*b*) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rent and profits of the property dedicated:—

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

Wakfs not to be invalid by reason of remoteness of benefit to poor, etc.

4. No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

Saving of local and sectarian custom.

5. Nothing in this Act shall affect any custom or usage whether local or prevalent among Mussalmans of any particular class or sect.

THE INDIAN COMPANY ACT, 1913.

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 27TH MARCH 1913.

ACT NO. VII OF 1913.

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An Act to consolidate and amend the law relating to Tradin Companies and other Associations.

WHEREAS it is expedient to consolidate and amend the la relating to Trading Companies and other associations ; It is hereb enacted as follows :—

PART I.

PRELIMINARY.

Short title, commencement and extent.

1. (1) This Act may be called the India Companies Act, 1913.

(2) It shall come into force on the first day of April 1914 and

(3) It extends to the whole of British India including Britis Baluchistan and the Santhal Parganas.

Definitions.

2. In this Act, unless there is anything re pugnant in the subject or context,—

(1) " articles " means the articles of association of a com pany as originally framed or as altered by special reso lution, including, so far as they apply to the company the regulations contained (as the case may be) in Table B in the Schedule annexed to Act No. XIX o 1857 or in Table A in the First Schedule annexed to the Indian Companies Act, 1882, or in Table A in the First Schedule annexed to this Act.

(2) " company " means a company formed and registered under this Act or an existing company :

(3) " the Court " means the Court having jurisdiction under this Act :

(4) " debenture " includes debenture stock :

(5) " director " includes any person occupying the position of a director by whatever name called :

(6) " District Court " means the principal Civil Court of original jurisdiction in a district, but does not include a High Court in the exercise of its ordinary original civil jurisdiction :

(7) " existing company " means a company formed and registered under the Indian Companies Act, 1866, or under any Act or Acts repealed thereby, or under the Indian Companies Act, 1882 :

(*8*) " Insurance Company " means a company that carries on the business of insurance either solely or in common with any other business or businesses :

(*9*) " manager " includes any person occupying the position of a manager by whatever name called and whether under a contract of service or not :

(*10*) " memorandum " means the memorandum of association of a company as originally framed or as altered in pursuance of the provisions of this Act :

(*11*) " officer " includes any director, manager or secretary but, save in sections 235, 236 and 237, does not include an auditor.

(*12*) " prescribed" means, as respects the provisions of this Act relating to the winding up of companies, prescribed by rules made by the High Court. and as respects the other provisions of this Act, prescribed by the Governor General in Council :

(*13*) " private company" means a company which

(i) by its articles—

(*a*) restricts the right to transfer its shares ; and

(*b*) limits the number of its members (exclusive of persons who are in the employ of the company) to fifty and

(*c*) prohibits any invitation to the public to subscribe for any shares or debentures of the company : and

(ii) continues to observe such restrictions, limitations and prohibitions :

Provided that where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this definition, be considered as a single member :

(*14*) " prospectus" means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares of debentures of a company :

(*15*) " the registrar" means a registrar or assistant registrar performing under this Act the duty of registration of companies : and

(*16*) " share" means share in the share capital of the company, and includes stock except when a distinction between stock and shares is expressed or implied.

Jurisdiction of the Courts.

3. (1) The Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate:

Provided that the Local Government may, by notification in the local official Gazette and subject to such restrictions and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction by this Act conferred upon the Court, and in that case such District Court shall, as regards the jurisdiction so conferred, be the Court in respect of all companies having their registered offices in the district.

(2) For the purposes of jurisdiction to wind up companies, the expression 'registered office' means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up.

(3) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court.

PART II.

CONSTITUTION AND INCORPORATION.

Prohibition of partnerships exceeding certain number.

4. (1) No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor General in Council, or of Royal Charter or Letters Patent.

(2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act or is formed in pursuance of an Act of Parliament or some other Act of the Governor General in Council or of Royal Charter or Letters Patent.

Memorandum of Association.

Mode of forming incorporated company.

5. Any seven or more persons (or, where the company to be formed will be a private company, any two or more persons) associated for any lawful purpose may by subscribing their names to a memorandum

of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability (that is to say), either—

(*i*) a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed a company limited by shares); or

(*ii*) A company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed a company limited by guarantee); or

(*iii*) a company not having any limit on the liability of its members (in this Act termed an unlimited company).

Memorandum of company limited by shares.

6. In the case of a company limited by shares—

(1) the memorandum shall state—

(*i*) the name of the company, with "Limited" as the last word in its name;

(*ii*) the province in which the registered office of the company is to be situate;

(*iii*) the objects of the company;

(*iv*) that the liability of the members is limited;

(*v*) the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount;

(2) no subscriber of the memorandum shall take less than one share:

(3) each subscriber shall write opposite to his name the number of shares he takes.

Memorandum of company limited by guarantee.

7. In the case of a company limited by guarantee—

(1) the memorandum shall state—

(*i*) the name of the company, with "Limited" as the last word in its name;

(*ii*) the province in which the registered office of the company is to be situate;

(iii) the objects of the company :

(iv) that the liability of the members is limited ;

(v) that each member undertakes to contribute to the assests of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount :

(2) if the company has a share capital—

(i) the memorandum shall also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount ;

(ii) no subscriber of the memorandum shall take less than one share ;

(iii) each subscriber shall write opposite to his name the number of shares he takes.

Memorandum of unlimited company.

8. In the case of an unlimited company—

(1) the memorandum shall state—

(i) the name of the company ;

(ii) the province in which the registered office of the company is to be situate ;

(iii) the objects of the company ;

(2) if the company has share capital—

(i) no subscriber of the memorandum shall take less than one share ;

(ii) each subscriber shall write opposite to his name the number of shares he takes.

Signature of memorandum.

9. The memorandum shall be signed by each subscriber in the presence of at least one witness who shall attest the signature.

Restriction on alteration of memorandum.

10. A company shall not alter the condition contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act.

11. (*1*) A company shall not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires.

Name of company and change of name

(*2*) If a company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a company in existence is previously registered, or so nearly resembling it as to be calculated to deceive, the first mentioned company may, with the sanction of the registrar, change its name.

(*3*) A company shall not be registered by a name which contains any of the following words, namely :—" Crown ", "Emperor " " Empire ", " Empress ", " Imperial ", " King ", " Queen " " Royal ", or words expressing or employing the sanction, approval or patronage of the Crown or the Government of India or a Local Government, except where the Governor General in Council signifies his consent to the use of such words as part of the name of the company by order in writing under the hand of one of the Secretaries to the Government of India :

Provided that nothing in this sub-section shall apply to companies registered before the commencement of this Act.

(*4*) Any company may, by special resolution and subject to the approval of the Local Government signified in writing, under the hand of one of the Secretaries to such Government, change its name.

(*5*) Where a company changes its name, the registrar shall enter the new name on the register in place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case. On the issue of such a certificate, the change of name shall be complete.

(*6*) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company; and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

12. (*1*) Subject to the provisions of this Act, a company may by special resolution, alter the provisions of its memorandum so as to change the place of the registered office from one province to another, or with respect to the objects of the company, so far as may be required to enable it—

Alteration of memorandum.

(a) to carry on its business more economically or more efficiently; or

(b) to attain its main purpose by new or improved means; or

(c) to enlarge or change the local area of its operations; or

(d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or

(e) to restrict or abandon any of the objects specified in the memorandum.

(2) The alteration shall not take effect until and except in so far as it is confirmed by the Court on petition.

(3) Before confirming the alteration, the Court must be satisfied—

(a) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and

(b) that, with respect to every creditor who in the opinion of the Court is entitled to object and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Court:

Provided that the Court may, in the case of any person or class, for special reasons, dispense with the notice required by this section.

Power of Court when confirming alterations.

13. The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it think proper.

Exercise of discretion by Court.

14. The Court shall, in exercising its discretion under sections 12 and 13, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members; and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement:

Provided that no part of the capital of the company may be expended in any such purchase.

15. (*1*) A certified copy of the order confirming the alteration together with a printed copy of the memorandum as altered, shall, within three months from the date of the order, be filed by the company with the registrar, and he shall register the same, and shall certify the registration under his hand, and the certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum so altered shall be the memorandum of the company.

Procedure on confirmation of the alteration.

(*2*) Where the alteration involves a transfer of the registered office from one province to another, a certified copy of the order confirming such change shall be filed by the company with the registrar in each of such provinces, and each of such registrars shall register the same, and shall certify under his hand the registration thereof, and the registrar for the province from which such office is transferred shall send to the registrar for the other province all documents relating to the company registered or filed in his office.

(*3*) The Court may by order at any time extend the time for the filing of documents with the registrar under this section for such period as the Court thinks proper.

16. No such alteration shall have any operation until registration thereof has been duly effected in accordance with the provisions of section 15, and if such registration is not effected within three months next after the date of the order of the Court confirming the alteration, or within such further time as may be allowed by the Court in accordance with the provisions of section 15, such alteration and order and all proceedings connected therewith shall, at the expiration of such period of three months or such further time, as the case may be, become absolutely null and void :

Effect of failure to register within three months.

Provided that the Court may, on sufficient cause shown, revive the order on application made within a further period of one month.

Articles of association.

17. (1) There may, in the case of a company limited by share and there shall, in the case of a company limited by guarantce or unlimited, be registered with the memorandum articles of association signed by

Registration of articles.

the subscribers to the memorandum and prescribing regulations for the company.

(2) Articles of association may adopt all or any of the regulations contained in Table A in the First Schedule.

(3) In the case of an unlimited company or a company limited by guarantee, the articles, if the company has a share capital, shall state the amount of share capital with which the company proposes to be registered.

(4) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles shall state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration.

Application of Table A.

18. In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A in the First Schedule, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles.

Form and signature of articles.

19. Articles shall—

(*a*) be printed :

(*b*) be divided into paragraphs numbered consecutively; and

(*c*) be signed by each subscriber of the memorandum of association in the presence of at least one witness who must attest the signature.

Alteration of articles by special resolution

20. (1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles ; and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution.

(2) The power of altering articles under this section shall, in the case of any company formed and registered under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, extend to altering any provisions in Table B annexed to Act XIX of 1857,

and shall also, in the case of an unlimited company formed and registered under the said Acts or either of them, extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding that those regulations are contained in memorandum.

General Provisions.

Effect of memorandum and article

21. (1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

Registration of memorandum and articles.

22. The memorandum and the articles (if any) shall be filed with the registrar for the province in which the registered office of the company is stated by the memorandum to be situate, and he shall retain and register them.

Effect of registration.

23. (1) On the registration of the memorandum of a company, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited.

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum, together with such other persons as may from time to time become members of company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

Conclusiveness of certificate of incorporation.

24. (1) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent

and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under this Act.

(2) A declaration by an advocate, attorney or pleader entitled to appear before a High Court who is engaged in the formation of a company, or by a person named in the articles as a director, manager or secretary of the company, of compliance with all or any of the said requirements shall be filed with the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance.

Copies of memorandum and articles to be given to members.

25. (1) Every company shall send to every member, at his request, and on payment of one rupee or such less sum as the company may prescribe, a copy of the memorandum and of the articles (if any).

If a company makes default in complying with the requirements of this section, it shall be liable for each offence to a fine not exceeding ten rupees.

Associations not for Profit.

Power to dispense with "Limited" in name of charitable and other companies.

26. (1) Where it is proved to the satisfaction of the Local Government that an association capable of being formed as a limited company has been or is about to be formed for promoting commerce, art, science, charity, or any other useful object, and applies or intends to apply its profits (if any) or other income in promoting its objects, and to prohibit the payment of any dividend to its members, the Local Government may, by license under the hand of one of its Secretaries, direct that the Association be registered as a company with limited liability, without the addition of the word "Limited" to its name, and the association may be registered accordingly.

(2) A license by the Local Government under this section may be granted on such conditions and subject to such regulations as the Local Government thinks fit, and those conditions and regulations shall be binding on the association, and shall, if the Local Government so directs, be inserted in the memorandum and articles, or in one of those documents.

(3) The association shall on registration enjoy all the privileges of limited companies, and be subject to all their obligations, except those of using the word "Limited" as any part of its name, and of

publishing its name, and of filing lists of members and directors and managers with the registrar.

(4) A license under this section may at any time be revoked by the Local Government, and upon revocation the registrar shall enter the word "Limited" at the end of the name of the association upon the registrar, and the association shall cease to enjoy the exemptions and privileges granted by this section:

Provided that, before a license is so revoked, the Local Government shall give to the association notice in writing of its intention, and shall afford the association an opportunity of submitting a representation in opposition to the revocation.

Companies limited by Guarantee.

Provisions as to companies limited by guarantee.

27. (1) In the case of a company limited by guarantee and not having a share capital, and registered after the commencement of this Act, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

(2) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles, or in any resolution, of any company limited by guarantee and registered after the commencement of this Act, purporting to divide the undertaking of the company into shares or interests, shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby.

PART III.

SHARE CAPITAL, REGISTRATION OF UNLIMITED COMPANY AS LIMITED AND UNLIMITED LIABILITY OF DIRECTORS.

Distribution of Share Capital.

Nature of shares.

28. (1) The share or other interest of any member in a company shall be moveable property, transferable in manner provided by the articles of the company.

(2) Each share in a company having a share capital shall be distinguished by its appropriate number.

Certificate of shares or stock.

29. A certificate, under the common seal of the company, specifying any shares or stock held by any member, shall be *prima facie* evidence of the title of the member to the shares or stock therein specified.

Definition of member.

30. (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the campany, and on its registration shall be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.

Register of members.

31. (1) Every company shall keep in one or more books a register of its members, and enter therein the following particulars:—

(i) the names and address, and the occupations, if any, of the members, and in the case of a company having a share capital, a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member;

(ii) the date at which each person was entered in the register as a member;

(iii) the date at which any person ceased to be a member.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues ; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

Annual list of members and summary.

32. (1) Every company having a share capital shall once at least in every year make a list of all persons who on the day of the first or only ordinary general meeting in the year, are members of the company and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company.

(2) The list shall state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last

return or (in the case of the first return) of the incorporation of the company by persons who are still members and persons who have ceased to be members respectively and the dates of registration of the transfers, and shall contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

(*a*) the amount of the share capital of the company, and the number of the shares into which it is divided;

(*b*) the number of shares taken from the commencement of the company up to the date of the return;

(*c*) the amount called up on each share;

(*d*) the total amount of calls received;

(*e*) the total amount of calls unpaid;

(*f*) the total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount in respect of any debentures, since the date of the last return;

(*g*) the total number of shares forfeited;

(*h*) the total amount of shares or stock for which share-warrants are outstanding at the date of the return;

(*i*) the total amount of share-warrants issued and surrendered respectively since the date of the last return;

(*k*) the number of shares or amount of stock comprised in each share-warrant;

(*l*) the names and addresses of the persons who at the date of the return are the directors of the company and of the persons (if any) who at the said date are the managers of the company; and

(*m*) the total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act.

(*3*) The above list and summary shall be contained in a separate part of the register of members, and shall be completed within seven days after the day of the first or only ordinary general meeting in the year, and the company shall forthwith file with the registrar a copy signed by a director or by the manager or the secretary of the company, together with a certificate from such director, manager or secretary that the list and summary state the facts as they stood on the day aforesaid.

(4) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

Trusts not to be entered on register.

33. No notice of any trust, expressed, implied or constructive, shall be entered on the register, or be receivable by the registrar.

Registration of transfer at request of transferor.

34. On the application of the transfer of any share or interest in a company, the company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee.

Transfer by legal representative.

35. A transfer of the share or other interest of a deceased member of a company made by his legal representative shall, although the legal representative is not himself a member be as valid as if he had been a member at the time of the execution of the instrument of transfer.

Inspection of register of members.

36. (1) The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company, and except when closed under the provisions of this Act, shall during business hours (subject to such reasonable restrictions, as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member gratis, and to the inspection of any other person on payment of one rupee, or such less sum as the company may prescribe, for each inspection.

(2) Any member or other person may require a copy of the register, or of any part thereof, or of the list and summary required by this Act, or any part thereof, on payment of six annas for every hundred words or fractional part thereof required to be copied.

(3) If any inspection or copy required under this section is rufused, the company shall be liable for such refusal to a fine not exceeding twenty rupees and to a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall be liable to the like penalty, and the Court may by order compel an immediate inspection of the register.

37. A company may, on giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate, close the register of members for any time or times not exceeding in the whole thirty days in each year.

Power to close register.

Power of Court to rectify register.

38. (1) If—

(*a*) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members of a company; or

(*b*) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member.

the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

(2) The Court may either refuse the application, or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved, and may make such order as to costs as it in its discretion thinks fit.

(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand; and generally may decide any question necessary or expedient to be decided for rectification of the register:

Provided that the Court may direct an issue to be tried in which any question of law may be raised; and an appeal from the decision on such an issue shall lie in the manner directed by the Court of Civil Procedure, 1908, on the grounds mentioned in section 100 of that Code.

39. In the case of a company required by this Act to file a list of its members with the registrar, the Court, when making an order for rectification of the register, shall, by its order, direct notice of the rectification to be filed with the registrar.

Notice to registrar of rectification of register.

40. The register of members shall be *prima facie* evidence of any matters by this Act directed or authorised to be inserted therein.

Register to be evidence.

Power for company to keep branch register in the United Kingdom.

41. (1) A company having a share capital may, if so authorised by its articles, cause to be kept in the United Kingdom a branch register of members (in this Act called a British register).

(2) The company shall, within one month from the date of the opening of any British register, file with the registrar notice of the situation of the office where such register is kept and, in the event of any change in the situation of such office or of its discontinuance, shall within one month from the date of such change or discontinuance, as the case may be, file notice of such change or discontinuance.

(3) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

Regulations as to British register.

42. (1) A British register shall be deemed to be part of the company's register of members (in this section called the principal register).

(2) It shall be kept in the same manner in which the principal register is by this Act required to be kept, except that the advertisement before closing the register shall be inserted in some newspaper circulating in the locality wherein the British register is kept.

(3) The company shall transmit to its registered office in India a copy of every entry in its British register as soon as may be after the entry is made; and shall cause to be kept at such office, duly entered up from time to time, a duplicate of its British register, and the duplicate shall, for all the purposes of this Act, be deemed to be part of the principal register.

(4) Subject to the provisions of this section with respect to the duplicate register, the shares registered in a British register shall be distinguished from the shares registered in the principal register, and no transaction with respect to any shares registered in a British register shall, during the continuance of that registration, be registered in any other register.

(5) The company may discontinue to keep any British register and thereupon all entries in that register shall be transferred to the principal register.

(6) Subject to the provisions of this Act, any company may, by its articles, make such regulations as it may think fit respecting the keeping of a British register.

43. A company limited by shares, if so authorised by its articles, may, with respect to any fully paid-up shares, or to stock, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares or stock therein specified, and may provide by coupons or otherwise, for the payment of the future dividends the shares or stock included in the warrant, in this Act termed a share-warrant.

Issue of share-warrants to bearer.

44. A share-warrant shall entitle the bearer thereof to the shares or stock therein specified, and the shares or stock may be transferred by delivery of the warrant.

Effect of share-warrant.

45. The bearer of a share-warrant shall, subject to the articles of the company, be entitled, on surrendering it for cancellation to have his name entered as a member in the register of members; and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register the name of a bearer of a share-warrant in respect of the shares of stock therein specified without the warrant being surrendered and cancelled.

Registration of name of bearer of share-warrant.

46. The bearer of a share-warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either to the full extent or for any purposes defined in the articles, except that he shall not be qualified in respect of the shares or stock specified in the warrant for being a director or manager of the company, in cases where such a qualification is required by the articles.

Position of bearer of share-warrant

47. (1) On the issue of a share-warrant, the company shall strike out of its register of members the name of the member then entered therein as holding the shares or stock specified in the warrant as if he had ceased to be a member, and shall enter in the register the following particulars, namely:—

Entries in register when share-warrant issued.

(i) the fact of the issue of the warrant;

(ii) a statement of the shares or stock included in the warrant, distinguishing each share by its number; and

(iii) the date of the issue of the warrant.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty

rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully continues or permits the default shall be liable to the like penalty.

Surrender of share-warrant.

48. Until the warrant is surrendered, the above particulars shall be deemed to be the particulars required by this Act to be entered in the register of members and on the surrender the date of the surrender shall be entered as if it were the date at which a person ceased to be a member.

Power of company to arrange for different amounts being paid on share

49. A company, if so authorised by its articles, may do any one or more of the following things namely :—

(1) make arrangements on the issue of shares for a difference between the shareholders in the amounts and times of payment of calls on their shares :—

(2) accept from any member who assents thereto the whole or a part of the amount remaining unpaid on any shares held by him although no part of that amount has been called up ;

(3) pay dividend in proportion to the amount paid up, on each share where a larger amount is paid up on some shares than on others.

Power of company limited by shares to alter its share capital.

50. A company limited by shares, if so authorised by its articles, may alter the conditions of its memorandum as follows, (that is to say), it may—

(*a*) increase its share capital by the issue of new shares of such amount as it thinks expedient ;

(*b*) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares ;

(*c*) convert all or any of its paid-up shares into stock and re-convert that stock into paid-up shares of any denomination ;

(*d*) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived ;

(e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any preson, and diminish the amount of its share capital by the amount of the shares so cancelled.

(2) The powers conferred by this section with respect to sub-division of shares must be exercised by special resolution.

(3) Where any alteration has been made under this section in the memorandum of a company, every copy of the memorandum issued after the date of the alteration shall be in accordance with the alteration.

(4) If a company makes default in complying with the requirements of sub-section (3), it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

(5) A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act.

Notice to registrar of consolidation of share capital, conversion of shares into stock, etc.

51. (*1*) Where a company having a share capital has consolidated and divided its share capital into shares of larger amount than its existing shares or converted any of its shares into stock, or re-converted stock into shares, it shall within fifteen days of the consolidation and division, conversion or re-conversion, file notice with the Registrar of the same, specifying the share consolidated and divided, or converted, or the stock re-converted.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

Effect of conversion of shares into stock.

52. Where a company having a share capital has converted any of its shares into stock, and filed notice of the conversion with the registrar, all the provisions of this Act which are applicable to shares only shall cease as to so much of the share capital as is converted into stock; and the register of members of the company, and the list of members to be filed with the Registrar

shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares hereinbefore required by this Act.

Notice of increase of share capital or of members.

53. (1) Where a company having a share capital, whether its shares have or have not been converted into stock, has increased its share capital beyond the registered capital, and where a company not having a share capital has increased the number of its members beyond the registered number, it shall file with the registrar, in the case of an increase of share capital, within fifteen days after the passing, or in the case of a special resolution the confirmation, of the resolution authorising the increase, and in the case of an increase of members within fifteen days after the increase was resolved on or took place, notice of the increase of capital or members, and the registrar shall record the increase.

(2) If a company makes a default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

Reorganization of share capital.

54. (1) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganize its share capital whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes:

Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all shareholders of the class.

(2) Where an order is made under this section, a certified copy thereof shall be filed with the registrar within twenty-one days after the making of the order or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed.

Reduction of Share Capital.

Reduction of share capital.

55. (*1*) No company limited by shares shall have power to buy its own shares unless the consequent reduction of capital is effected and sanctioned in manner hereinafter provided.

(*2*) Subject to confirmation by the Court, a company limited by shares if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may—

(*a*) extinguish or reduce the liability on any of its shares in respect of share capital not paid up ; or

(*b*) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets ; or

(*c*) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company,

and may if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(3) A special resolution under this section is in this Act called a resolution for reducing share capital.

Application to Court for confirming order.

56. Where a company has passed and confirmed a resolution for reducing share capital, it may apply by petition to the Court for an order confirming the reduction.

Addition to name of company of "and reduced."

57. On and from the confirmation by a company of a resolution for reducing share capital, or where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital then on and from the presentation of the petition for confirming the reduction the company shall add to its name until such date as the Court may fix, the words "and reduced" as the last words in its name, and those words shall, until that date, be deemed to be part of the name of the company :

Provided that, where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court

may, if it thinks expedient, dispense altogether with the addition of the words "and reduced."

Objections by creditors, and settlement of list of objecting creditors.

58. (*1*) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital, or the payment to any share-holder of any paid-up share capital, and in any other case if the Court so directs, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction.

(2) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

Power to dispense with consent of creditor on security being given for his debt.

59. Where a creditor entered on the list of creditors whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount (that is to say),—

(*i*) if the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim;

(*ii*) if the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.

Order confirming reduction.

60. The Court, if satisfied, with respect to every creditor of the company who under this Act is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

61. (1) The registrar on production to him of an order of the Court confirming the reduction of the share capital of a company, and on the filing with him of a certified copy of the order and of a minute (approved by the Court) showing, with respect to the share capital of the company as altered by the order, the amount of the share capital, the number of shares into which it is to be divided and the amount of each share, and the amount (if any) at the date of the registration deemed to be paid up on each share, shall register the order and minute.

Registration of order and minute of reduction.

(2) On the registration, and not before, the resolution for reducing share capital as confirmed by the order so registered shall take effect.

(3) Notice of the registration shall be published in such manner as the Court may direct.

(4) The registrar shall certify under his hand the registration of the order and minute, and his certificate, shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute.

62. (1) The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of the company, and shall be valid and alterable as if it had been originally contained therein, and shall be embodied in every copy of the memorandum issued after its registration.

Minute to form part of memorandum.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

63. (1) A member of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount paid, or (as the case may be) the reduced amount, if any, which is to be deemed to have been paid, on the share and the amount of the share as fixed by the minute:

Liability of members in respect of reduced shares.

Provided that, if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceedings for reduction, or of their nature

and effect with respect to his claim not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions of this Act with respect to winding up by the Court, to pay the amount of his debt or claim, then—

(i) every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt, or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration; and

(ii) if the company is wound up the Court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding up.

(2) Nothing in this section shall affect the rights of the contributories among themselves.

Penalty for concealment of name of creditor.

64. If any officer of the company wilfully conceals the name of any creditor entitled to object to the reduction or wilfully misrepresents the nature or amount of the debt or claim of any creditor, or if any officer of the company abets any such concealment or misrepresentation as aforesaid, every such officer shall be punishable with imprisonment which may extend to one year, or with fine, or with both.

Publication of reasons for reduction.

65, In any case of reduction of share capital, the Court may require the company to publish as the Court directs the reasons for reduction, or such other information in regard thereto as the Court may think expedient with a view to give proper information to the public and, if the Court thinks fit, the causes which led to the reduction.

Increase and reduction of share capital in case of a company limited by guarantee having a share capital.

66. A company limited by guarantee and registered after the commencement of this Act may, if it has a share capital and is so authorised by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of this Act.

Registration of Unlimited Company as Limited.

Registration of unlimited company as limited.

67. (*1*) Subject to the provisions of this section, any company registered as unlimited may register under this Act as limited, or any company already registered as a limited company may re-register under this Act, but the registration of an unlimited company as a limited company shall not affect any debts, liabilities, obligations or contracts incurred or entered into by, to, with or on behalf of, the company before the registration, and those debts, liabilities, obligations and contracts may be enforced in manner provided by Part VIII of this Act in the case of a company registered in pursuance of that Part.

(*2*) On registration in pursuance of this section, the registrar shall close the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company; but save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Act.

Power of limited company to provide for reserve share capital on registration.

68. An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things, namely :—

(*a*) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the amount by which its capital is so increased shall be capable of being called up except in the event and for the purposes of the company being wound up ;

(*b*) provided that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up.

Reserve Liability of Limited Company.

Reserve liability of limited company

69. A limited company may by special resolution determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up, and thereupon that

portion of its share capital shall not be capable of being called up except in the event and for the purposes aforesaid.

Unlimited Liability of Directors.

Limited company may have directors with unlimited liability.

70. (1) In a limited company the liability of the directors or of any director, may, if so provided by the memorandum, be unlimited.

(2) In a limited company in which the liability of any director is unlimited, the directors of the company (if any) and the member who proposes a person for election or appointment to the office of director shall add to that proposal a statement that the liability of the person holding that office will be unlimited, and the promoters and officers of the company, or one of them, shall, before the person accepts the office or acts therein, give him notice in writing that his liability will be unlimited.

(3) If any director or proposer makes default in adding such a statement, or if any promoter or officer of the company makes default in giving such a notice, he shall be liable to a fine not exceeding one thousand rupees and shall also be liable for any damage which the person so elected or appointed may sustain from the default, but the liability of the person elected or appointed shall not be affected by the default.

Special resolution of limited company making liability of director unlimited.

71. (1) A limited company, if so authorised by its articles, may, by special resolution alter its memorandum so as to render unlimited the liability of its directors or of any director.

(2) Upon the confirmation of any such special resolution, the provisions thereof shall be as valid as if they had been originally contained in the memorandum, and a copy thereof shall be embodied in or annexed to every copy of the memorandum issued after the confirmation of the resolution.

(3) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made; and every officer of the company who knowingly and wilfully authorises or permits the default, shall be liable to the like penalty.

PART IV.

MANAGEMENT AND ADMINISTRATION.

Office and Name.

Registered office of company.

72. (1) Every company shall have a registered office to which all communications and notices may be addressed.

(2) Notice in writing of the situation of the registered office, and of any change therein, shall be filed with the registrar who shall record the same.

(3) If a company carries on business without complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which it so carries on business.

Publication of name by a limited company.

73. Every limited company—

(a) shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible and in English characters, and also, if the registered office be situate in a place beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place.

(b) shall have its name engraven in legible characters on its seal;

(c) shall have its name mentioned in legible English characters in all bill-heads and letter paper and in all notices, advertisements and other official publications of the company, and in all bills of exchange, hundis, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts and letters of credit of the company.

Penalties for non-publication of name.

74. (1) If a limited company does not paint or affix, and keep painted or affixed, its name in manner directed bthis Act, itshall be liable to a fine not exceeding fifty rupees for not so painting or affixing its name, and for every day during which its name is not so kept painted or affixed, and every officer of the company,

who knowingly and wilfully authorises or permits the default, shall be liable to the like penalty.

(2) If any officer of a limited company, or any person on its behalf, uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issues or authorises the issue of any bill-head, letter paper, notice, advertisement or other official publication of the company, or signs or authorises to be signed on behalf of the company any bill of exchange, hundi, promissory note, endorsement, cheque or order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a fine not exceeding five hundred rupees, and shall further be personally liable to the holder of any such bill of exchange, hundi, promissory note, cheque or order for money or goods, for the amount thereof, unless the same is duly paid by the company.

Publication of authorised as well as subscribed and paid-up capital.

75. (1) Where any notice, advertisement or other official publication of a company contains a statement of the amount of the authorised capital of the company, such notice, advertisement or other official publication shall also contain a statement in an equally prominent position and in equally conspicuous characters of the amount of the capital which has been subscribed and the amount paid up.

(2) Any company which makes default in complying with the requirements of this section and every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding one thousand rupees.

Meetings and Proceedings.

Annual general meetings.

76. (1) A general meeting of every company shall be held once at the least in every year, and not more than fifteen months after the holding of the last preceding general meeting, and, if not so held, the company and every officer of the company, who is knowingly a party to the default, shall be liable to a fine not exceeding five hundred rupees.

(2) When default has been made in holding a meeting of the company in accordance with the provisions of this section the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company.

Statutory meeting of company.

77. (*1*) Every Company limited by shares and registered after the commencement of this Act shall, within a period of six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company which shall be called the statutory meeting.

(*2*) The directors shall, at least ten days before the day on which the meeting is held, forward a report (in this Act called "the statutory report") to every member of the company and to every other person entitled under this Act to receive it.

(*3*) The statutory report shall be certified by not less than two directors of the company or, where there are less than two directors, by the sole director and shall state—

(*a*) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted;

(*b*) the total amount of cash received by the company in respect of all the shares allotted distinguished as aforesaid;

(*c*) an abstract of the receipts of the company whether from its share capital or from debentures, and of the payments made thereout, up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout and particulars concerning the balance remaining in hand and an account or estimate of the preliminary expenses of the company;

(*d*) the name, addresses and descriptions of the directors, auditors (if any), managers (if any) and secretary of the company;

(*e*) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification.

(*4*) The statutory report shall, so far as it relates to the shares allotted by the company and to the cash received in respect of such shares and to the receipts and payments of the company on capital

account, be certified as correct by the auditors (if any) of the company.

(5) The directors shall cause a copy of the statutory report, certified as by this section required, to be filed with the registrar forthwith after the sending thereof to the members of the company.

(6) Every director of the company who knowingly and wilfully authorises or permits a default in complying with the provisions of sub-section (2) or sub-section (5) shall be liable to a fine not exceeding twenty rupees for every day during which the default continues.

(7) The directors shall cause a list showing the names, descriptions and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(8) The members of the company present at the meeting shall be at liberty to discuss any matters relating to the formation of the company, or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed.

(9) The meeting may adjourn from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed and the adjourned meeting shall have the same powers as an original meeting.

(10) If a petition is presented to the Court in manner provided by Part V for winding up the company on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just.

(11) The provisions of this section as to the forwarding and filing of the statutory report shall not apply in the case of a private company.

Calling of extraordinary general meeting on requisition.

78. (1) Notwithstanding anything in the articles, the directors of a company which has a share capital shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to call an extraordinary general meeting of the company.

(2) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3) If the directors do not proceed within twenty one days from the date of the requisition being so deposited to cause a meeting to be called, the requisitionists, or a majority of them in value, may themselves call the meeting, but in either case any meeting so called shall be held within three months from the date of the deposit of the requisition.

(4) If at any such meeting a resolution requiring confirmation at another meeting is passed; the directors shall forthwith call a further extraordinary general meeting for the purpose of considering the resolution and, if thought fit of confirming it as a special resolution and, if the directors do not call the meeting within seven days from the date of the passing of the first resolution, the requisitionists, or a majority of them in value, may themselves call the meeting.

(5) Any meeting called under this section by the requisitionists shall be called in the same manner, as nearly as possible, as that in which meetings are to be called by directors.

Provisions as to meetings and votes.

79. In default of, and subject to, any regulations in the articles,—

(*i*) a meeting of a company may be called by fourteen days' notice in writing, served on every member in manner in which notices are required to be served by Table A in the First Schedule;

(*ii*) five members may call a meeting;

(*iii*) any person elected by the members present at a meeting may be chairman thereof; and

(*iv*) every member shall have one vote.

Representation of companies at meeting of other companies of which they are members.

80. A company which is a member of another company may, by resolution of the directors, authorise any of its officials or any other person to act as its representative at any meeting of that other company, and the person so authorised shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an individual shareholder of that other company.

81. (1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

Extraordinary and special resolution.

(2) A resolution shall be a special resolution when it has been—

(*a*) passed in manner required for the passing of an extraordinary resolution ; and

(*b*) confirmed by a majority of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a subsequent general meeting, of which notice has been duly given, and held after an interval of not less than fourteen days, nor more than one month, from the date of the first meeting.

(3) At any meeting at which an extraordinary resolution is submitted to be passed or a special resolution is submitted to be passed or confirmed a declaration of the chairman on a show of hands that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favor of or against the resolution.

(4) At any meeting at which an extraordinary resolution is submitted to be passed or a special resolution is submitted to be passed or confirmed, a poll may be demanded by three persons for the time being entitled according to the articles to vote, unless the articles of the company require a demand by such number of such persons, not in any case exceeding five, as may be specified in the articles.

(5) In a case where, if a poll is demanded, it may in accordance with the articles be taken in such manner as the chairman may direct; it may, if the chairman so directs, be taken at the meeting at which it is demanded.

(6) When a poll is demanded in accordance with this section, in computing the majority on the poll, reference shall be had to the number of votes to which each member is entitled by the articles of the company.

(7) For the purposes of this section notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by the articles.

Registration and copies of special and extraordinary resolutions.

82. (1) A copy of every special and extraordinary resolution shall, within fifteen days from the confirmation of the special resolution or from the passing of the extraordinary resolution, as the case may be, be printed or typewritten and filed with the registrar who shall record the same.

(2) Where articles have been registered, a copy of every special resolution for the time being in force shall be embodied in or annexed to every copy of the articles issued after the date of the resolution.

(3) Where articles have not been registered, a copy of every special resolution shall be forwarded in print to any member at his request, on payment of one rupee or such less sum as the company may direct.

(4) If a company makes default in so filing with the registrar a copy of a special or extraordinary resolution, it shall be liable to a fine not exceeding twenty rupees for every day during which the default continues.

(5) If a company makes default in embodying in or annexing to a copy of its articles or in forwarding in print to a member when required by this section a copy of a special resolution, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made.

(6) Every officer of a company who knowingly and wilfully authorises or permits any default by the company in complying with the requirements of this section shall be liable to the like penalty as is imposed by this section on the company for that default.

Minutes of proceedings of meeting and directors.

83. (1) Every company shall cause minutes of all proceedings of general meetings and of its directors to be entered in books kept for that purpose.

(2) Any such minute, if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

(3) Until the contrary is proved, every general meeting of the company or meeting of directors in respect of the proceedings whereof minutes have been so made shall be deemed to have been duly called and held, and all proceedings had thereat to have been duly had, and all appointments of directors or liquidators shall be deemed to be valid.

84. (1) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in any prospectus issued by or on behalf of the company or in relation to any intended company or in any statement in lieu of prospectus filed by or on behalf of a company, unless, before the registration of the articles or the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case may be, he has, by himself or by his agent authorised in writing—

Restrictions on appointment or advertisement of director.

(i) signed and filed with the registrar a consent in writing to act as such director; and

(ii) save in the case of a company limited by guarantee and not having a share capital, either signed the memorandum for a number of shares not less than his qualification (if any), or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (if any).

(2) On the application for registration of the memorandum and articles of a company the applicant shall file with the registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented, the applicant shall be liable to a fine not exceeding five hundred rupees.

(3) This section shall not apply to a private company nor to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business.

85. (1) Without prejudice to the restrictions imposed by section 84, it shall be the duty of every director who is by the articles required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles.

Qualification of director.

(2) The office of director of a company shall be vacated if the director does not, within two months from the date of his appointment, or within such shorter time as may be fixed by the articles, obtain his qualification, or if after the expiration of such period or shorter time he ceases at any time to hold his qualification; and a person vacating office under this section shall be incapable of being re-appointed director of the company until he has obtained his qualification.

(3) If, after the expiration of the said period or shorter time, any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding fifty rupees for every day between the expiration of the said period or shorter time and the last day on which it is proved that he acted as a director.

Validity of acts of directors.

86. The acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification: Provided that nothing in this section shall be deemed to give validity to acts done by a director after the appointment of such director has been shown to be invalid.

List of directors to be sent to registrar.

87. (1) Every company shall keep at its registered office a register containing the names and addresses and the occupations of its directors, and file with the registrar a copy thereof, and from time to time file with the registrar notice of any change among its directors or managers.

(2) If default is made in complying with this section, the company shall be liable to a fine not exceeding fifty rupees for every day during which the default continues; and every officer of the company, who knowingly and wilfully authorises or permits the default, shall be liable to the like penalty.

Contracts.

Form of contracts.

88. (1) Contracts on behalf of a company may be made as follows (that is to say):—

(i) any contract which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged;

(ii) any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

(2) All contracts made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto, their heirs, or legal representatives as the case may be.

89. A bill of exchange, hundi or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a company if made, drawn, accepted or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority, express or implied.

Bills of exchange and promissory notes.

90. A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place not situate in British India; and every deed signed by such attorney, on behalf of the company, and under his seal, where sealing is required, shall bind the company, and have the same effect as if it were under its common seal.

Execution of deeds abroad.

91. (1) A company whose objects require or comprise the transaction of business beyond the limits of British India may, if authorised by its articles, have for use in any territory, district or place not situate in British India, an official seal, which shall be a facsimile of the common seal of the company, with the addition on its face of the name of every territory, district or place where it is to be used.

Power for company to have official seal for use abroad.

(2) A company having such an official seal may, by writing under its common seal, authorise any person appointed for the purpose in any territory, district or place not situate in British India to affix the same to any deed or other document to which the company is party in that territory, district or place.

(3) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period (if any) mentioned in the instrument conferring the authority, or if no period is there mentioned then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(4) The person affixing any such official seal shall, by writing under his hand, on the deed or other document to which the seal is affixed, certify the date and place of affixing the same.

(5) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.

Prospectus.

Filing of prospectus.

92. (*1*) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus.

(*2*) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, shall be filed for registration with the registrar on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration.

(*3*) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section.

(*4*) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section.

(*5*) If a prospectus is issued without a copy thereof being so filed, the company, and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding fifty rupees for every day from the date of the issue of the prospectus until a copy thereof is so filed.

Specific requirements as to particulars of prospectus.

93. (*1*) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, shall state—

(*a*) the contents of the memorandum, with the names, descriptions and addresses of the signatories and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company; and

(*b*) the number of shares (if any) fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and

(*c*) the names, descriptions and addresses of the directors or proposed directors and of the managers or proposed managers (if any); and

(*d*) the minimum subscription on which the directors may proceed to allotment, and the amount payable on

application and allotment on each share; and in the case of a second or subsequent offer of shares the amount offered for subscription on each previous allotment made within the two preceding years, and the amount (if any) paid on the shares so allotted; and

(*e*) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or agreed to be issued; and

(*f*) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares or debentures to the vendor, and where there is more than one separate vendor or the company is a sub-purchaser, the amount so payable to each vendor: Provided that where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors; and

(*g*) the amount (if any) paid or payable as purchase-money in cash, shares or debentures, for any such property as aforesaid, specifying the amount (if any) payable for goodwill; and

(*h*) the amount (if any) paid within the two preceding years or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or the rate of any such commission: Provided that it should not be necessary to state the commission payable to sub-underwriters; and

(*i*) the amount or estimated amount of preliminary expenses; and

(*k*) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment; and

(*l*) the dates of, and parties to, every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected: Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company or to any contract entered into more than two years before the date of issue of the prospectus; and

(*m*) the names and addresses of the auditors (if any) of the company; and

(*n*) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company; and

(*o*) where the company is a company having shares of more than one class the right of voting at meetings of the company conferred by the several classes of shares respectively.

(2) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum, or the signatories thereto, and the number of shares subscribed for by them.

(3) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons.

(4) The requirements of this section as to the memorandum and the qualification, remuneration and interest of directors, the names, descriptions and addresses of directors or proposed directors, and of managers or proposed managers, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a

prospectus issued more than one year after the date at which the company is entitled to commence business.

(5) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section.

Meaning of "vendor" in section 93.

94. For the purposes of section 93 every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

(*a*) the purchase-money, is not fully paid at the date of issue of prospectus ; or

(*b*) the purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus ; or

(*c*) the contract depends for its validity or fulfilment on the result of that issue.

Application of section 93 to the case of property taken on lease.

95. Where any of the property to be acquired by the company is to be taken on lease, section 93 shall apply as if the expression "vendor" included the lessor, and the expression "purchase-money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

Invalidity of certain conditions as to waiver or notice.

96. Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirements of section 93, or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus, shall be void.

Saving in certain cases of non-compliance with section 93.

97. In the event of non-compliance with any of the requirements of section 93, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance, if he proves that—

(*a*) as regards any matter not disclosed, he was not cognisant thereof ; or

(*b*) the non-compliance arose from an honest mistake of fact on his part :

Provided that, in the event of non-compliance with the requirements contained in clause (*n*) of sub-section (*1*) of section 93, no

such director or other person shall incur any liability in respect of the non-compliance unless it be proved that he had knowledge of the matters not disclosed.

Obligations of companies where no prospectus is issued.

98. (1) A company which does not issue a prospectus on or with reference to its formation shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in the Second Schedule.

(2) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act or, in so far as it relates to the allotment of shares to a company limited by a guarantee and not having a share capital.

Restriction on alteration of terms mentioned in prospectus or statement in lieu of prospectus.

99. A company shall not, at any time, vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of the company in general meeting.

Liability for statements in prospectus.

100. (1) Where a prospectus invites persons to subscribe for shares in or debentures of a company every person who is a director of the company at the time of the issue of the prospectus, and every person who has authorised the naming of himself and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorised the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for all loss or damage they may have sustained by reason of any misleading or untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith unless it is proved—

(a) with respect to every misleading or untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that he had reasonable ground to believe and did up to the time of

the allotment of the shares or debentures, as the case may be, believe that the statement fairly represented the facts or was true;

(b) with respect to every misleading or untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation: Provided that the director, person named as director, promoter or person who authorised the issue of the prospectus shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report or valuation was competent to make it; and

(c) with respect to every misleading or untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document:

or unless it is proved—

(i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or

(ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent; or

(iii) that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any misleading or untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

(2) Where a company existing at the commencement of this Act has issued shares or debentures, and for the purpose of obtaining further capital by subscriptions for shares or debentures issues a prospectus, a director shall not be liable in respect of any statement therein, unless he has authorised the issue of the prospectus, or has adopted or ratified it.

(3) Where the prospeetus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorised the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages, costs and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any suit or legal proceedings brought against him in respect thereof.

(4) Every person who, by reason of his being a director or named as a director, or as having agreed to become a director, or of his having authorised the issue of the prospectus, becomes liable to make any payment under this section may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

(5) For the purposes of this section—

(a) the expression "promoter" means a promoter who was a party to the preparation of the prospectus, or the portion thereof containing the misleading or untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company;

(b) the expression "expert" includes engineer, valuer, accountant and any other person whose profession gives authority to a statement made by him.

Allotment.

Restriction as to allotment.

101. (1) No allotment shall be made of any share capital of a company offered to the public for subscription, unless the following conditions have been complied with, namely:—

(a) the amount (if any) fixed by the memorandum or articles and named in the prospectus as the minimum subscription upon which the directors may proceed to allotment: or

(b) if no amount is so fixed and named, then the whole amount of the share capital so offered for subscription,

has been subscribed, and the sum payable on application for the amount so fixed and named or for the whole amount offered for subscription, has been paid to and received in cash by the company.

(*2*) The amount so fixed and named and the whole amount aforesaid shall be reckoned exclusively of any amount payable otherwise than in cash, and is in this Act referred to as the minimum subscription.

(*3*) The amount payable on application on each share shall not be less than five per cent, of the nominal amount of the share.

(*4*) If the conditions aforesaid have not been complied with on the expiration of one hundred and twenty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and, if any such money is not so repaid within one hundred and thirty days after thirty days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of seven per cent. per annum from the expiration of the one hundred and thirtieth day: Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

(*5*) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

(*6*) This section, except sub-section (*3*) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

(*7*) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription (that is to say)—

(*a*) the amount (if any) fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment; or

(*b*) if no amount is so fixed and named the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash;

has been subscribed and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company.

(8) Sub-section (7) shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act.

Effect of irregular allotment.

102. (1) An allotment made by a company to an applicant in contravention of the provisions of section 101 shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

(2) If any director of a company knowingly contravenes or permits or authorises the contravention of any of the provisions of section 101 with respect to allotment, he shall be liable to compensate the company and the allottee respectively for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby: Provided that proceedings to recover any such loss, damages or costs shall not be commenced after the expiration of two years from the date of the allotment.

Restrictions on commencement of business.

103. (1) A company shall not commence any business or exercise any borrowing powers unless—

(a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and

(b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription or, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash; and

(c) there has been filed with the registrar a duly verified declaration by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with; and

(d) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar a statement in lieu of prospectus.

(2) The registrar shall, on the filing of a duly verified declaration, in accordance with the provisions of this section certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled:

Provided that, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

(3) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures.

(5) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding five hundred rupees for every day during which the contravention continues.

(6) Nothing in this section shall apply to a private company, or to a company registered before the commencement of this Act which does not issue a prospectus inviting the public to subscribe for its shares or, in so far as its provisions relate to shares to a company limited by guarantee and not having a share capital.

Return as to allotments.

104. (1) Whenever a company having a share capital makes any allotment of its shares, the company shall, within one month thereafter,—

(a) file with the registrar a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and descriptions of the allottees, and the amount (if any) paid or due and payable on each share; and

(*b*) in the case of shares allotted as fully or partly paid up otherwise than in cash, produce for the inspection and examination of the registrar a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and file with the registrar copies verified in the prescribed manner of all such contracts and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

(2) Where such a contract as above-mentioned is not reduced to writing, the company shall, within one month after the allotment, file with the registrar the prescribed particulars of the contract stamped with the same stamp-duty as would have been payable if the contract had been reduced to writing, and these particulars shall be deemed to be an instrument within the meaning of the Indian Stamp Act, 1899, and the registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section 31 of that Act.

(3) If default is made in complying with the requirements of this section, every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues:

Provided that, in case of default in filing with the registrar within one month after the allotment any document required to be filed by this section, the company, or any person liable for the default, may apply to the Court for relief, and the Court, if satisfied that the omission to file the document was accidental or due to inadvertence or that on other grounds it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such a period as the Court may think proper.

Commissions and Discounts.

Power to pay certain commission and prohibition of payment of all other commissions discounts, etc.

105. (*1*) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission

is authorised by the articles, and the commission paid or agreed to be paid does not exceed the amount or rate so authorized and if the amount or rate per cent. of the commission paid or agreed to be paid is—

(*a*) in the case of shares offered to the public for subscription, disclosed in the prospectus; or

(*b*) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar and, where a circular or notice, not being a prospectus inviting subscription for the shares is issued, also disclosed in that circular or notice.

(2) Save as aforesaid, no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring, or agreeing to procure subscriptions whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase-money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase-money or contract price, or otherwise.

(3) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay, and a vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section.

Statement in balance sheet as to commissions and discounts.

106. Where a company has paid any sums by way of commission in respect of any shares or debentures, or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed or so much thereof as has not been written off, shall be stated in every balance-sheet of the company until the whole amount thereof has been written off.

Payment of interest out of Capital.

107. Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up for the period and subject to the conditions and restrictions in this section mentioned, and may charge the same to capital as part of the cost of construction of the work or building, or the provision of plant :

Power of company to pay interest out of capital in certain cases.

Provided that—

(1) no such payment shall be made unless the same is authorised by the articles or by special resolution ;

(2) no such payment, whether authorised by the articles or by special resolution, shall be made without the previous sanction of the Local Government, which sanction shall be conclusive evidence for the purposes of this section that the shares of the company, in respect of which such sanction is given, have been issued for a purpose specified in this section ;

(*3*) before sanctioning any such payment, the Local Government may, at the expense of the company, appoint a person to inquire and report to such Local Government as to the circumssances of the case, and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry ;

(*4*) the payment shall be made only for such period as may be determined by the Local Government; and such period shall in no case extend beyond the close of the half-year next after the half-year during which the works or buildings have been actually completed or the plant provided ;

(*5*) the rate of interest shall in no case exceed four per cent. per annum or such lower rate as the Governor General in Council may, by notification in the Gazette of India prescribe ;

(*6*) the payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid ;

(7) the accounts of the company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate;

(8) nothing in this section shall affect any company to which the Indian Railway Companies Act, 1895, or the Indian Tramways Act, 1902, applies.

Certificates of Shares, etc.

Limitation of time for issue of certificates.

108. (1) Every company shall, within three months after the allotment of any of its shares, debentures or debenture stock, and within three months after the registration of the transfer of any such shares, debentures or debenture stock, complete and have ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures or debenture stock otherwise provide.

(2) If default is made in complying with the requirements of this section, the company, and every officer of the company who is knowingly a party to the default, shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

Information as to Mortgages, Charges, etc.

Certain mortgages and charges to be void if not registered.

109. Every mortgage or charge created after the commencement of this Act by a company and being either—

(a) a mortgage or charge for the purpose of securing any issue of debentures; or

(b) a mortgage or charge on uncalled share capital of the company; or

(c) a mortgage or charge on any immoveable property wherever situate, or any interest therein; or

(d) a mortgage or charge on any book debts of the company; or

(e) a floating charge on the undertaking or property of the company;

shall, so far as any security on the company's property or undertaking is thereby conferred, be void as against the liquidator and any creditor of the company, unless the prescribed particulars of the

mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner are filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section, the money secured thereby shall immediately become payable:

Provided that—

(*i*) in the case of a mortgage or charge created out of British India comprising solely property situate outside British India, twenty-one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the date of the creation of the mortgage or charge, as the time within which the particulars and instrument or copy are to be filed with the registrar; and

(*ii*) where the mortgage or charge is created in British India but comprises property outside British India, the instrument creating or purporting to create the mortgage or charge or a copy thereof verified in the prescribed manner may be filed for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and

(*iii*) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a mortgage or charge on those book debts; and

(*iv*) the holding of debentures entitling the holder to a charge on immoveable property shall not be deemed to be an interest in immovable property.

Particulars in case of series of debentures entitling holders *pari passu*.

110. Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture-holders of tha series are entitled *pari passu* is created by a company, it shall be sufficient for the purposes of

section 109 if there are filed with the registrar within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars :—

(a) the total amount secured by the whole series ; and

(b) the dates of the resolutions authorising the issue of the series and the date of the covering deed (if any) by which the security is created or defined ; and

(c) a general description of the property charged and

(d) the names of the trustees (if any) for the debenture-holders ;

together with the deed or a copy thereof verified in the prescribed manner containing the charge, or if there is no such deed, one of the debentures of the series, and the registrar shall, on payment of the prescribed fee, enter those particulars in the register.

Provided that, where more than one issue is made of debentures in the series, there shall be filed with the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

Particulars in case of commission, etc., on debentures.

111. Where any commission, allowance or discount has been paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be filed for registration under sections 109 and 110 shall include particulars as to the amount or rate per cent. of the commission, discount or allowance so paid or made, but an ommission to do this shall not affect the validity of the debentures issued :

Provided that the deposit of any debentures as security for any debt of any company shall not for the purposes of this provision be treated as the issue of the debentures at a discount.

Register of mortgages and charges.

112. (1) The registrar shall keep, with respect to each company, a register in the prescribed form of all mortgages and charges created by the company after the commancement of this Act and requiring registration under section 109, and shall, on payment of the

prescribed fee, enter in the register, with respect to every such mortgage or charge the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.

(2) After making the entry required by sub-section (1), the registrar shall return the instrument (if any) or the verified copy thereof, as the case may be, filed in accordance with the provisions of section 109 or section 110 to the person filing the same.

(3) The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee, not exceeding one rupee for each inspection.

Index to register of mortgages and charges.

113. The registrar shall keep a chronological index, in the prescribed form and with the prescribed particulars, of the mortgages or charges registered with him under this Act.

Certificate of registration.

114. The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of section 109, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of sections 109 to 112 as to registration have been complied with.

Endorsement of certificate of registration on debenture or certificate of debenture stock.

115. The company shall cause a copy of every certificate of registration given under section 114, to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered :

Provided that nothing in this section shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be endorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created.

Duty of company and right of interested party as regards registration.

116. (1) It shall be the duty of the company to file with the registrar for registration the prescribed particulars of every mortgage or charge created by the company and of the issues of debentures of a series, requiring registration under section 109, but registration of any such mortgage or charge may be effected on the application of any person interested therein.

(2) Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

Copy of instrument creating mortgage or charge to be kept at registered office.

117. Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under section 109, to be kept at the registered office of the company: Provided that in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient.

Registration of appointment of receiver.

118. (1) If any person obtains an order for appointment of a receiver of the property of a company, or appoints such a receiver under any powers contained in any instrument, he shall, within fifteen days from the date of the order or of the appointment under the powers contained in the instrument, file notice of the fact with the registrar, and the registrar shall, on payment of the prescribed fee, enter the fact in the register of mortgages and charges.

(2) If any person makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

Filing of accounts of receivers.

119. (1) Every receiver of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, shall once in every half-year while he remains in possession, and also on ceasing to act as receiver, file with the registrar an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall also on ceasing to act as receiver file with the registrar notice to that effect, and the registrar shall enter the notice in the register of mortgages and charges.

(2) Every receiver who makes default in complying with the provisions of this section shall be liable to a fine not exceeding five hundred rupees.

Rectification of register of mortgages.

120. The Court, on being satisfied that the omission to register a mortgage or charge within the time required by section 109, or that the omission or mis-statement of any particular with respect to any such mortgage or charge, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on

other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the Court just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or mis-statement be rectified, and may make such order as to the costs of the application as it thinks fit.

Entry of satisfaction.

121. The registrar may, on evidence being given to his satisfaction that the debt for which any registered mortgage or charge was given has been paid or satisfied, order that a memorandum of satisfaction be entered on the register, and shall if required furnish the company with a copy thereof.

Penalties.

122. (*1*) If any company makes default in filing with the registrar for registration the particulars—

(*a*) of any mortgage or charge created by the company; or

(*b*) of the issues of debentures of a series,

requiring registration with the registrar under the foregoing provisions of this Act, then, unless the registration has been effected on the application of some other person, the company, and every officer of the company or other person who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding five hundred rupees for every day during which the default continues.

(*2*) Subject as aforesaid, if any company makes default in complying with any of the requirements of this Act as to the registration with the registrar of any mortgage or charge created by the company, the company, and every officer of the company, who knowingly and wilfully authorises or permits the default shall, without prejudice to any other liability, be liable on conviction to a fine not exceeding one thousand rupees.

(*3*) If any person knowingly and wilfully authorises or permits the delivery of any debenture or certificate of debenture stock requiring registration with the registrar under the foregoing provisions of this Act without a copy of the certificate of registration being endorsed upon it, he shall, without prejudice to any other liability, be liable on conviction to a fine not exceeding one thousand rupees.

Company's register of mortgages.

123. (1) Every limited company shall keep a register of mortgages and enter therein all mortgages and charges specifically affecting property of the company, giving in each case a short description of the pro-

perty mortgaged or charged, the amount of the mortgage or charge and (except in the case of securities to bearer) the names of the mortgagees or persons entitled thereto.

(2) If any director, manager or other officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding five hundred rupees.

Right to inspect copies of instruments creating mortgages and charges and company's register of mortgages.

124. (1) The copies kept at the registered office of the company in pursuance of section 117 of instruments creating any mortgage or charge requiring registration under this Act with the registrar and the register of mortgages kept in pursuance of section 123, shall be open at all reasonable times to the inspection of any creditor or member of the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding one rupee for each inspection, as the company may prescribe.

(2) If inspection of the said copies or register is refused, the company shall be liable to a fine not exceeding fifty rupees and a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall incur the like penalty, and in addition to the above penalty, the Court may by order compel an immediate inspection of the copies or register.

Right to inspect the register of debentureholders and to have copies of trust-deed.

125. (1) Every register of holders of debentures of a company shall, except when closed in accordance with the articles during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles be open to the inspection of the registered holder of any such debentures, and of any holder of shares in the company, but subject to such reasonable restrictions as the company may in general meeting impose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of six annas for every one hundred words or fractional part thereof required to be copied.

(2) A copy of any trust-deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request on payment in the case of a printed trust-deed of the

sum of one rupee or such less sum as may be prescribed by the company, or, where the trust-deed has not been printed, on payment of six annas for every one hundred words or fractional part thereof required to be copied.

(3) If inspection is refused, or a copy is refused or not forwarded, the company shall be liable to a fine not exceeding fifty rupees, and to a further fine not exceeding twenty rupees for every day during which the refusal continues, and evey officer of the company who knowingly authorises or permits the refusal shall incur the like penalty, and the Court may by order compel an immediate inspection of the register.

Debentures and Floating Charges.

Perpetual debentures

126. A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the passing of this Act, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period however long.

Power to re-issue redeemed debentures in certain cases.

127. (1) Where either before or after the commencement of this Act a company has redeemed any debentures previously issued, the company, unless the articles or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns) shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place, and upon such re-issue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

(2) Where with the object of keeping debentures alive for the purpose of re-issue they have, either before or after the commencement of this Act, been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

(3) Where a company has, either before or after the commencement of this Act, deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(4) The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to, or deemed to have been possessed by, a company, whether the re-issue or issue was made before or after the commencement of this Act, shall be treated as the issue of a new debenture for the purposes of stamp-duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued:

Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp-duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered, that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp-duty and penalty.

(5) Nothing in this section shall prejudice—

(a) the operation of any decree or order of a Court of competent jurisdiction pronounced or made before the twenty-fifth day of February, 1910, as between the parties to the proceedings in which the decree or order was made, and any appeal from any such decree or order shall be decided as if this Act had not been passed; or

(b) any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same.

Specific performance of contract to subscribe for debentures.

128. A contract with a company to take up and pay for any debentures of the company may be enforced by a decree for specific performance.

Payments of certain debts out of assets subject to floating in priority to claims under the charge.

129. (1) Where either a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to the charge, then, if the company is not at the time in course

of being wound up, the debts which in every winding-up are under the provisions of Part V relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2) The periods of time mentioned in the said provisions of Part V shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(3) Any payments made under this section shall be recouped, as far as may be out of the assets of the company available for payment of general creditors.

Statements, Books and Accounts.

Company to keep proper books of account.

130. Every company shall keep proper books of account in which shall be entered full, true, and complete accounts of the affairs and transactions of the company.

Annual balance-sheet.

131. (1) Every company shall, once at least in every year and at intervals of not more than fifteen months, cause the accounts of the company to be balanced and a balance-sheet to be prepared.

(2) The balance-sheet shall be audited by the auditor of the company as hereinafter provided, and the auditor's report shall be attached thereto, or there shall be inserted at the foot thereof a reference to the report, and the report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

(3) Every company other than a private company shall send a copy of such balance-sheet so audited to the registered address of every member of the company at least seven days before the meeting at which it is to be laid before the members of the company, and shall deposit a copy at the registered office of the company for the inspection of the members of the company during a period of at least seven days before that meeting.

(4) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding one thousand rupees, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

Contents of balance sheet.

132. (1) The balance-sheet shall contain a summary of the property and assets and of the capital and liabilities of the company giving such particulars as will disclose the general nature of those liabilities and assets and how the value of the fixed assets has been arrived at.

(2) The balance-sheet shall be in the form marked F in the Third Schedule or as near thereto as circumstances admit.

Authentication of balance-sheet.

133. (1) Save as provided by sub-section (2) the balance-sheet shall—

(*i*) in the case of a banking company, be signed by the manager (if any) and, where there are more than three directors of the company, by at least three of those directors and, where there are not more than three directors, by all the directors;

(*ii*) in the case of any other company, be signed by two directors or, when there are less than two directors, by the sole director and by the manager (if any) of the company.

(2) When the total number of directors of the company for the time being in British India is less than the number of directors whose signatures are required by sub-section (1), then the balance-sheet shall be signed by all the directors for the time being in British India, or, if there is only one director for the time being in British India, by such director, but in such a case there shall be subjoined to the balance-sheet a statement signed by such directors or director explaining the reason for non-compliance with the provisions of sub-section (1).

(3) If any copy of a balance-sheet which has not been signed as required by this section is issued, circulated or published, the company and every officer of the company who is knowingly a party to the default shall be punishable with fine which may extend to five hundred rupees.

Copy of balance-sheet and auditor's report to be forwarded to the registrar.

134. (1) After the balance-sheet has been laid before the company at the general meeting, a copy thereof signed by the manager or secretary of the company shall be filed with the registrar at the same time as the copy of the annual list of members and summary prepared in accordance with the requirements of section 32.

(2) If the general meeting before which a balance-sheet is laid does not adopt the balance-sheet, a statement of that fact and of the reasons therefor shall be annexed to the balance-sheet and to the copy thereof required to be filed with the registrar.

(3) This section shall not apply to a private company.

(4) If a company makes default in complying with the requirements of this section, the company and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty as is provided by section 32 for a default in complying with the provisions of that section.

Right of member of company to copies of the balance sheet and the auditor's report.

135. Save as otherwise provided in this Act, any member of a company shall be entitled to be furnished with copies of the balance-sheet and the auditor's report at a charge not exceeding six annas for every hundred words or fractional part thereof.

Statement to be published by Banking and certain other Companies.

Certain companies to publish statement in schedule.

136. (1) Every company being a limited banking company or an insurance company or a deposit, provident or benefit society shall, before it commences business, and also on the first Monday in February and the first Monday in August in every year during which it carries on business, make a statement in the form marked G in the Third Schedule, or as near thereto as circumstances will admit.

(2) A copy of the statement shall be displayed and, until the display of the next following statement, kept displayed in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on.

(3) Every member and every creditor of the company shall be entitled to a copy of the statement on payment of a sum not exceeding eight annas.

(4) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

(5) This section shall not apply to a life assurance company or provident insurance society to which the provisions of the Indian

Life Assurance Companies Act, 1912, or of the Provident Insurance Societies Act, 1912, as the case may be, as to the annual statements to be made by such company or society apply with or without modifications, if the company or society complies with those provisions.

Investigation by the Registrar.

Power of registrar to call for information or explanation.

137. (*1*) Where the registrar, on perusal of any document which a company is required to submit to him under the provisions of this Act, is of opinion that any information or explanation is necessary in order that such document may afford full particulars of the matter to which it purports to relate, he may, by a written order call on the company submitting the document to furnish in writing such information or explanation with such time as he may specify in his order.

(*2*) On the receipt of an order under sub-section (1), it shall be the duty of all persons who are or have been officers of the company to furnish such information or explanation to the best of their power.

(*3*) If any such person refuses or neglects to furnish any such information or explanation, he shall be liable to a fine not exceeding fifty rupees in respect of each offence.

(*4*) On receipt of such information or explanation the registrar may annex the same to the original document submitted to him; and any additional document so annexed by the registrar shall be subject to the like provisions as to inspection and the taking of copies as the original document is subject.

(*5*) If such information or explanation is not furnished within the specified time, or if after perusal of such information or explanation the registrar is of opinion that the document in question discloses an unsatisfactory state of affairs, or that it does not disclose a full and fair statement of the matters to which it purports to relate, the registrar shall report in writing the circumstances of the case to the Local Government.

Inspection and Audit.

Investigation of affairs of company by inspectors.

138. The Local Government may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the Local Government may direct—

(i) in the case of a banking company having a share capital, on the application of members holding not less than one-fifth of the shares issued ;

(ii) in the case of any other company having a share capital on the application of members holding not less than one-tenth of the shares issued;

(iii) in the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members;

(iv) in the case of any company on a report by the registrar under section 137, sub-section (5).

Application for inspection to be supported by evidence.

139. An application by members of a company under section 138 shall be supported by such evidence as the Local Government may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in requiring the investigation ; and the Local Government may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.

Inspection of books and examination of officers.

140. (1) It shall be the duty of all persons who are or have been officers of the company to produce to the inspectors all books and documents in their custody or power relating to the company.

(2) An inspector may examine on oath any such person in relation to its business, and may administer an oath accordingly.

(3) If any person refuses to produce any book or document which under this section it is his duty to produce, or to answer any question relating to the affairs of the company, he shall be liable to a fine not exceeding fifty rupees in respect of each offence.

Results of examination how dealt with.

141. (1) On the conclusion of the investigation the inspectors shall report their opinion to the Local Government, and a copy of the report shall be forwarded by the Local Government to the registered office of the company, and a further copy shall, at the request of the applicants for the investigation, be delivered to them.

(2) The report shall be written or printed, as the Local Government directs.

(3) All expenses of, and incidental to, the investigation shall be defrayed by the applicants unless the Local Government directs

the same to be paid by the company, which the Local Government is hereby authorised to do.

Powers of company to appoint inspectors.

142. (*1*) A company may by special resolution appoint inspectors to investigate its affairs.

(*2*) Inspectors so appointed shall have the same powers and duties as inspectors appointed by the Local Government, except that, instead of reporting to the Local Government, they shall report in such manner and to such persons as the company in general meeting may direct.

(*3*) All persons who are or have been officers of the company shall incur the like penalties in case of refusal to produce any book or document required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the Local Government.

Report of inspectors to be evidence.

143. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company whose affairs they have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report.

Qualifications and appointment of auditors.

144. (*1*) No person shall be appointed or act as an auditor of any company other than a private company unless he holds a certificate from the Local Government entitling him to act as an auditor of companies:

Provided that the Governor General in Council may, by notification in the Gazette of India, declare that the members of any institution or association specified in such notification shall be entitled to be appointed and to act as auditors of companies throughout British India.

(2) The Local Government shall, by notification in the local official Gazette, make rules providing for the grant of certificates entitling the holders thereof to act as auditors of companies, and may by such rules provide the conditions and restrictions on and subject to which such certificate shall be granted. The holder of such certificate shall be entitled to act as an auditor of companies throughout British India unless such certificate restricts or limits the exercise of the right.

(3) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

(4) If an appointment of an auditor is not made at an annual general meeting, the Local Government may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

(5) The following persons : that is to say,

(i) a director or officer of the company ; and

(ii) a partner of such director or officer ; and

(iii) in the case of a company other than a private company, any person in the employment of such director or officer, shall not be appointed auditors of the company.

(6) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of audit, or has been given by a member of the company to the company not less than fourteen days before such annual general meeting, and the company shall send a copy of any such notice to the retiring auditor and shall give notice thereof to its members either by advertisement or in any other mode allowed by the articles not less than seven days before the annual general meeting:

Provided that, if after notice of the intention to nominate an auditor has been given to the company, an annual general meeting is called for a date fourteen days or less after the notice has been given, the requirements of this section as to time in respect of such a notice shall be deemed to have been satisfied, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this section, be sent or given at the same time as the notice of the annual general meeting.

(7) The first auditors of the company may be appointed by the directors before the statutory meeting, and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the members of the company in general meeting, in which case such members at that meeting may appoint auditors.

(8) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues, the surviving or continuing auditor or auditors (if any) may act.

(9) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting, or to fill any casual vacancy, may be fixed by the directors.

Powers and duties of auditors.

145. (1) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

(2) The auditors shall make a report to the members of the company on the accounts examined by them, and on every balance-sheet laid before the company in general meeting during their tenure of office, and the report shall state—

(a) whether or not they have obtained all the information and explanations they have required ; and

(b) whether, in their opinion the balance-sheet referred to in the report is drawn up in conformity with the law ; and

(c) whether such balance sheet exhibits a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company.

(3) In the case of a banking company, if the company has branch banks beyond the limits of India, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in British India.

Rights of preference shareholders etc, as to receipt and inspection of reports, etc.

146. (1) Holders of preference shares and debentures of a company shall have the same right to receive and inspect the balance-sheets of the company and the reports of the auditors and other reports as is possessed by the holders of ordinary shares in the company.

(2) This section shall not apply to a private company, nor to a company registered before the commencement of this Act.

Carrying on business with less than the legal minimum members.

Liability for carrying on business with fewer than seven or, in the case of a private company, two members.

147. If at any time the number of members of a company is reduced, in the case of a private company, below two, or in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those

six months and is cognisant of the fact that it is carrying on business with fewer than two members or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be sued for the same without joinder in the suit of any other member.

Service and Authentication of Documents.

Service of documents of company.

148. A document may be served on a company by leaving it at, or sending it by post to, the registered office of the company.

Service of documents on registrar.

149. A document may be served on the registrar by sending it to him by post or, delivering it to him, or by leaving it for him at his office.

Authentication of documents.

150. A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorized officer of the company, and need not be under its common seal.

Tables, Forms and Rules as to prescribed matters.

Application and alteration of tables and forms, and power to make rules as to prescribed matters.

151. (*1*) The forms in the Third Schedule or forms as near thereto as circumstances admit shall be used in all matters to which those forms refer.

(*2*) The Governor General in Council may alter any of the tables and forms in the First Schedule, so that he does not increase the amount of fees payable to the registrar in the said Schedule mentioned, and may alter or add to the forms in the Third Schedule.

(*3*) Any such table or form, when altered, shall be published in the Gazette of India, and on such publication shall have effect as if enacted in this Act, but no alteration made by the Governor General in Council in Table A in the First Schedule shall affect any company registered before the alteration, or repeal, as respects that company, any portion of that table.

(*4*) In addition to the powers hereinbefore conferred by this section, the Governor General in Council may make rules providing for all or any matters which by this Act are to be prescribed by his authority.

(*5*) Every such rule shall be published in the Gazette of India, and on such publication shall have effect as if enacted in this Act.

Arbitration and Compromise.

Power for companies to refer matters to arbitration.

152. (*1*) A company may by written agreement refer to arbitration, in accordance with the Indian Arbitration Act, 1899, an existing or future difference between itself and any other company or person.

(*2*) Companies, parties to the arbitration, may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves. or by their directors or other managing body.

(*3*) The provisions of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations between companies and persons in pursuance of this Act.

Power to compromise with creditors and members.

153. (*1*) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(*2*) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(*3*) In this section the expression "company" means any company liable to be wound up under this Act.

Conversion of private company into public company.

Conversion of private into public company.

154. (*1*) A private company may, subject to anything contained in its memorandum or articles, by a special resolution and by filing with the registrar a copy of such resolution and also such a statement in lieu of prospectus as the company, if a public company, would have had

to file before allotting any of its shares or debentures, together with such a duly verified declaration as the company, if a public company, would have had to file before commencing business, turn itself into a public company.

(2) Upon the filing of the documents mentioned in sub-section (1), the registrar shall record the change in his books relating to the company.

PART V.

WINDING UP.

Preliminary.

Mode of winding up.

155. (1) The winding up of a company may be either—

(i) by the Court or;

(ii) voluntary; or

(iii) subject to the supervision of the Court.

(2) The provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of these modes.

Contributories.

Liability as contributories of present and past members.

156. (1) In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for paymant of its debts and liabilities and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following (that is to say) :—

(i) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up ;

(ii) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member ;

(iii) a past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act ;

(iv) in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect to which he is liable as a present or past member;

(v) in the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up;

(vi) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract;

(vii) a sum due to any member of a company in his character of a member, by way of dividends, profits or otherwise, shall not be deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company; but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.

(2) In the winding up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, to contribute to the extent of any sums unpaid on any shares held by him.

Liability of directors whose liability is unlimited.

157. In the winding up of a limited company any director whether past or present, whose liability is, in pursuance of this Act, unlimited, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding up a member of an unlimited company:

Provided that—

(i) a past director shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before the commencement of the winding up;

(ii) a past director shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office;

(iii) subject to the articles a director shall not be liable to make such further contribution unless the Court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company, and the costs, charges and expenses of the winding up.

Meaning of "contributory."

158. The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.

Nature of liability of contributory.

159. (1) The liability of a contributory shall create a debt accruing due from him at the time when his liability commenced, but payable at the times when calls are made for enforcing the liability.

(2) No claim founded on the liability of a contributory shall be cognizable by any Court of Small Causes sitting outside the Presidency-towns.

Contributories in case of death of member.

160. (1) If a contributory dies either before or after he has been placed on the list of contributories, his legal representatives and his heirs shall be liable in a due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly.

(2) If the legal representatives or heirs make default in paying any money ordered to be paid by them, proceedings may be taken for administering the property of the deceased contributory, whether moveable or immoveable, or both, and of compelling payment thereout of the money due.

Contributories in case of insolvency of member.

161. If a contributory is adjudged insolvent either before or after he has been placed on the list of contributories, then—

(1) his assignees shall represent him for all the purposes of the winding up, and shall be contributories accordingly, and may be called on to admit to proof against the

estate of the insolvent, or otherwise to allow to be paid out of his assets in due course of law, any money due from the insolvent in respect of his liability to contribute to the assets of the company; and

(2) there may be proved against the estate of the insolvent the estimated value of his liability to future calls as well as calls already made.

Winding up by Court.

Circumstances in which company may be wound up by Court.

162. A company may be wound up by the Court—

(i) if the company has by special resolution resolved that the company be wound up by the Court:

(ii) if default is made in filing the statutory report or in holding the statutory meeting:

(iii) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year:

(iv) if the number of members is reduced, in the case of a private company, below two or, in the case of ony other company, below seven:

(v) if the company is unable to pay its debts:

(vi) if the Court is of opinion that it is just and equitable that the company should be wound up.

Company when deemed unable to pay its debts.

163. A company shall be deemed to be unable to pay its debts—

(i) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by leaving the same at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(ii) if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(iii) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

Winding up may be referred to District Court.

164. Where the High Court makes an order for winding up a company under this Act, it may, if it thinks fit, direct all subsequent proceedings to be had in a District Court; and thereupon such District Court, shall for the purpose of winding up the company, be deemed to be "the Court" within the meaning of this Act, and shall have, for the purposes of such winding up, all the jurisdiction and powers of the High Court.

Transfer of winding up from one District Court to another.

165. If during the progress of a winding up in a District Court it is made to appear to the High Court that the same could be more conveniently prosecuted in any other District Court having jurisdiction to wind up companies, the High Court may transfer the same to such other Court, and thereupon the winding up shall proceed in such other District Court.

Provisions as to applications for winding up.

166. An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributories, or by all or any of those parties, together or separately:

Provided that—

(*a*) a contributory shall not be entitled to present a petition for winding up a company unless—

(i) either the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven; or

(ii) the shares in respect of which he is a contributory or some of them either were originally allotted to him or have been held by him and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder;

(*b*) a petition for winding up a company on the ground of default in filing the statutory report or in holding the

statutory meeting shall not be presented by any person except a share-holder, nor before the expiration of fourteen days after the last day on which the meeting ought to have been held;

(c) the Court shall not give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a *prima facie* case for winding up has been established to the satisfaction of the Court.

Effect of winding up order.

167. An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.

Commencement of winding up by Court

168. A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.

Court may grant injunction.

169. The Court may, at any time after the presentation of the petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company or of any creditor or contributory of the company, restrain further proceedings in any suit or proceeding against the company, upon such terms as the Court thinks fit.

Powers of Court on hearing petition.

170. (*1*) On hearing the petition the Court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim order or any other order that it deems just, but the Court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(*2*) Where the petition is presented on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default.

Suits stayed on winding up order.

171. When a winding up order has been made, no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

172. (1) On the making of a winding up order, it shall be the duty of the company forthwith to file with the registrar a copy of the order, and the petitioner in the winding up proceedings may so file a copy.

Copy of winding up order to be filed with registrar.

(2) On the filing of a copy of a winding up order, the registrar shall make a minute thereof in his books relating to the company, and shall notify in the local official Gazette that such an order has been made.

(3) Such order shall be deemed to be notice of discharge to the servants of the company, except when the business of the company is continued.

173. The Court may at any time after an order for winding up, on the application of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

Power of Court to stay winding up.

174. The Court may, as to all matters relating to a winding up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

Court may have regard to wishes of creditors or contributories.

Official Liquidators.

175. (1) For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a person or persons, to be called an official liquidator or official liquidators.

Appointment of official liquidator.

(2) The Court may make such an appointment provisionally at any time after the presentation of a petition and before the making of an order for winding up.

(3) If more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act by this Act required or authorised to be done by the official liquidator is to be done by all or any one or more of such persons.

(4) The Court may determine whether any, and what, security is to be given by any official liquidator on his appointment.

(5) The acts of an official liquidator shall be valid notwithstanding any defect that may afterwards be discovered in his appointment: Provided that nothing in this sub-section shall be deemed to give validity to acts done by an official liquidator after his appointment has been shown to be invalid.

(6) A receiver shall not be appointed of assets in the hands of an official liquidator.

Resignations removals, filling up vacancies and compensation.

176. (1) Any official liquidator may resign or be removed by the Court on due cause shown.

(2) Any vacancy in the office of an official liquidator appointed by the Court shall be filled up by the Court.

(3) There shall be paid to the official liquidator such salary or remuneration, by way of percentage or otherwise, as the Court may direct; and, if more liquidators than one are appointed, such remuneration shall be distributed amongst them in such proportions as the Court directs.

Official liquidator.

177. The official liquidator shall be described by the style of the official liquidator of the particular company in respect of which he is appointed, and not by his individual name.

Custody of company's property.

178. (1) The official liquidator shall take into his custody, or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled.

(2) If no official liquidator is appointed, or during any vacancy in such appointment, all the property of the company shall be deemed to be in the custody of the Court.

Powers of official liquidator.

179. The official liquidator shall have power, with the sanction of the Court, to do the following things :—

(a) to institute or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company ;

(b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the same ;

(c) to sell the immoveable and moveable property of the company by public auction or private contract, with

power to transfer the whole thereof to any person or company, or to sell the same in parcels ;

(*d*) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal ;

(*e*) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance as a separate debt due from the insolvent, and rateably with the other separate creditors ;

(*f*) to draw, accept, make and indorse any bill of exchange hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill, hundi or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business ;

(*g*) to raise on the security of the assets of the company any money requisite ;

(*h*) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company ; and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself : Provided that nothing herein empowered shall be deemed to affect the rights, duties and privileges of any Administrator General ;

(*i*) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

Discretion of official liquidator.

180. The Court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court, and, where an official liquidator is provisionally appointed, may limit and restrict his powers by the order appointing him.

181. The official liquidator may, with the sanction of the Court, appoint an advocate, attorney or pleader entitled to appear before the Court to assist him in the performance of his duties: Provided that, where the official liquidator is an attorney, he shall not appoint his partner, unless the latter consents to act without remuneration.

Provision for legal assistance to official liquidator.

182. The official liquidator of a company which is being wound up by the Court shall keep, in manner prescribed, proper books in which he shall cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor or contributory may, subject to the control of the Court, personally or by his agent inspect any such books.

Official books to be kept by liquidator in winding up.

183. (1) Subject to the provisions of this Act the official liquidator of a company which is being wound up by the Court shall, in the administration of the assets of the company and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting.

Exercise and control of liquidator's powers.

(2) The official liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be.

(3) The official liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising in the winding up.

(4) Subject to the provisions of this Act, the official liquidator shall use his own discretion in the administration of the assets of the company and in the distribution thereof among the creditors.

(5) If any person is aggrieved by any act or decision of the official liquidator, that person may apply to the Court and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just in the circumstances.

Ordinary powers of Court.

Settlement of list of contributories and application of assets.

184. (*1*) As soon as may be after making a winding up order, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities.

(2) In settling the list of contributories, the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others.

Power to require delivery of property.

185. The Court may, at any time after making a winding up order, require any contributory for the time being settled on the list of contributories and any trustee, receiver, banker, agent, or officer of the company to pay, deliver, surrender or transfer forthwith, or within such time as the Court directs, to the official liquidator any money, property or documents in his hands to which the company is *prima facie* entitled.

Power to order payment of debts by contributory.

186. (*1*) The Court may, at any time after making a winding up order, make an order on any contributory for the time being settled on the list of contributories to pay, in manner directed by the order, any money due from him or from the estate of the person whom he represents to the company exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.

(*2*) The Court in making such an order may, in the case of an unlimited company, allow to the contributory by way of set-off any money due to him or to the estate which he represents from the company on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and may, in the case of a limited company, make to any director whose liability is unlimited or to his estate the like allowance:

Provided that in the case any company, whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

Power of Court to make calls.

187. (*1*) The Court may, at any time after making a winding up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the

contributories for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

(2) In making the call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

Power to order payment into bank.

188. The Court may order any contributory, purchaser or other person from whom money is due to the company to pay the same into the Bank of Bengal, the Bank of Madras, or the Bank of Bombay, as the case may be, or any branch thereof, respectively, to the account of the official liquidator instead of to the official liquidator, and any such order may be enforced in the same manner as if it had directed payment to the official liquidator.

Regulation of account with Court.

189. All moneys, bills, hundis, notes and other securities paid and delivered into the Bank of Bengal, the Bank of Madras or the Bank of Bombay, or any branch thereof, respectively, in the event of a company being wound up by the Court, shall be subject in all respects to the orders of the Court.

Order on contributory conclusive evidence.

190. (1) An order made by the Court on a contributory shall (subject to any right of appeal) be conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due.

(2) All other pertinent matters stated in the order shall be taken to be truly stated as against all persons, and in all proceedings whatsoever.

Power to exclude creditors not proving in time.

191 The Court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved.

Adjustments of rights of contributories.

192. The Court shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto.

Power to order costs.

193. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the Court thinks just.

194. (*1*) When the affairs of a company have been completely wound up, the Court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

Dissolution of company.

(*2*) The order shall be reported within fifteen days of the making thereof by the official liquidator to the registrar, who shall make in his books a minute of the dissolution of the company.

(*3*) If the official liquidator makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which he is in default.

Extraordinary Powers of Court.

195. (*1*) The Court may, after it has made a winding up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company, or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.

Power to summon persons suspected of having property of company.

(*2*) The Court may examine him on oath concerning the same, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(3) The Court may require him to produce any documents in his custody or power relating to the company; but, where he claims any lien on documents produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to that lien.

(*4*) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause him to be apprehended and brought before the Court for examination.

196. (*1*) When an order has been made for winding up a company by the Court, and the official liquidator has applied to the Court stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since its formation, the Court may, after consideration of the application, direct that any person who has

Power to order public examination of promoters, directors, etc.

taken any part in the promotion or formation of the company, or has been a director, manager or other officer of the company, shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director, manager or other officer thereof.

(*2*) The official liquidator shall take part in the examination, and for that purpose may, if specially authorised by the Court in that behalf, employ such legal assistance as may be sanctioned by the Court.

(*3*) Any creditor or contributory may also take part in the examination either personally or by any person entitled to appear before the Court.

(*4*) The Court may put such questions to the person examined as the Court thinks fit.

(*5*) The person examined shall be examined on oath, and shall answer all such questions as the Court may put or allow to be put to him.

(*6*) A person ordered to be examined under this section may at his own cost employ any person entitled to appear before the Court, who shall be at liberty to put to him such questions as the Court may deem just for the purpose of enabling him to explain or qualify any answers given by him: Provided that if he is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as in its discretion it may think fit.

(*7*) Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him in civil proceedings, and shall be open to the inspection of any creditor or contributory at all reasonable times.

(*8*) The Court may, if it thinks fit, adjourn the examination from time to time.

(*9*) An examination under this section may, if the Court so directs, and subject to any rules in this behalf, be held before any District Judge or before any officer of the High Court, being an Official Referee, Master, Registrar or Deputy Registrar, and the powers of the Court under this section as to the conduct of the examination, but not as to costs, may be exercised by the person before whom the examintion is held.

197. The Court, at any time either before or after making a winding up order on proof of probable cause for believing that a contributory is about to quit British India or otherwise to abscond, or to remove or conceal any of his property, for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested and his books and papers and moveable property to be seized, and him and them to be safely kept until such time as the Court may order.

Power to arrest absconding contributory.

198. Any powers by this Act conferred on the Court shall be in addition to, and not in restriction of any existing powers of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any call or other sums.

Saving of other proceedings.

Enforcement of and Appeal from Orders.

199. All orders made by a Court under this Act may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced.

Power to enforce orders.

200. Any order made by a Court for or in the course of the winding up of a company shall be in force in any place in British India other than that in which such Court is situate, by the Court that would have had jurisdiction in respect of such company if the rigistered office of the company had been situate at such other place, and in the same manner in all respects as if such order had been made by the Court that is hereby required to enforce the same.

Order made in any Court to be enforced by other Court.

201. Where any order made by one Court is to be enforced by another Court, a certified copy of the order so made shall be produced to the proper officer of the Court required to enforce the same, and the production of such certified copy shall be sufficient evidence of such order having been made; and thereupon the last-mentioned Court shall take the requisite steps in the matter for enforcing the order in the same manner as if it were the order of the Court enforcing the same.

Mode of dealing with orders to be enforced by other Courts.

Appeals from orders

202. Re-hearings of, and appeals from, any order or decision made or given in the matter of the winding up of a company by the Court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same court in cases within its ordinary jurisdiction.

Voluntary winding up.

Circumstance in which company may be wound up voluntarily.

203. A company may be wound up voluntarily—

(1) when the period (if any) fixed for the duration of the company by the articles expires, or the event (if any), occurs, on the occurrence of which the articles provide that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;

(2) if the company resolves by special resolution that the company be wound up voluntarily;

(3) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.

Commencement of voluntary winding up.

204. A voluntary winding up shall be deemed to commence at the time of the passing of the resolution authorising the winding up.

Effect of voluntary winding up on status of company.

205. When a company is wound up voluntarily, the company shall from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof:

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved.

Notice of resolution to wind up voluntarily.

206. (*1*) Notice of any special resolution or extraordinary resolution for winding up a company voluntarily shall be given by the company within ten days of the passing of the same by advertisement in the local official Gazette, and also in some newspaper (if any) circulating in the district where the registered office of the company is situate.

(2) If a company makes default in complying with the requirements in this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to a like penalty.

Consequences of voluntarily winding up.

207. The following consequences shall ensue on the voluntary winding up of a company:—

(i) the assets of the company shall be applied in satisfaction of its liabilities *pari passu* and, subject thereto, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company;

(ii) the company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them;

(iii) on the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof;

(iv) the liquidator may, without the sanction of the Court, exercise all powers by this Act given to the official liquidator in a winding up by the Court;

(v) the liquidator may exercise the powers of the Court under this Act of settling a list of contributories, and of making calls, and shall pay the debts of the company, and adjust the rights of the contributories among themselves;

(vi) the list of contributories shall be *prima facie* evidence of the liability of the persons named therein to be contributories;

(vii) when several liquidators are appointed, every power hereby given may be exercised by such one or more of them as may be determined by the company at the time of their appointment, or in default of such determination by any number not less than two;

(viii) if from any cause whatever there is no liquidator acting, the Court may, on the application of a contributory, appoint a liquidator; and

(ix) the Court may, on cause shown, remove a liquidator, and appoint another liquidator.

208. (*1*) The liquidator in a voluntary winding up shall, within twenty-one days after his appointment, file with the registrar a notice of his appointment in the form prescribed.

Notice by liquidator of his appointment.

(*2*) If the liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

209. (*1*) Every liquidator appointed by a company in a voluntary winding up shall, within seven days from his appointment, send notice by post to all persons who appear to him to be creditors of the company that a meeting of the creditors of the company will be held on a date, not being less than twenty-one days nor more than one month after his appointment, and at a place and hour, to be specified in the notice, and shall also advertise notice of the meeting once in the local official Gazette and once at least in some newspaper (if any) circulating in the district where the registered office or principal place of business of the company was situate.

Rights of creditors in a voluntary winding up.

(*2*) At the meeting to be held in pursuance of the foregoing provisions of this section the creditors shall determine whether an application shall be made to the Court for the appointment of any person as liquidator in the place of, or jointly with, the liquidator appointed by the company, and, if the creditors so resolve, an application may be made accordingly to the Court at any time not later than fourteen days after the date of the meeting, by any creditor appointed for the purpose at the meeting :

Provided that the Court may, by order at any time, extend the time for making an application under this sub-section for such period as the Court thinks proper.

(*3*) On any such application to the Court may make an order either for the removal of the liquidator appointed by the company and for the appointment of some other person as liquidator or for the appointment of some other person to act as a liquidator jointly with the liquidator appointed by the company, or such other order as, having regard to the interests of the creditors and contributories of the company, may seem just.

(*4*) The Court shall make such order as to the costs of the application as it may think fit, and, if it is of opinion that, having regard to the interests of the creditors in the liquidation, there were reasonable grounds for the application, may order the costs of the

application to be paid out of the assets of the company notwithstanding that the application is dismissed or otherwise disposed of adversely to the applicant.

Power to fill vacancy in office of liquidator.

210. (1) If a vacancy occurs by death, resignation or otherwise in the office of liquidator appointed by the company in a voluntary winding up, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy.

(2) For that purpose a general meeting may be called by any contributory or, if there were more liquidators than one, by the continuing liquidators.

(3) The meeting shall be held in manner prescribed by the articles, or in such manner as may, on application by any contributory or by the continuing liquidators, be determined by the Court.

Delegation of authority to appoint liquidators.

211. (1) A company about to be, or in course of being, wound up voluntarily may, by extraordinary resolution, delegate to its creditors, or to any committee of them, the power of appointing liquidators or any of them, and of supplying vacancies among the liquidators, or enter into any arrangement with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised.

(2) Any act done by creditors in pursuance of any such delegated power shall have the same effect as if it had been done by the company.

Arrangement when binding on creditors.

212. (1) Any arrangement entered into between a company about to be, or in the course of being, wound up voluntarily and its creditors shall subject to any right of appeal under this section, be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors.

(2) Any creditor or contributory may, within three weeks from the completion of the arrangement, appeal to the Court against it, and the Court may thereupon, as it thinks just, amend, vary or confirm the arrangement.

Power for liquidators to accept shares, etc., as a consideration for sale of property of company.

213. (1) Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company (in this section called the transferee company) the liquidator of the first mentioned

company (in the section called the transferor company) may, with the sanction of a special resolution of that company conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive, in compensation or part compensation for the transfer for sale, shares, policies or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies or other like interests, or in addition thereto, participate in the profits of, or receive any other benefit from, the transferee company.

(*2*) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(*3*) If any member of the transferor company who did not vote in favour of the special resolution at either of the meetings held for passing and confirming the same expresses his dissent therefrom in writing addressed to the liquidator, and left at the registered office of the company within seven days after the confirmation of the special resolution, he may require the liquidator either to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined by agreement or by arbitration in manner hereinafter provided.

(*4*) If the liquidator elects to purchase the member's interest, the purchase-money must be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

(*5*) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for winding up the company, or for appointing liquidators; but if an order is made within a year for winding up the company by or subject to the supervision of the Court, the special resolution shall not be valid unless sanctioned by the Court.

Mode of determining price.

214. (*1*) The price to be paid for the purchase of the interest of any dissentient member may be determined by by agreement. If the parties dispute about the same, such dispute shall be settled by arbitration.

(2) The provisions of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject matter of the arbitration, shall apply to all arbitration in pursuance of this section.

215. (1) Where a company is being wound up voluntarily, the liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding up, or to exercise as respects the enforcing of calls, or any other matters, all or any of the powers which the Court might exercise if the company were being wound up by the Court.

Power to apply to Court.

(2) The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as the Court thinks fit, or may make such other order on the application as the Court thinks just.

216. (1) Where a company is being wound up voluntarily, the liquidator may, from time to time, summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extraordinary resolution, or for any other purposes he may think fit.

Power of liquidator to call general meeting.

(2) In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding up, and of each succeeding year, or as soon thereafter as may be convenient, and shall lay before the meeting a statement in the prescribed form containing the prescribed particulars with respect to the proceedings in and the position of the liquidation.

217. (1) In the case of every voluntary winding up, as soon as the affairs of the company are fully wound up the liquidator shall make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of; and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving any explanation thereof.

Final meeting and dissolution.

(2) The meeting shall be called by advertisement, specifying the time, place and object thereof, and published one month at least before the meeting in the manner specified in section 206.

(3) Within one week after the meeting, the liquidator shall file with the registrar a return of the holding of the meeting, and of its date, and in default of so doing, shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

(4) The registrar on the filing of the return shall forthwith register it, and, on the expiration of three months from the registration of the return the company shall be deemed to be dissolved :

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5) It shall be the duty of the person on whose application an order of the Court under sub-section (4) is made, within twenty-one days after the making of the order, to file with the registrar a certified copy of the order, and if that person fails so to do, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

Cost of voluntary liquidation.

218. All costs, charges and expenses properly incurred in the voluntary winding up of a company including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims at the date of the winding up.

Saving for rights of creditors and contributories.

219. The voluntary winding up of a company shall not bar the right of any creditor or contributory to have it wound up by the Court, if the Court is of opinion, in the case of an application by a creditor, that the rights of the creditor or, in the case of an application by a contributory, that the rights of the contributories will be prejudiced by a voluntary winding up.

Power of Court to adopt proceedings of voluntary winding up.

220. Where a company is being wound up voluntarily, and an order is made for winding up by the Court, the Court may, if it thinks fit, by the same or any subsequent order, provide for the adoption of all or any of the proceedings in the voluntary winding up.

Winding up subject to supervision of Court.

Power to order winding up subject to supervision.

221. When a company has by special or extraordinary resolution resolved to wind up voluntarily, the Court may make an order that the voluntary winding up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories or others to apply to the Court, and generally on such terms and conditions as the Court thinks just.

Effect of petition for winding up subject to supervision.

222. A petition for the continuance of a voluntary winding up subject to the supervision of the Court shall, for the purpose of giving jurisdiction to the Court over suits, be deemed to be a petition for winding up by the Court.

Court may have regard to wishes of creditors and contributories.

223. The Court may, in deciding between a winding up by the Court and a winding up subject to supervision, in the appointment of liquidators, and in all other matters relating to the winding up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

Power for Court to appoint or remove liquidators.

224. (*1*) Where an order is made for a winding up subject to supervision, the Court may by the same or any subsequent order appoint any additional liquidator.

(*2*) A liquidator appointed by the Court under this section shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if he had been appointed by the company.

(*3*) The Court may remove any liquidator so appointed by the Court or any liquidator continued under the supervision order, and fill any vacancy occasioned by the removal, or by death or resignation.

Effect of supervision order.

225. (*1*) Where an order is made for a winding up subject to supervision, the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily.

(*2*) Except as provided in sub-section (1), and save for the purposes of section 195, any order made by the Court for a winding up subject to the supervision of the Court shall for all purposes, including the staying of suits and other proceedings, be deemed to be an order of the Court for winding up the company by the Court, and shall confer full authority on the Court to make calls, or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court.

(*3*) In the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of

the official liquidator, the expression "official liquidator" shall be deemed to mean the liquidator conducting the winding up subject to the supervision of the Court.

Appointment in certain case of voluntary liquidators to office of official liquidators.

226. Where an order has been made for the winding up of a company subject to supervision, and an order is afterwards made for winding up by the Court, the Court may, by the last-mentioned order or by any subsequent order, appoint the voluntary liquidators or any of them, either provisionally or permanently, and either with or without the addition of any other person, to be official liquidator in the winding up by the Court.

Supplemental Provisions.

Avoidance of transfers, etc., after commencement of winding up.

227. (*1*) In the case of voluntary winding up every transfer of shares, except transfers made to or with the sanction of the liquidator, and every alteration in the status of the members of the company made after the commencement of the winding up shall be void.

(*2*) In the case of a winding up by or subject to the supervision of the Court, every disposition of the property (including actionable claims) of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding up shall, unless the Court otherwise orders, be void.

Debts of all descriptions to be proved.

228. In every winding up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of insolvency) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or for some other reason do not bear a certain value.

Application of insolvency rules in winding up of insolvent companies.

229. In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in

under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section.

Preferential payments.

230. *(1)* In a winding up there shall be paid in priority to all other debts—

(*a*) all revenue, taxes, cesses and rates, whether payable to the Crown or to a local authority, due from the company at the date hereinafter mentioned and having become due and payable within the twelve months next before that date;

(*b*) all wages or salary of any clerk or servant in respect of service rendered to the company within the two months next before the said date, not exceeding one thousand rupees for each clerk or servant; and

(*c*) all wages of any labourer or workman, not exceeding five hundred rupees for each, whether payable for time or piecework, in respect of services rendered to the company within the two months next before the said date.

(2) The foregoing debts shall—

(*a*) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportion; and

(*b*) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(3) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be charged forthwith so far as the assets are sufficient to meet them.

(4) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof:

Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(5) The date hereinbefore in this section referred to is—

(a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order ; and

(b) in any other case, the date of the commencement of the winding up.

Fraudulent preference.

231. (1) Any transfer delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual, be deemed in his insolvency a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.

(2) For the purposes of this section the presentation of a petition for winding up in the case of a winding up by or subject to the supervision of the Court, and a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond with the act of insolvency in the case of an individual.

(3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

Avoidance of certain attachments, executions, etc.

232. (1) Where any company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force without leave of the Court against the estate or effects of the company after the commencement of the winding up shall be void.

(2) Nothing in this section applies to proceedings by the Government.

Effect of floating charge.

233. Where a company is being wound up a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid except to the amount of any cash paid to the company at the time of, or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent. per annum.

General scheme of liquidation may be sanctioned.

234. (1) The liquidator may, with the sanction of the Court when the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the company in the case of a voluntary winding up, do the following things or any of them :—

(i) pay any classes of creditors in full ;

(ii) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, whereby the company may be rendered liable ;

(iii) compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contigent subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.

(2) The exercise by the liquidator of the powers of this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers.

Power of Court to assess damages against delinquent directors, etc.

235. (1) Where, in the course of winding up a company, it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just.

(2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

(3) The Indian Limitation Act, 1908, shall apply to an application under this section as if such application were a suit.

Penalty for falsification of books.

236. If any director, manager, officer or contributory of any company being wound up destroys, mutilates, alters or falsifies or fraudulently secretes any books, papers or securities, or makes, or is privy to the making of, any false or fraudulent entry in any register book of account or document belonging to the company with intent to defraud or deceive any person, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Prosecution of delinquent directors, etc.

237. (1) If it appears to the Court in the course of a winding up by or subject to the supervision of the Court that any past or present director, manager, officer or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible, the Court may, on the application of any person interested in the winding up, or of its own motion, direct the official liquidator or the liquidator (as the case may be) to prosecute for the offence, and may order the costs and expenses to be paid out of the assets of the company.

(2) If it appears to the liquidator in the course of a voluntary winding up that any past or present director, manager, officer or member of the company has been guilty of any offence relation to the company for which he is criminally responsible, the liquidator, with the previous sanction of the Court, may prosecute the offender, and all expenses properly incurred by him in the prosecution shall be payable out of the assets of the company in priority to all other liabilities.

Penalty for false evidence.

238. If any person, upon any examination upon oath authorised under this Act, or in any affidavit, deposition or solemn affirmation, in or about the winding up of any company under this Act, or otherwise in or about any matter arising under this Act, intentionally gives false evidence, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Meetings to ascertain wishes of creditors or contributories.

239. (1) Where by this Act the Court is authorised in relation to winding up to have regard to the wishes of creditors or contributories, as proved to it by any sufficient evidence, the Court may, if it thinks fit for the purpose of ascertaining

those wishes, direct meetings of the creditors or contributories to be called, held and conducted in such manner as the Court directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the Court.

(*2*) In the case of creditors, regard shall be had to the value of each creditor's debt.

(*3*) In the case of contributories, regard shall be had to the number of votes conferred on each contributory by the articles.

Documents of company to be evidence.

240. Where any company is being wound up, all documents of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded.

Inspection of documents.

241 After an order for a winding up by or subject to the supervision of the Court, the Court may make such order for inspection by creditors and contributories of the company of its documents as the Court thinks just, and any documents in the possession of the company may be inspected by creditors or contributories accordingly, but not further or otherwise.

Disposal of documents of company.

242. (*1*) When a company has been wound up and is about to be dissolved, the documents of the company and of the liquidators may be disposed of as follows (that is to say) :—

(*a*) in the case of a winding up by or subject to the supervision of the Court, in such way as the Court directs ;

(*b*) in the case of a voluntary winding up, in such way as the company by extraordinary resolution directs.

(2) After three years from the dissolution of the company, no responsibility shall rest on the company or the liquidators, or any person to whom the custody of the documents has been committed, by reason of the same not being forthcoming to any person claiming to be interested therein.

Power of Court to declare dissolution of company void.

243. (*1*) Where a company has been dissolved, the Court may, at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such

proceedings may be taken as might have been taken if the company had not been dissolved.

(2) It shall be the duty of the person on whose application the order was made, within twenty-one days after the making of the order, to file with the registrar a certified copy of the order, and if that person fails so to do, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

Information as to pending liquidations.

244. (1) Where a company is being wound up, if the winding up is not concluded within one year after its commencement, the liquidator shall, at such intervals as may be prescribed, until the winding up is concluded, file with the registrar a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidation.

(2) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement, and to receive a copy thereof, or extract therefrom ; but any person untruthfully so stating himself to be a creditor or contributory shall be deemed to be guilty of an offence under section 182 of the Indian Penal Code, and shall be punishable accordingly on the application of the liquidator.

(3) If a liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding five hundred rupees for each day during which the default continues.

Court or person before whom affidavit may be sworn

245. (1) Any affidavit required to be sworn under the provisions or for the purposes of this Part may be sworn in British India, or elsewhere within the dominions of His Majesty, before any Court, Judge or person lawfully authorised to take and receive affidavits, or in any part of India other than British India before any Court authorised or continued by the Governor General in Council, or in any place outside His Majesty's dominions before any of His Majesty's Consuls or Vice Consuls.

(2) All Courts, Judges, Justices, Commissioners and persons acting judicially in British India shall take judicial notice of the seal or stamp or signature (as the case may be) of any such Court, Judge, person, Consul or Vice-Consul, attached, appended or subscribed to any such affidavit, or to any other document to be used for the purposes of this Part.

Rules.

Power of High Court to make rules.

246. (1) The High Court may, from time to time, make rules consistent with this Act and with the Code of Civil Procedure, 1908, concerning the mode of proceedings to be had for winding up a company in such a Court and in the Courts subordinate thereto, and for giving effect to the provisions hereinbefore contained as to the reduction of the capital and the sub-division of the shares of a company.

(2) Without prejudice to the generality of the foregoing power, the High Court may by such rules enable or require all or any of the powers and duties conferred and imposed on the Court by this Act, in respect of the matters following, to be exercised or performed by the official liquidator, and subject to the control of the Court, that is to say, the powers and duties of the Court in respect of—

(a) holding and conducting meetings to ascertain the wishes of creditors and contributories ;

(b) settling lists of contributories and rectifying the register of members where required, and collecting and applying the assets ;

(c) requiring delivery of property or documents to the liquidator ;

(d) making calls ;

(e) fixing a time within which debts and claims must be proved :

Provided that the official liquidator shall not, without the special leave of the Court, rectify the register of members, and shall not make any call without the special leave of the Court.

Removal of defunct Companies from Register.

Registrar may strike defunct company off register.

247. (1) Where the registrar has reasonable cause to believe that a company is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation.

(2) If the registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received and that, if an answer is not received to

the second letter within one month from the date thereof, a notice will be published in the local official Gazette with a view to striking the name of the company off the register.

(3) If the registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer, he may publish in the local official Gazette, and send to the company by post a notice that, at the expiration of three months from the date of that notice, the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

(4) If, in any case where a company is being wound up, the registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of six consecutive months after notice by the registrar demanding the returns has been sent by post to the company, or to the liquidator at his last known place of business, the registrar may publish in the local official Gazette and send to the company a like notice as is provided in the last preceding sub-section.

(5) At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the local official Gazette, and on the publication in the local official Gazette of this notice, the company shall be dissolved: Provided that the liability (if any) of every director and member of the company shall continue and may be enforced as if the company had not been dissolved.

(6) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Court, on the application of the company or member or creditor, may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if its name had not been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

(7) A letter or notice under this section may be addressed to the company at its registered office, or, if no office has been registered, to the care of some director, manager or other officer of the company, or, if there is no director, manager or other officer of the company whose name and address are known to the registrar, may be sent to each of the persons who subscribed the memorandum, addressed to him at the address mentioned in the memorandum.

PART VI.

REGISTRATION OFFICE AND FEES.

Registration offices.

248. (1) For the purposes of the registration of companies under this Act, there shall be offices at such places as the Local Government thinks fit, and no company shall be registered except at an office within the province in which, by the memorandum, the registered office of the company is declared to be established.

(2) The Local Government may appoint such registrars and assistant registrars as it thinks necessary for the registration of companies under this Act, and may make regulations with respect to their duties.

(3) The salaries of the persons appointed under this section shall be fixed by the Local Government.

(4) The Local Government may direct a seal or seals to be prepared for the authentication of documents required for or connected with the registration of companies.

(5) Any person may inspect the documents kept by the registrar on payment of such fees as may be appointed by the Local Government, not exceeding one rupee for each inspection ; and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document, or any part of any other document, to be certified by the registrar on payment for the certificate, certified copy or extract, of such fees as the Local Government may appoint, not exceeding three rupees for a certificate of incorporation, and not exceeding six annas for every hundred words or fractional part thereof required to be copied.

(6) Whenever any act is by this Act directed to be done to or by the registrar it shall until the Local Government otherwise directs, be done to or by the existing registrar of joint-stock companies or in his absence to or by such person as the Local Government may

for the time being authorise; but, in the event of the Local Government altering the constitution of the existing registry offices or any of them, any such act shall be done to or by such officer and at such place with reference to the local situation of the registered offices of the companies to be registered as the Local Government may appoint.

Fees.

249. (*1*) There shall be paid to the registrar in respect of the several matters mentioned in Table B in the First Schedule the several fees therein specified, or such smaller fees as the Governor General in Council may direct.

(*2*) All fees paid to the registrar in pursuance of this Act shall be accounted for to the Crown.

PART VII.

APPLICATION OF ACT TO COMPANIES FORMED AND REGISTERED UNDER FORMER COMPANIES ACTS.

Application of Act to companies formed under former Companies Acts.

250. In the application of this Act to existing companies, it shall apply in the same manner in the case of a limited company, other than a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by shares; in the case of a company limited by guarantee as if the company had been formed and registered under this Act as a company limited by guarantee; and, in the case of a company other than a limited company, as if the company had been formed and registered under this Act as an unlimited company:

Provided that—

(1) nothing in Table A in the First Schedule shall apply to a company formed and registered under Act XIX of 1857 and Act VII of 1860, or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882;

(2) reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under Act No. XIX of 1857 and Act No. VII of 1860, or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882, as the case may be.

251. This Act shall apply to every company registered but not formed under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882, in the same manner as it is hereinafter in this Act declared to apply to companies registered but not formed under this Act:

Application of Act to companies registered but not formed under former Companies Acts.

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the said Acts or any of them.

252. A company registered under Act XIX of 1857 and Act VII of 1860 or either of them may cause its shares to be transferred in the manner hitherto in use, or in such other manner as the company may direct.

Mode of transferring.

PART VIII.

COMPANIES AUTHORISED TO REGISTER UNDER THIS ACT.

Companies capable of being registered.

253. (1) With the exceptions and subject to the provisions mentioned and contained in this section,—

(i) any company consisting of seven or more members, which was in existence on the first day of May eighteen hundred and eighty-two, including any company registered under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, and

(ii) any company formed after the date aforesaid, whether before or after the commencement of this Act, in pursuance of any Act of Parliament or Act of the Governor General in Council other than this Act, or of Letters Patent, or being otherwise duly constituted according to law, and consisting of seven or more members;

may at any time register under this Act as an unlimited company or as a company limited by shares, or as a company limited by guarantee; and the registration shall not be invalid by reason that it has taken place with a view to the company being wound up:

(2) Provided as follows:—

(*a*) a company having the liability of its members limited by Act of Parliament or Act of the Governor General

in Council or by Letters Patent, and not being a joint-stock company as hereinafter defined, shall not register in pursuance of this section;

(b) a company having the liability of its members limited by Act of Parliament or Act of the Governor General in Council or by Letters Patent shall not register in pursuance of this section as an unlimited company or as a company limited by guarantee;

(c) a company that is not a joint-stock company as hereinafter defined shall not register in pursuance of this section as a company limited by shares;

(d) a company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person or by proxy (in cases where proxies are allowed by the articles) at a general meeting summoned for the purpose;

(e) where a company not having the liability of its members limited by Act of Parliament or Act of the Governor General in Council or by Letters Patent is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present in person or by proxy at the meeting;

(f) where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceased to be a member, and of the costs aud expenses of winding up, and for the adjustment of the rights of the contributories among themselves such amount as may be required not exceeding a specified amount.

(3) In computing any majority under this section when a poll is demanded, regard shall be had to the number of votes to which each member is entitled according to the articles.

(4) A company registered under the Indian Companies Act, 1882, shall not be registered in pursuance of this section.

254. For the purposes of this Part as far as relates to registration of companies as companies limited by shares, a joint-stock company means a company hang a ivpermanent paid-up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons; and such a company, when registered with limited liability under this Act, shall be deemed to be a company limited by shares.

Definition of "joint-stock company."

255. Before the registration in pursuance of this Part of a joint-stock company there shall be delivered to the registrar the following documents (that is to say):—

Requirements for registration by joint stock companies.

(1) a list showing the names, addresses and occupations of all persons who on a day named in the list, not being more than six clear days before the day of registration, were members of the company, with the addition of the shares or stock held by them respectively, distinguishing, in cases where the shares are numbered each share by its number;

(2) a copy of any Act of Parliament, Act of the Governor General in Council, Royal Charter, Letters Patent, deed of settlement, contract of co-partnery or other instrument constituting or regulating the company; and

(3) if the company is intended to be registered as a limited company, a statement specifying the following particulars (that is to say):—

(a) the nominal share capital of the company and the number of shares into which it is divided or the amount of stock of which it consists;

(b) the number of shares taken and the amount paid on each share;

(c) the name of the company, with the addition of the word "Limited" as the last word thereof; and

(d) in the case of a company intended to be registered as a company limited by guarantee, the resolution declaring the amount of the guarantee.

Requirements for registration by other than joint stock companies.

256. Before the registration in pursuance of this Part of any company not being a joint-stock company, there shall be delivered to the registrar—

(*1*) a list showing the names, addresses and occupations of of the directors of the company; and

(*2*) a copy of any Act of Parliament, Act of the Governor General in Council, Letters Patent, deed of settlement, contract of co-partnery or other instrument constituting or regulating the company; and

(*3*) in the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee.

Authentication of statement of existing companies.

257. The lists of members and directors and any other particulars relating to the company required to be delivered to the registrar shall be duly verified by a declaration of any two or more directors or other principal officers of the company.

Registrar may require evidence as to nature of company.

258. The registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether any company proposing to be registered is or is not a joint-stock company as herein-before defined.

On registration of banking company with limited liability, notice to be given to customers.

259. (*1*) Where a banking company, which was in existence on the first day of May Eighteen hundred and eighty-two proposes to register as a limited company, it shall at least thirty days before so registering, give notice of its intention so to register to every person who has a banking account with the company, either by delivery of the notice to him, or by posting it to him at, or delivering it at, his last known address.

(2) If the company omits to give the notice required by this section, then as between the company and the person for the time being interested in the account in respect of which the notice ought to have been given, and so far as respects the account down to the time at which notice is given, but not further or otherwise, the certificate of registration with limited liability shall have no operation.

Exemption of certain companies from payment of fees.

260. No fees shall be charged in respect of the registration in pursuance of this Part of a company if it is not registered as a limited company, or if before its registration as a limited company the liability of the shareholders was limited by some Act of Parliament or Act of the Governor-General in Council or by Letters Patent.

Addition of "Limited" to name.

261. When a company registers in pursuance of this Part with limited liability, the word "Limited" shall form and be registered as part of its name.

Certificate of registration of existing companies.

262. On compliance with the requirements of this Part with respect to registration, and on payment of such fees, if any, as are payable under Table B in the First Schedule, the registrar shall certify under his hand that the company applying for registration is incorporated as a company under this Act, and in the case of a limited company that it is limited, and thereupon the company shall be incorporated, and shall have perpetual succession and a common seal.

Vesting of property on registration.

263. All property, moveable and immoveable, including all interests and rights in, to and out of property, moveable and immoveable, and including obligations and actionable claims as may belong to or be vested in a company at the date of its registration in pursuance of this Part, shall, on registration, pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein.

Saving of existing liabilities.

264. The registration of a company in pursuance of this Part shall not affect the rights or liabilities of the company in respect of any debt or obligation incurred or any contract entered into, by, to, with, or on behalf of, the company before registration.

Continuation of existing suits.

265. All suits and other legal proceedings which at the time of the registration of a company in pursuance of this part are pending by or against the company, or the public officer are any member thereof, may be continued in the same manner as if the registration had not taken place, nevertheless execution shall not issue against the effects of any individual member of the company on any decree or order obtained in any such suit or proceeding; but in the event of

the property and effects of the company being insufficient to satisfy the decree or order, an order may be obtained for winding up the company.

Effect of registration under Act.

266. When a company is registered in pursuance of this Part—

(i) all provisions contained in any Act of Parliament, Act of the Governor General in Council, deed of settlement, contract of co-partnery, Letters Patent, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidents as if so much thereof as would, if the company had been formed under this Act, have been required to be inserted in the memorandum, were contained in a registered memorandum, and the residue thereof were contained in registered articles;

(ii) all the provisions of this Act shall apply to the company and the members, contributories and creditors thereof, in the same manner in all respects as if it had been formed under this Act, subject as follows (that is to say):—

(*a*) the regulations in Table A in the First Schedule shall not apply unless adopted by special resolution;

(*b*) the provisions of this Act relating to the numbering of shares shall not apply to any joint-stock company whose shares are not numbered;

(*c*) subject to the provisions of this section, the company shall not have power to alter any provision contained in any Act of Parliament or Act of the Governor General in Council relating to the company;

(*d*) subject to the provisions of this section, the company shall not have power, without the sanction of the Governor General in Council, to alter any provision contained in any Letters Patent relating to the company;

(*e*) the company shall not have power to alter any provision contained in a Royal Charter or Letters Patent with respect to the objects of the company;

(*f*) in the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted before registration, who is liable to pay or contribute to the payment of any debt or liability of the company contracted before registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves in respect of any such debt or liability; or to pay or contribute to the payment of the costs and expenses of winding up the company, so far as relates to such debts or liabilities as aforesaid; and every contributory shall be liable to contribute to the assets of the company, in the course of the winding up, all sums due from him in respect of any such liability as aforesaid; and in the event of the death or insolvency of any contributory, the provisions of this Act with respect to the legal representatives and heirs of deceased contributories, and with reference to the assignees of insolvent contributories, shall apply;

(iii) the provisions of this Act with respect to—

(*a*) the registration of an unlimited company as limited;

(*b*) the powers of an unlimited company on registration as a limited company to increase the nominal amount of its share capital and to provide that a portion of its share capital shall not be capable of being called up except in the event of winding up;

(*c*) the power of a limited company to determine that a portion of its share capital shall not be capable of being called up except in the event of winding up;

shall apply notwithstanding any provisions contained in any Act of Parliament, Act of the Governor General in Council, Royal Charter, deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company;

(iv) nothing in this section shall authorise the company to alter any such provisions contained in any deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company, as would, if the company had originally been formed under this Act, have been required to be con-

tained in the memorandum and are not authorised to be altered by this Act;

(v) nothing in this Act shall derogate from any lawful power of altering its constitution or regulations which may by virtue of any Act of Parliament, Act of the Governor General in Council, deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or relating the company, be vested in the company.

Power to substitute memorandum and articles for deed of settlement.

267. (1) Subject to the provisions of this section, a company registered in pursuance of this Part may by special resolution alter the form of its constitution by substituting a memorandum and articles for a deed of settlement.

(2) The provisions of this Act with respect to confirmation by the Court and registration of an alteration of the objects of a company shall, so far as applicable, apply to an alteration under this section with the following modifications:—

(a) there shall be substituted for the printed copy of the altered memorandum required to be filed with the registrar a printed copy of the substituted memorandum and articles; and,

(b) on the registration of the alteration being certified by the registrar, the substituted memorandum and articles shall apply to the company in the same manner as if it were a company registered under this Act with that memorandum and those articles, and the company's deed of settlement shall cease to apply to the company.

(3) An alteration under this section may be made either with or without any alteration of the objects of the company under this Act.

(4) In this section the expression "deed of settlement" includes any contract of co-partnery or other instrument constituting or regulating the company, not being an Act of Parliament, an Act of the Governor General in Council, a Royal Charter or Letters Patent.

Power of Court to stay or restrain proceedings.

268. The provisions of this Act with respect to staying and restraining suits and legal proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order shall, in the case of a com-

pany registered in pursuance of this Part, where the application to stay or restrain is by a creditor, extend to suits and legal proceedings against any contributory of the company.

Suits stayed on winding-up order.

269. Where an order has been made for winding up a company registered in pursuance of this Part, no suit or other legal proceeding shall be commenced or proceeded with against the company or any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

PART IX.

WINDING UP OF UNREGISTERED COMPANIES.

Meaning of "unregistered company."

270. For the purposes of this Part, the expression "unregistered company" shall not include a railway company incorporated by Act of Parliament or by an Act of the Governor General in Council, nor a company registered under the Indian Companies Act, 1886, or under any Act repealed thereby, or under the Indian Companies Act, 1882, or under this Act, but, save as aforesaid, shall include any partnership, association or company consisting of more than seven members.

Winding up of unregistered companies.

271. (*1*) Subject to the provisions of this Part, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with the following exceptions and additions:—

(i) an unregistered company shall, for the purpose of determining the Court having jurisdiction in the matter of the winding up, be deemed to be registered in the province where its principal place of business is situate or, if it has a principal place of business situate in more than one province, then in each province where it has a principal place of business; and the principal place of business situate in that province in which proceedings are being instituted shall, for all the purposes of the winding up, be deemed to be the registered office of the company;

(ii) no unregistered company shall be wound up under this Act voluntarily or subject to supervision;

(iii) the circumstances in which an unregistered company may be wound up are as follows (that is to say):—

(*a*) if the company, is dissolved, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;

(*b*) if the company is unable to pay its debts;

(*c*) if the Court is of opinion that it is just and equitable, that the company should be wound up;

(iv) an unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts—

(*a*) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by leaving at its principal place of business, or by delivering to the secretary, or some director, manager or principal officer of the company or by otherwise serving in such manner as the Court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks after the service of the demand neglected to pay the sum, or to secure or compound for it to the satisfaction of the creditor;

(*b*) if any suit or other legal proceeding has been instituted against any member for any debt or demand due or claimed to be due, from the company or from him in his character or member, and notice in writing of the institution of the suit or other legal proceeding having been served on the company by leaving the same at its principal place of business or by delivering it to the secretary, or some director, manager or principal officer of the company or by otherwise serving the same in such manner as the Court may approve or direct, the company has not within ten days after service of the notice paid, secured or compounded for the debt or demand, or procured the suit or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against suit or other legal proceeding, and against all costs, damages and expenses to be incurred by him by reason of the same;

(c) if execution or other process issued on a decree or order obtained in any Court in favour of a creditor against the company, or any member thereof as such, or any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied; and

(d) if it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) Nothing in this part shall affect the operation of any enactment which provides for any partnership, association or company being wound up, or being wound up as a company or as an unregistered company, under any enactment repealed by this Act, except that references in any such first-mentioned enactment to any such repealed enactment shall be read as references to the corresponding provision (if any) of this Act.

Contributories in winding up of unregistered companies.

272. (1) In the event of an unregistered company being wound up, every person shall be deemed to be a contributory who is liable to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves, or to pay or contribute to the payment of the costs and expenses of winding up the company, and every contributory shall be liable to contribute to the assets of the company all sums due from him in respect of any such liability as aforesaid.

(2) In the event of any contributory, dying or being adjudged insolvent, the provisions of this Act with respect to the legal representatives and heirs of deceased contributories, and to the assignees of insolvent contributories shall apply.

Power to stay or restrain proceedings.

273. The provisions of this Act with respect to staying and restraining suits and legal proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order shall, in the case of an unregistered company, where the application to stay or restrain is by a creditor, extend to suits and legal proceedings against any contributory of the company.

Suits stayed on winding up order.

274. Where an order has been made for winding up an unregistered company, no suit or other legal proceeding shall be proceeded with or commenced against any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

Directions as to property in certain cases.

275. If an unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the Court may by the winding up order, or by any subsequent order, direct that all or any part of the property, moveable or immoveable, including all interests and rights in, to and out of property, moveable and immoveable, and including obligations and actionable claims as may belong to the company or to trustees on its behalf, is to vest in the official liquidator by his official name, and thereupon the property or the part thereof specified in the order shall vest accordingly; and the official liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official name any suit or other legal proceeding relating to that property, or necessary to be brought or defended for the purposes of effectually winding up the company and recovering its property.

Provisions of this Part cumulative.

276. The provisions of this Part with respect to unregistered companies shall be in addition to, and not in restriction of, any provisions hereinbefore in this Act contained with respect to winding up companies by the Court, and the Court or official liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under this Act; but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this Part.

PART X.

COMPANIES ESTABLISHED OUTSIDE BRITISH INDIA.

Requirements as to companies established outside British India.

277. (*1*) Every company incorporated outside British India which at the commencement of this Act has a place of business in British India, and every such company which after the commencement of this Act establishes such a place of business within British India shall, within six months from the commencement of this Act or within one month from the establishment of such place of business, as the case may be, file with the registrar in the province in which such place of business is situated,—

(*a*) a certified copy of the charter, statutes or memorandum and articles of the company, or other instrument

constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof;

(*b*) the full address of the registered or principal office of the company;

(*c*) a list of the directors and managers (if any) of the company;

(*d*) the names and addresses of some one or more person resident in British India authorised to accept on behalf of the company service of process and any notices required to be served on the company;

and, in the event of any alteration being made in any such instrument or in such address or in the directors or managers or in the names or addresses of any such persons as aforesaid, the company shall, within the prescribed time, file with the registrar a notice of the alteration.

(2) Any process or notice required to be served on the company shall be sufficiently served, if addressed to any person whose name has been so filed as aforesaid and left at or sent by post to the address which has been so filed.

(*3*) Every company to which this section applies shall in every year file with the registrar of the province in which the company has its principal place of business—

(i) in a case where by the law, for the time being in force, of the country in which the company is incorporated such company is required to file with the public authority an annual balance-sheet,—a copy of that balance-sheet; or

(ii) in a case where no such provision is made by the law, for the time being in force, of the country in which the the company is incorporated, such a statement in the form of a balance-sheet such company would if it were a company formed and registered under this Act, be required to file in accordance with the provisions of this Act:

Provided that the Governor General in Council may, by notification in the Gazette of India subject to such restrictions and conditions, if any, as he may therein prescribe, exempt any such company or any class of such companies from this requirement.

(4) Every company to which this section applies and which uses the word "Limited" as part of its name, shall—

(a) in every prospectus inviting subscriptions for its share or debentures in British India state the country in which the company is incorporated; and

(b) conspicuously exhibit on every place where it carries on business in British India the name of the company and the country in which the company is incorporated in letters easily legible in English characters, and also, if any place where it carries on business is beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place; and

(c) have the name of the company and of the country in which the company is incorporated mentioned in legible English characters in all bill-heads and letter paper, and in all notices, advertisements and other official publications of the company.

(5) If any company to which this section applies fails to comply with any of the requirements of this section, the company, and every officer or agent of the company, shall be liable to a fine not exceeding five hundred rupees or, in the case of a continuing offence, fifty rupees for every day during which the default continues.

(6) For the purposes of this section—

(a) the expression "certified" means certified in the prescribed manner to be a true copy of a correct translation;

(b) the expression "place of business" includes a share transfer or share registration office;

(c) the expression "director" includes any person occupying the position of director, by whatever name called; and

(d) the expression "prospectus" means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of the company.

(7) There shall be paid to the registrar for registering any document required by this section to be filed with him a fee of five rupees or such smaller fee as may be prescribed.

PART XI.

SUPPLEMENT.

Legal proceedings, offences, etc.

Cognizance of offences.

278. (*1*) No court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence against this Act.

(*2*) If any offence which by this Act is declared to be punishable by fine only is committed by any person within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William, Madras and Bombay, such offence shall be punishable upon summary conviction by any Presidency Magistrate of the place at which such Court is held.

(*3*) Notwithstanding anything in the Code of Criminal Procedure, 1898, every offence against this Act shall, for the purposes of the said Code, be deemed to be non-cognizable.

Applications of fines.

279. The Court imposing any fine under this Act may direct that the whole or any part thereof be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding of the person on whose information the fine is recovered.

Power to require limited company to give security for costs.

280. Where a limited company is plaintiff or petitioner in any suit or other legal proceeding, at any Court having jurisdiction in the matter may, if it appears that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

Power of Court to grant relief in certain cases.

281. If in any proceeding before any Court against a director of a company for negligence or breach of trust it appears to such Court that the director is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think proper.

Penalty for false statement.

282. Whoever in any return, report, certificate, balance-sheet or other document, required by or for the purposes of any of the provisions of this Act wilfully makes a statement false in any material

particular, knowing it to be false, shall be punishable with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Penalty for improper use of word "Limited."

283. If any person or persons trade or carry on business under any name or title of which "Limited" is the last word, that person or those persons shall, unless duly incorporated with limited liability, be liable to a fine not exceeding fifty rupees for every day upon which that name or title has been used.

Saving of pending proceedings for winding up.

284. The provisions of this Act with respect to winding up shall not apply to any company of which the winding up has commenced before the commencement of this Act, but every such company shall be wound up in the same manner and with the same incidents as if this Act had not been passed, and, for the purposes of the winding up, the Indian Companies Act, 1882, shall be deemed to remain in full force.

Saving of document.

285. Every instrument of transfer or other document made before the commencement of this Act in pursuance of any enactment hereby repealed, shall be of the same force as if this Act had not been passed, and for the purposes of that instrument or document the repealed enactment shall be deemed to remain in full force.

Former registration offices, registers, and registrars continued.

286. (1) The offices existing at the commencement of this Act for registration of joint-stock companies shall be continued as if they had been established under this Act.

(2) Registers of companies kept in any such existing offices shall respectively be deemed part of the registers of companies to, be kept under this Act.

(3) The existing registrars, assistant registrars and officers in those offices shall, during the pleasure of the Local Government, hold the offices and receive the salaries hitherto held and received by them, but subject to any regulations of the Local Government with regard to the execution of their duties.

Savings for Indian Life Assurance Companies Act, 1912, and Provident Insurance Societies Act, 1912.

287. Nothing in this Act shall affect the provisions of the Indian Life Assurance Companies Act, 1912, or of the Provident Insurance Societies Act, 1912.

Construction of "registrar of joint-stock companies" in Act XXI of 1860

288. In sections 1 and 18 of Act No. XXI 1860 (for the registration of Literary, Scientific and Charitable Societies), the words "registrar of joint-stock companies" shall be construed to mean the registrar under this Act.

Act not to apply to Banks of Bengal, Madras or Bombay.

289. Save as provided in sections 188 and 189, nothing in this Act shall be deemed to apply to the Bank of Bengal, the Bank of Madras and the Bank of Bombay.

Repeal of Acts and Savings.

290. The enactments mentioned in the Fourth Schedule are hereby repealed to the extent specified in the fourth column thereof:

Provided that the repeal shall not affect—

(*a*) the information of any company registered under any enactment hereby repealed; nor

(*b*) Table B in the Schedule annexed to Act No. XIX of 1857, or any part thereof, so far as the same applies to any company existing at the commencement of this Act; nor

(*c*) Table A in the First Schedule annexed to the Indian Companies Act, 1882, or any part thereof so far as the same applies to any company existing atthe commencement of this Act.

(*2*) All fees directed, resolutions passed and other things duly done under any enactment hereby repealed, shall be deemed to have been directed, passed or done under this Act.

(*3*) The mention of particular matters in this section or in any other section of this Act shall not prejudice the general application of section 6 of the General Clauses Act, 1897, with regard to the effect of repeals.

SCHEDULES.

THE FIRST SCHEDULE.

(*See sections 2, 17, 18 79, 266.*)

TABLE A.

REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES.

Preliminary.

1. In these regulations, unless the context otherwise requires, expressions defined in the Indian Companies Act, 1913, or any statutory modification thereof in force at the date at which these regulations become binding on the company, shall have the meaning so defined; and words importing the singular shall include the plural, and *vice versa,* and words importing the masculine gender shall include females, and words importing persons shall include bodies corporate.

Business.

2. The directors shall have regard to the restrictions on the commencement of business imposed by section 103 of the Indian Companies Act, 1913, if, and so far as, those restrictions are binding upon the company.

Shares.

3. Subject to the provisions, if any, in that behalf of the memorandum of association of the company, and without prejudice to any special rights previously conferred on the holders of existing shares in the company, and share in the company may be issued with such preferred, deferred or other special rights, or such restrictions, whether in regard to dividend, voting, return of share capital, or otherwise, as the company may from time to time by special resolution determine.

4. If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall *mutatis mutandis* apply, but so that the necessary

quorum shall be two persons at least holding or representing by proxy one-third of the issued shares of the class.

5. No share shall be offered to the public for subscription except upon the terms that the amount payable on application shall be at least five per cent. of the nominal amount of the share; and the directors shall, as regards any allotment of shares, duly comply with such of the provisions of sections 101 and 104 of the Indian Companies Act, 1913, as may be applicable thereto.

6. Every person whose name is entered as a member in the register of members shall, without payment, be entitled to a certificate under the common seal of the company specifying the share or shares held by him and the amount paid up thereon: Provided that, in respect of a share or shares held jointly by several persons, the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint-holders shall be sufficient delivery to all.

7. If a share certificate is defaced, lost or destroyed, it may be renewed on payment of such fee, if any, not exceeding eight annas, and on such terms, if any, as to evidence and indemnity as the directors think fit.

8. No part of the funds of the company shall be employed in the purchase, of, or in loans upon the security of, the company's shares.

Lien.

9. The company shall have a lien on every share (not being a fully-paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share and the company shall also have a lien on all shares (other than fully-paid shares) standing registered in the name of a single person, for all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this clause. The company's lien, if any, on a share shall extend to all dividends payable thereon.

10. The company may sell, in such manner as the director thinks fit, any shares on which the company has a lien, but no sale shall be made unless some sum in respect of which the lien exists is presently payable, nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of amount in respect of which the lien exists as is presently payable,

has been given to the registered holder for the time being of the share, or the person entitled by reason of his death or insolvency to the share.

11. The proceeds of the sale shall be applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of the sale. The purchaser shall be registered as the holder of the shares, and he shall not be bound to see to the application of the purchase-money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

Calls on Shares.

12. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payments) pay to the company at the time or times so specified the amount called on his shares.

13. The joint-holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

14. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of five per cent. per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part.

15. The provisions of these regulations as to payment of interest shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had become payable by virtue of a call duly made and notified.

16. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

17. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys

uncalled and unpaid upon any shares held by him; and upon all or any of the moneys so advanced may (until the same would, but for such advance, become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, six per cent.) as may be agreed upon between the member paying the sum in advance and the directors.

Transfer and transmission of shares.

18. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain holder of the share until the name of the transferee is entered in the register of members in respect thereof.

19. Shares in the company shall be transferred in the following form, or in any usual or common form which the directors shall approve:

I, A B of , in consideration of the sum of rupees paid to me by C D of (hereinafter called "the said transferee"), do hereby transfer to the said transferee the share [*or* shares] numbered in the undertaking called the Company, Limited, to hold unto the said transferee, his executors, administrators and assigns, subject to the several conditions on which I held the same at the time of the execution thereof, and I, the said transferee, do hereby agree to take the said share [*or* shares] subject to the conditions aforesaid. As witness our hands the day of

Witness to the signatures of, etc.

20. The directors may decline to register any transfer of shares not being fully-paid shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. The directors may also suspend the registration of transfers during the fourteen days immediately preceding the ordinary general meeting in each year. The directors may decline to recognise any instrument of transfer unless—

(*a*) a fee not exceeding two rupees is paid to the company in respect thereof; and

(*b*) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer.

21. The executors or administrators of a deceased sole holder of a share shall be the only persons recognised by the company as having any title to the share. In the case of a share registered in the names or two or more holders, the survivors or survivor, or the executors or administrators of the deceased survivor, shall be the only persons recognised by the comyany as having any title to the share.

22. Any person becoming entitled to a share in consequence of the death of insolvency of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or insolvent person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or insolvent person before the death or insolvency.

23. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

Forfeiture of shares.

24. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

25. The notice shall name a further day (not earlier than the expiration of fourteen days, from the date of the notice) on or before which the payment required by the notice is to be made, and shall state that, in the event of non-payment at or before the time appointed, the shares in respect of which the call was made will be liable to be forfeited.

26. If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

27. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.

28. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture, were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company receive payment in full of the nominal amount of the shares.

29. A duly verified declaration in writing that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share, and that declaration, and the receipt of the company for the consideration, if any, given for the share on the sale or disposition thereof, shall constitute a good title to the share, and the person to whom the share is sold or disposed of shall be registered as the holder of the share and shall not be bound to see to the application of the purchase-money (if any), nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.

30. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified.

Conversion of shares into stock.

31. The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock, and may with the like sanction re-convert any stock into paid-up shares of any denomination.

32. The holders of stock may transfer the same, or any part thereof, in the same manner, and subject to the same regulations, as, and subject to which, the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit; but the directors may from time to time fix the minimum amount of stock transferable, and restrict or

forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the shares from which the stock arose.

33. The holders of stock shall, according to the amount of the stock held by them, have the same rights, privileges and advantages as regards dividends, voting at meetings of the company, and other matters, as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privilege or advantage.

34. Such of the regulations of the company (other than those relating to share-warrants), as are applicable to paid-up shares shall apply to stock, and the words "share" and "shareholder" therein shall include "stock" and "stockholder."

Share-warrants.

35. The company may issue share-warrants, and accordingly the directors may in their discretion, with respect to any share which is fully paid up, on application in writing signed by the person registered as holder of the share, and authenticated by such evidence (if any) as the directors may from time to time require as to the identity of the person signing the request, and on receiving the certificate (if any) of the share, and the amount of the stamp-duty on the warrant and such fee as the directors may from time to time require, issue under the company's seal a warrant, duly stamped, stating that the bearer of the warrant is entitled to the shares therein specified, and may provide by coupons or otherwise for the payment of dividends, or other moneys, on the shares included in the warrant.

36. A share-warrant shall entitle the bearer to the shares included in it, and the share shall be transferred by the delivery of the share-warrant, and the provisions of the regulations of the company with respect to transfer and transmission of shares shall not apply thereto.

37. The bearer of a share-warrant shall, on surrender of the warrant to the company for cancellation, and on payment of such sum as the directors may from time to time prescribe, be entitled to have his name entered as a member in the register of members in respect of the shares included in the warrant.

38. The bearer of a share-warrant may at any time deposit the warrant at the office of the company, and so long as the

warrant remains so deposited, the depositor shall have the same right of signing a requisition for calling a meeting of the company, and of attending and voting and exercising the other privileges of a member at any meeting held after the expiration of two clear days from the time of deposit, as if his name were inserted in the register of members as the holders of the shares included in the deposited warrant. Not more than one person shall be recognised as depositor of the share-warrant. The company shall, on two days' written notice, return the deposited share-warrant to the depositor.

39. Subject as herein otherwise expressly provided, no person shall, as bearer of a share-warrant, sign a requisition for calling a meeting of the company, or attend, or vote or exercise any other privilege of a member at a meeting of the company, or be entitled to receive any notices from the company; but the bearer of a share-warrant shall be entitled in all other respects to the same privileges and advantages as if he were named in the register of members as the holder of the shares included in the warrant, and he shall be a member of the company.

40. The directors may from time to time make rules as to the terms on which (if they shall think fit) a new share-warrant or coupon may be issued by way of renewal in case of defacement, loss or destruction.

Alteration of Capital.

41. The directors may, with the sanction of an extraordinary resolution of the company, increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

42. Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of share capital, all new shares shall, before issue, be offered to such persons as at the date of the offer or entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered; the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which by reason of the ratio which the

new shares bear to shares held by persons entitled to an offer of new shares cannot, in the opinion of the directors, be conveniently offered under this article.

43. The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture and otherwise as the shares in the original share capital.

44. The company may, by special resolution,—

(*a*) consolidate and divide its share capital into shares of larger amount than its existing shares ;

(*b*) by sub-division of its existing shares or any of them, divide the whole or any part of its share capital into shares of smaller amouut than is fixed by the memorandum of association, subject, nevertheless, to the provisions of paragraph (*d*) of sub-section (*1*) of section 50 of the Indian Companies Act, 1913 ;

(*c*) cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person ;

(*d*) reduce its share capital in any manner and with, and subject to, any incident authorised, and consent required, by law.

General Meetings.

45. The statutory general meeting of the company shall be held within the period required by section 77 of the Indian Companies Act, 1913.

46. A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be called by any two members in the same manner as nearly as possible as that in which meetings are to be called by the directors.

47. The above-mentioned generel meetings shall be called ordinary meetings ; all other general meetings shall be called extraordinary.

48. The directors may, whenever they think fit, call an extraordinary general meeting, and exeraordinary general meetings shall

also be called on such requisition, or on default, may be called by such requisitionists, as provided by section 78 of the Indian Companies Act, 1913. If at any time there are not within British India sufficient directors capable of acting to form a quorum, any director or or any two members of the company may call an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be called by the directors.

Proceedings at General Meeting.

49. Fourteen days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, the day and the hour of meeting and, in case of special business, the general nature of that business, shall be given in manner hereinafter mentioned, or in such other manner, or if any, as may be prescribed by the company in general meeting, to such persons as are, under the regulations of the company, entitled to receive such notices from the company; but the non-receipt of the notice by any member shall not invalidate the proceedings at any general meeting.

50. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting with the exception of sanctioning a dividend, the consideration of the accounts, balance sheets and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors.

51. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, three members personally present shall be a quorum.

52. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if called upon the requisition of members, shall be dissolved; in any other case, it shall stand adjourned to the same day in the next week at the same time and place, and, if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum.

53. The chairman if any, of the board of directors shall preside as chairman at every general meeting of the company.

54. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for

holding the meeting, or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman.

55. The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

56. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded by at least three members, and, unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried unanimously, or by a particular majority or lost, and an entry to that effect in the book of the proceedings of the company shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against, that resolution.

57. If a poll is duly demanded, it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

58. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place, or at which the poll is demanded, shall be entitled to a second or casting vote.

59. A poll demanded on the election of a chairman or on a question of adjournment shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs.

Votes of Members.

60. On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which he is the holder.

61. In the case of joint-holders, the vote of the senior who tenders a vote, whether in person or by proxy shall be accepted to

the exclusion of the votes of the other joint-holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

62. A member of unsound mind, or in respect of whom an order has been made by any Court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee or other legal guardian, and any such committee or guardian may, on a poll, vote by proxy.

63. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid.

64. On a poll votes may be given either personally or by proxy: Provided that no company shall vote by proxy as long as a resolution of its directors in accordance with the provisions of section 80 of the Indian Companies Act, 1913, is in force.

65. The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing, or, if the appointor is a corporation, either under the common seal, or under the hand of an officer or attorney so authorised. No person shall act as a proxy unless either he is entitled on his own behalf to be present and vote at the meeting at which he acts as proxy, or he has been appointed to act at that meeting as proxy for a corporation.

66. The instrument appointing a proxy and the power-of-attorney or other authority (if any), under which it is signed or a notarially certified copy of that power or authority shall be deposited at the registered office of the company not less than seventy-two hours before the time for holding the meeting at which the person named in the instrument proposes to vote, and in default the instrument of proxy shall not be treated as valid.

67. An instrument appointing a proxy may be in the following form, or in any other form which the directors shall approve:—

Company, Limited.

"I of in the district of, , being a member of the Company, Limited, hereby appoint of as my proxy to vote for me and on my behalf at the [ordinary or extraordinary, as the case may be] general meeting of the company to be held on the day of and at any adjournment thereof."

Signed this day of

Directors.

68. The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association.

69. The remuneration of the directors shall from time to time be determined by the company in general meeting.

70. The qualification of a director shall be the holding of at least one share in the company, and it shall be his duty to comply with the provisions of section 85 of the Indian Companies Act, 1913.

Powers and duties of Directors.

71. The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not, by the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulation of these articles, to the provisions of the said Act, and to such regulations being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

72. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation of retirement of directors, but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.

73. The amount for the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company (otherwise than by the issue of share capital) shall not at any time exceed the issued share capital of the company without the sanction of the company in general meeting.

74. The directors shall duly comply with the provisions of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, and in particular with the provisions in regard to the registration of the particulars of mortgages and charges affecting the property of the company or created by it, and to keeping a register of the directors, and to sending to the registrar an annual list of members, and a summary of particulars relating thereto and notice of any consolidation or increase of share capital, or conversion of shares into stock, and copies of special resolutions and a copy of the register of directors and notifications of any changes therein.

75. The directors shall cause minutes to be made in books provided for the purpose—

(*a*) of all appointments of officers made by the directors;

(*b*) of the names of the directors present at each meeting of the directors and of any committee of the directors;

(*c*) of all resolutions and proceedings at all meetings of the company, and, of the directors, and of committees of directors;

and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

The Seal.

76. The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for the purpose; and those two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

Disqualifications of Directors.

77. The office of director shall be vacated if the director—

(*a*) ceases to be a director by virtue of section 85 of the Indian Companies Act, 1913; or

(*b*) holds or any partner of his, or the firm of which he is a member, holds any other office of profit under the company except that of managing director or manager; or

(*c*) is adjudged insolvent; or

(*d*) is found lunatic or becomes of unsound mind; or

(e) is concerned or participates in the profit of any contract with the company; or

(f) is punished with imprisonment for a term exceeding six months:

Provided, however, that no director shall vacate his office by reason of his being a member of any company which has entered into contracts with, or done any work for, the company of which he is director; but a director shall not vote in respect of any such contract or work, and if he does so vote, his vote shall not be counted.

Rotation of Directors.

78. At the first ordinary meeting of the company, the whole of the directors shall retire from office, and at the ordinary meeting in every subsequent year, one-third of the directors for the time being or, if their number is not three or a multiple of three, then the number nearest to one-third shall retire from office.

79. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

80. A retiring director shall be eligible for re-election.

81. The company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto.

82. If at any meeting at which an election of directors ought to take place, the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place, and, if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors or such of them as have not had their places filled up shall be deemed to have been re-elected at the adjourned meeting.

83. The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

84. Any casual vacancy occurring on the board of directors may be filled up by the directors, but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director,

85. The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director.

86. The company may by extrordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

Proceedings of Directors.

87. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings, as they think it. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time, summon a meeting of directors.

88. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall (when the number of directors exceeds three) be three.

89. The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company, but for no other purpose.

90. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting.

91. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so found shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.

92. A committee may elect a chairman of their meetings: if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting.

93. A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and, in case of an equality of votes, the chairman shall have a second or casting vote.

94. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

Dividends and Reserve.

95. The company in general meeting may declare dividends, but no dividends shall exceed the amount recommended by the directors.

96. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

97. No dividends shall be paid otherwise than out of profits.

98. Subject to the rights of persons (if any) entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid up on any of the shares in the company, dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purposes of this article as paid on the share.

99. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit.

100. If several persons are registered as joint-holders of any share, any one of them may give effectual receipts for any dividend payable on the share.

101. Notice of any dividend that may have been declared shall be given in manner hereinafter mentioned to the persons entitled to share therein.

102. No dividend shall bear interest against the company.

Accounts.

103. The directors shall cause true accounts to be kept—

(*a*) of the sums of money received and expended by the company, and the matter in respect of which such receipt and expenditure takes place; and

(*b*) of the assets and liabilities of the company.

104. The books of account shall be kept at the registered office of the company, or at such other place or places as the directors think fit, and shall always be open to the inspection of the directors.

105. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by law or authorised by the directors or by the company in general meeting,

106. Once at least in every year the directors shall lay before the company in general meeting a profit and loss account for the period since the preceding account or (in the case of the first accent) since the incorporation of the company, made up to a date not more than six months before such meeting.

107. The profit and loss account shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expenses of the establishment, salaries and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting, and, in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be

stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

108. A balance-sheet shall be made out in every year and laid before the company in general meeting made up to a date not more than six months before such meeting. The balance-sheet shall be accompanied by a report of the directors as to the state of the company's affairs, and the amount which they recommend to be paid by way of dividend, and the amount (if any) which they propose to carry to a reserve fund.

109. A copy of the balance-sheet and report shall, seven days previously to the meeting, be sent to the persons entitled to receive notices of general meetings in the manner in which notices are to be given hereunder.

110. The directors shall in all respects comply with the provisions of sections 130 to 135 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force.

Audit.

111. Auditors shall be appointed and their duties regulated in accordance with sections 144 and 145 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force.

Notices.

112. (1) A notice may be given by the company to any member either personally or by sending it by post to him to his registered address, or (if he has no registered address in British India) to the address, if any, within British India supplied by him to the company for the giving of notices to him.

(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

113. If a member has no registered address in British India, and has not supplied to the company an address within British India for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly given to him on the day on which the advertisement appears.

114. A notice may be given by the company to the joint-holders of a share by giving the notice to the joint-holder named first in the register in respect of the share.

115. A notice may be given by the company to the persons entitled to a share in consequence of the death or insolvency of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or assignee of the insolvent or by any like description, at the address (if any) in British India supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or insolvency had not occurred.

116. Notice of every general meeting shall be given in some manner hereinbefore authorised to (*a*) every member of the company (including bearers of share-warrants) except those members who (having no registered address within British India) have not supplied to the company an address within British India for the giving of notices to them, and also to (*b*) every person entitled to a share in consequence of the death or insolvency of a member, who, but for his death or insolvency, would be entitled to receive notice of the meeting. No other persons shall be entitled to receive notices of general meetings.

TABLE B.

(See Sections 249 and 262.)

TABLE OF FEES TO BE PAID TO THE REGISTRAR.

I.—By a company having a share capital.

	Rs.	A.	P.
1. For registration of a company whose nominal share capital does not exceed Rs. 20,000, a fee of	40	0	0
2. For registration of a company whose nominal share capital exceeds Rs. 20,000, the above fee of forty rupees, with the following additional fees regulated according to the amount of nominal capital (that is to say)—			
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 20,000 rupees up to 50,000 rupees	20	0	0
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 50,000 rupees up to 10,00,000 rupees.	5	0	0
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 10,00,000 rupees ...	1	0	0
3. For registration of any increase of share capital made after the first registration of the company, the same fees per 10,000 rupees or, part of 10,000 rupees, as would have been payable if such increased share capital had formed part of the original share capital at the time of registration ;			

	Rs.	A.	P.
Provided that no company shall be liable to pay in respect of nominal share capital on registration, or afterwards, any greater amount of fees than 1,000 rupees taking into account, in the case of fees payable on an increase of share capital after registration, the fees paid on registration.			
4 For registration of any existing company, except such companies as are by this Act, exempted from payment of fees in respect of registration under this Act, the same fees as is charged for registering a new company.			
5. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the registrar by a receiver or the statement required to be filed with the registrar by its liquidator in a winding up...	5	0	0
6. For making a record of any fact by this Act authorised or required to be recorded by the registrar, a fee of ...	5	0	0

II—By a company not having a share capital.

	Rs.	A.	P.
1. For registration of a company whose number of members, as stated in the articles of association, does not exceed 20 ...	40	0	0
2. For registration of a company whose number of members, as stated in the articles of association, exceeds 20, but does not exceed 100	100	0	0
3. For registration of a company whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of Rs. 100 with an additional Rs. 5 for every 50 members, or less number than 50 members, after the first 100.			
4. For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of	400	0	0
5. For registration of any increase on the number of members made after the registration of the company, the same fees as would have been payable if such increase had been stated in the articles of association at the time of registration: ...	5	0	0
Provided that no one company shall be liable to pay on the whole a greater fee than Rs. 400 in respect of its number of members, taking into account the fee paid on the first registration of the company.			
6. For registration of any existing company except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.			
7. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the registrar by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up...	5	0	0
8. For making a record of any fact by this Act authorised or required to be recorded by the registrar, a fee of ...	5	0	0

THE SECOND SCHEDULE.

(See Section 98.)

STATEMENT IN LIEU OF PROSPECTUS.

filed by

LIMITED.

pursuant to section 98 of the Indian Companies Act, 1913.
Presented for filing by

THE INDIAN COMPANIES ACT, 19 .

LIMITED.

STATEMENT IN LIEU OF PROSPECTUS.

The nominal share capital of the company.	Rs.
Divided into	Shares of Rs. each. " " " " " "
Names, descriptions and addresses of directors or proposed directors and of the managers or proposed managers.	
Minimum subscription (if any) fixed by the memorandum or articles of association on which the company may proceed to allotment.	
Number and amount of shares and debentures agreed to be issued as fully or partly paid up otherwise than in cash. The consideration for the intended issue of those shares and debentures.	1. shares of Rs. fully paid. 2. shares upon which Rs. per share credited as paid. 3. debenture Rs. 4. Consideration.
Names and addresses of (a) vendors of property purchased or acquired (b) or proposed to be purchased or acquired by the company. Amount (in cash, shares or debentures) payable to each separate vendor.	

(a) For definition of vendor, see section 94 of the Indian Companies Act, 1913.

(b) See section 95 of the Indian Companies Act, 1913.

Amount (if any) paid or payable (in cash or shares or debentures) for any such property, specifying amount (if any) paid or payable for goodwill.	Total purchase price Rs. Cash ,, Shares ,, Debentures ,, Goodwill Rs.
Amount (if any) paid or payable as commission for subscribing or agreeing to procure subscriptions for any shares or debentures in the company or Rate of the commission	Amount paid. ,, payable. Rate per cent.
Estimated amount of preliminary expenses	Rs,
Amount paid or intended to be paid to any promoter. Consideration for the payment	Name of promoter Amount Rs. Consideration :—
Dates of, and parties to every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the company or entered into more than two years before the filing of this statement),	
Time and place at which the contracts or copies thereof may be inspected.	
Names and addresses of the auditors of the company (if any).	
Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise by any person either to induce him to become, or to qualify him as a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.	
Whether the articles contain any provisions precluding holders of shares or debentures receiving and inspecting balance-sheets or reports of the auditors or other reports	Nature of the provisions.

(Signature of the persons abovenamed as directors or proposed directors, or of their agents authorised in writing.

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THE THIRD SCHEDULE.

FORM A.

(See sections 6 and 151.

MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES.

1st.—The name of the company as "The Eastern Steam Packet Company, Limited."

2nd.—The registered office of the company will be situate in the province of Bombay.

3rd.—The objects for which the company is established are "the conveyance of passengers and goods in ships or boats between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th.—The liability of the members is limited.

5th.—The share capital of the company is two hundred thousand rupees divided into one thousand shares of two hundred rupees each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of his memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, addresses and descriptions of subscribers.	Number of shares taken by each subscriber.
1. A. B. of, merchant	200
2. C. D., ,, ,, ...	25
3. E. F., ,, ,, ...	30
4. G. H., ,, ,, ...	40
5. I. J., ,, ,, ...	15
6. K. L., ,, ,, ...	5
7. M. N., ,, ,, ...	20
Total shares taken ..	325

Dated the day of 19 .

Witness to the above signatures,

X. Y., of

FORM B.

(See Sections 7 and 151.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE, AND NOT HAVING A SHARE CAPITAL.

Memorandum of Association.

1st.—The name of the company is "The Mutual Calcutta Marine Association, Limited."

2nd.—The registered office of the company will be situate in Calcutta.

3rd.—The objects for which the company is established are "the mutual insurance of ships belonging to members of the company, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th.—The liability of the members is limited.

5th.—Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and the costs, charges and expenses of winding up and for the adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding one hundred rupees.

We, the several persons whose names and addresses are subscribed are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, Addresses and Descriptions of Subscribers.

"1. A. B. of
"2 C. D. of
"3. E. F. of
"4. G. H. of
"5. I. J. of
"6. K. L. of
"7. M. N. of

Dated the day of

Witness to the above signatures.

X. Y., of ,

ARTICLES OF ASSOCIATION TO ACCOMPANY PRECEDING MEMORANDUM OF ASSOCIATION.

Number of Members.

1. The company for the purpose of registration is declared to consist of five hundred members.

2. The directors hereinafter mentioned may, whenever the business or the association requires it, register an increase of members.

Definition of Members.

3. Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained.

General Meetings.

4. The first general meeting shall be held at such time, not being less than one month nor more than three months after the incorporation of the company, and at such place, as the directors may determine.

5. A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place, as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be called by any two members in the same manner as nearly as possible as that in which meetings are to be called by the directors.

6. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

7. The directors may, whenever they think fit, and shall, on a requisition made in writing by any five or more members, call an extraordinary general meeting.

8. Any requisition made by the members must state the object of the meeting proposed to be called, and must be signed by the requisitionists and deposited at the registered office of the company.

9. On receipt of the requisition the directors shall forthwith proceed to call a general meeting if they do not proceed to cause a meeting to be held within twenty-one days from the date of the

requisition being so deposited, the requisitionists or any other five members may themselves call a meeting.

Proceedings at General Meetings.

10. Fourteen days' notice at the least, specifying the place, the day and the hour of meeting, and in case of special business the general nature of the business, shall be given to the members in manner hereinafter mentioned, or in such other manner (if any) as may be prescribed by the company in general meeting; but the non-receipt of such a notice by any member shall not invalidate the proceedings at any general meeting.

11. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of the consideration of the accounts, balance-sheets and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of remuneration of the auditors.

12. No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of members is present at the commencement of the business. The quorum shall be ascertained as follows (that is to say):—if the members of the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every five additional members with this limitation, that no quorum shall in any case exceed ten.

13. If within one hour from the time appointed for the meeting a quorum of members is not present, the meeting, if called on the requisition of the members, shall be dissolved; in any other case it shall stand adjourned to the same day in the following week at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned *sine die*.

14. The chairman (if any) of the directors shall preside as chairman at every general meeting of the company.

15. If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the members present shall choose some one of their number to be chairman of that meeting.

16. The chairman may, with the consent of the meeting, adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

17. At any general meeting, unless a poll is demanded by at least three members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the resolution.

18. If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

Votes of Members.

19. Every member shall have one vote and no more.

20. If any member is a lunatic or idiot, he may vote by his committee or other legal guardian.

21. No member shall be entitled to vote at any meeting unless all moneys due from him to the company have been paid.

22. On a poll votes may be given either personally or by proxy: Provided that no company shall vote by proxy as long as a resolution of its directors in accordance with the provisions of section 80 of the Indian Companies Act, 1913, is in force. A proxy shall be appointed in writing under the hand of the appointor, or, if such appointor is a corporation, under its common seal.

23. (1) No person shall act as a proxy unless he is a member, or unless he is appointed to act at the meeting as proxy for a corporation.

(2) The instrument appointing him shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.

24. Any instrument appointing a proxy shall be in the following form:—

Company, Limited,

I, , of being a Member of the Company, Limited, hereby appoint of as my proxy, to vote for me and on my behalf at the [ordinary or extraordinary, as the case may be] general meeting of the company to be held on the day of and at any adjournment thereof.

Signed this day of

Directors.

25. The number of the directors and the names of the first directors shall be determined by the subscribers of the memorandum of association.

26. Until directors are appointed, the subscribers of the memorandum of association shall for all the purposes of the Indian Companies Act 1913, be deemed to be directors.

Powers of Directors.

27. The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not by the Indian Companies Act, 1913, or by any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

Elections of Directors.

28. The directors shall be elected annually by the company in general meeting.

Business of Company.

(Here insert *rules as to mode in which business of insurance is to be conducted.*)

Audit.

29. Auditors shall be appointed and their duties regulated in accordance with sections 144 and 145 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, and for this purpose the said sections shall have effect as if the word "members" were substituted for "shareholders," and as if "first general meeting" were substituted for "statutory meeting."

Notices.

30. A notice may be given by the company to any member either personally, or by sending it by post to him to his registered address.

31. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the notice and, unlesss the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Names, Addresses and Descriptions of Subscribers.

"1. A. B. of
"2. C. D. of
"3. E. F. of
"4. G. H. of
"5. I. J. of
"6. K. L. of
"7. M. N. of

Dated the day of 19 .

Witness to the above signatures.
X. Y., of .

FORM C.

(See sections 7 and 151.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE, AND HAVING A SHARE CAPITAL.

Memorandum of Association.

1st.—The name of the company is "The Snowy Range Hotel Company, Limited."

2nd.—The registered office of the company will be situate in the province of Bengal.

3rd.—The objects for which the company is established are "the facilitating travelling in the Snowy Range, by providing hotels and conveyances by sea and by land for the accommodation of travellers, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th.—The liability of the members is limited.

5th.—Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company, contracted before he ceases to be a member, and the costs, charges and expenses of winding up the same and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding fifty rupees.

6th.—The share capital of the company shall consist of five hundred thousand rupees, divided into five thousand shares of one hundred rupees each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses and Descriptions of Subscribers.	Number of shares taken by each Subscriber.
"1. A. B. of	200
"2. C. D. of	25
"3. E. F. of	30
"4. G. H. of	40
"5. I. J. of	15
"6. K. L. of	5
"7. M. N. of	10
Total shares taken ...	325

Dated the *day of* *19* .

Witness to the above signatures.

X. Y., of

Articles of Association to accompany preceding Memorandum of Association.

1. The share capital of the company is five hundred thousand rupees, divided into five thousand shares of one hundred rupees each.

2. The directors may, with the sanction of the company in general meeting, reduce the amount of shares in the company.

3. The directors may, with the sanction of the company in general meeting, cancel any shares belonging to the company.

4. All the articles of Table A of the Indian Companies Act, 1913 shall be deemed to be incorporated with these articles and to apply to the company.

Names, Addresses and Descriptions of Subscribers.

"1 A. B. of , merchant.
"2. C. D. of
"3. E. F. of
"4. G. H. of
"5. I. J. of
"6. K. L. of
"7. M. N. of

Dated the *day of* *19* .

Witness to the above signatures.

X. Y., of

FORM D.

(*See sections 8 and 151.*)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF AN UNLIMITED COMPANY HAVING A SHARE CAPITAL.

Memorandum of Association.

1st.—The name of the company is "The Patent Stereotype Company."

2nd.—The registered office of the company will be situate in the province of Bombay.

3rd.—The objects for which the company is established are "the working of a patent method of founding and casting stereotype plates of which method P. Q. of Bombay is the sole patentee.

We, the several persons whose names are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses and Descriptions of Subscribers.	Number of shares taken by each Subscriber.
"1. A. B. of	3
"2. C. D. of	2
"3. E. F. of	1,
"4. G. H. of	2
"5. I. J. of	2
"6. K. L. of	1
"7. M. N. of	1
Total shares taken ...	12

Dated the day of 19 .

Witness to the above signatures.

X. Y., of

Articles of Association to accompany the preceding Memorandum of Association.

1. The share capital of the company is twenty thousand rupees divided into twenty shares of one thousand rupees each.

2. All the articles of Table A of the Indian Companies' Act, 1913, shall be deemed to be incorporated with these articles, and to apply to the company.

Names, Addresses and Descriptions of Subscribers.

1. A. B. of , merchant.
" 2. C. D. of
" 3. E. F. of
" 4. G. H. of
" 5. I. J. of
" 6. K. L. of
" 7. M. N. of

Dated the day of 19

Witness to the above signatures.

X. Y., of

FORM E.

AS REQUIRED BY PART II OF THE ACT.

(*See section 32.*)

Summary of Share Capital and Shares of the Company, Limited, made up to the day of 19 (being the day of the first ordinary general meeting in 19).

Nominal share capital Rs. divided into* { shares of Rs. each / shares of Rs, each.

Total number of shares taken up* to the day of 19 which number must agree with the total shown in the list as held by existing members.

Number of shares issued subject to payment wholly in cash.

Number of shares issued as fully paid up ohterwise than in cash...

Number of shares issued as partly paid up to the extent of per share otherwise than in cash .. ..

† There has been called up on each—of shares .. .. Rs.
There has been called up on each—of shares ... .. Rs.
There has been called up on each—of shares .. .. Rs.

‡ Total amount of calls received, including payments on application and allotment Rs.

Total amount (if any) agreed to be considered as paid on shares which have been issued as fully paid up otherwise than in cash. Rs.

Total amount (if any) agreed to be considered as paid on shares which have been issued as partly paid up to the extent of per share Rs.

---

*When there are shares of different kinds or amounts (*e. g.*, Preference and Ordinary or Rs. 200 or Rs. 100), state the nnmbers and nominal values separately.

†Where various amounts have been called or there are shares of different kinds, state them separately.

‡Include what has been received on forfeited as well as on existing shares.

Total amount of calls unpaid ..	Rs.
Total amount (if any) of sums paid by way of commission in respect of shares or debentures or allowed by way of discount, since date of last summary ..	Rs.
Total amount (if any) paid on *shares forfeited ..	Rs.
Total amount of shares and stock for which share-warrants are outstanding ..	Rs.
Total amount of share-warrants issued and surrendered respectively since date of last summary ..	Rs.
Number of shares or amount of stock comprised in each share-warrant ..	Rs.
Total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act	Rs.

List of persons holding shares in the Company Limited, on the day of 19 , and of persons who have held shares herein at any time since the date of the last return, showing their names and addresses and an account of the shares so held.

Folio in register ledger containing particulars.	Names, Addresses and Occupations.				Account of shares.					Remarks.
						‖ Particulars of Shares transferred since the date of the last Return by persons who are still Members.		‖ Particulars of shares transferred since the date of the last return by persons who have ceased to be Members.		
	Name in full	Father's name.	Address.	Occupation or caste.	†Number of shares held by existing Members at Date of Return.	Number.‡	Date of Registration of Transfer.	Number**	Date of Registration of Transfer.	

*State the aggregate number of shares forfeited.

†State the aggregate number of shares forfeited (if any).

‡The aggregate number of shares held, and not the distinctive numbers, must be stated, and the column must be added up throughout so as to make one total to agree with that stated in the summary to have been taken up.

**When the shares are of different classes, these columns may be subdivided so that the number of each class held or transferred may be shown separately.

‖ The date of registration of each transfer should be given as well as the number of shares transferred on each date. The particulars should be placed opposite the name of the transferor and not opposite that of the transferee, but the name of the transferee may be inserted in the Remarks column immediately opposite the particulars of each transfer.

Names and addresses of the persons who are the Directors of the , Limited, on the day of 19 .

Names.	Addresses.

Names and addresses of the persons who are the managers of the , Limited, on the day of 19 .

Names.	Addresses.

NOTE.—Banking companies must add a list of all their places of business.

I, do hereby certify that the above list and summary truly and correctly states the facts as they stood on day of 19 .

(Signature)____________________

(State whether director, manager or secretary.)

FORM F.

(*See section 132.*)

______________________________LIMITED.

Balance-sheet as at ____________________ *19* .

CAPITAL AND LIABILITIES.

CAPITAL—	Rs. A. P.	Rs. A. P.
Authorised Capital..shares of Rs....each	.. .. ..	
Issued Capital..shares of Rs....each	.. .. ..	
Subscribed Capital..shares of Rs....each	.. .. ..	
Amount called up at Rs......per share	.. .. ..	
Less—Calls unpaid	.. .. ..	
	.. .. ..	
Add—Forfeited shares (amount paid up)	.. .. ..	.. .. ..

CAPITAL AND LIABILITIES.—(*contd.*)

	Rs. A. P.	Rs. A. P.
RESERVE FUND OR DEVELOPMENT FUND		
ANY SINKING FUND		.. .. ..
ANY OTHER FUND CREATED OUT OF NET PROFITS		.. .. ..
ANY PENSION OR INSURANCE FUND		.. .. ..
PROVISION FOR BAD AND DOUBTFUL DEBTS		.. .. ..
LOANS ON MORTGAGE OR MORTGAGE DEBENTURE BONDS		.. .. ..
LOANS OTHERWISE SECURED		.. .. ..
(Stating the nature of Security		
LOANS UNSECURED		
INTEREST		.. .. ..
Accrued on Mortgages, Debentures or other Secured Loans.		
UNCLAIMED DIVIDENDS		.. .. ..
LIABILITIES		.. .. ..
For Goods supplied	.. .. ..	
" Expenses	.. .. ..	
" Acceptances	.. .. ..	
" Other Finance	.. .. ..	
ADVANCE PAYMENTS AND UNEXPIRED DISCOUNTS		
(For the portion for which value has still to be given, *e.g.*, in the case of the following classes of Companies—Newspaper, Fire Insurance, Theatre, Club, Banking, Steamship Companies, &c.)		.. .. ..
PROFIT AND LOSS		.. .. ..
Balance as per previous Balance Sheet.	.. .. ..	
Less—appropriation thereof	.. .. ..	
Balance brought forward	.. .. ..	
Profits since last Balance Sheet	.. .. ..	
(*N.B.*—These details need not be given if the same be contained in a Profit and Loss account attached to the Balance Sheet.)		
		.. .. ..

CONTINGENT LIABILITIES—

	Rs. A. P.
Claims against the Company not acknowledged as debts	.. .. ..
Moneys for which the Company is contingently liable	.. .. ..
Arrears of Cumulative Preference Dividends	.. .. ..

PROPERTY AND ASSETS.

	Rs. A. P.	Rs. A. P.
FIXED CAPITAL EXPENDITURE (Distinguishing as far as possible between expenditure upon goodwill, and buildings, leaseholds, railway sidings, plant, machinery, furniture, development of property, patents, trade marks and designs, interest paid out of Capital during construction, etc., and stating in every case the original cost and the total Depreciation written off under each head.		
PRELIMINARY EXPENDITURE		.. .. ..
COMMISSION OR BROKERAGE		.. .. ..
(Commission or Brokerage paid for underwriting or placing shares or debentures until written off)		.. .. ..
STORES AND SPARE GEAR		.. .. ..
LOOSE TOOLS		.. .. ..
LIVE STOCK		.. .. ..
STOCK IN TRADE		.. .. ..
(Stating mode of valuation, e.g., cost or market-value)		
BILLS OF EXCHANGE		.. .. ..
BOOK DEBTS		.. .. ..
(Distinguishing in the case of a Bank between those considered good and in respect of which the Bank is fully secured and those considered good for which the Bank holds no security other than the debtor's personal security, and distinguishing in all cases between debts considered good and debts considered doubtful or bad. Debts due by Directors or other officers of the company or any of them either severally or jointly with any other persons to be separately stated in all cases)		
ADVANCES		.. .. ..
Recoverable in cash or in kind or for value to be received, e g., Rates. Taxes, Insurance, etc.)		.. .. ..
INVESTMENTS		.. .. ..
(Nature of Investment and mode of valuation, e. g., cost or market value.)		
INTEREST ACCRUED ON INVESTMENTS		.. .. ..
CASH AND OTHER BALANCES		.. .. ..
Amount in hand	.. .. ..	
Balances with Agents and Bankers (in detail showing whether on Deposit or current account, etc.)	.. .. ..	
Profit and Loss (giving, in the case of a debit balance, details as far as possible as in the case of a credit balance.)		.. .. ..
		.. .. ..

FORM G.

(*See section 136.*)

FORM OF STATEMENT TO BE PUBLISHED BY BANKING AND INSURANCE COMPANIES AND DEPOSIT, PROVIDENT OR BENEFIT SOCIETIES.

* The share capital of the company is Rs. divided into res of each.

The number of shares issued is Calls to the amount of Rs. share have been made, under which the sum of Rs. been received.

The liabilities of the company on the thirty-first day of ember (or thirtieth of June) were :—

Debts owing to sundry persons by the company.

Under decree, Rs.

On mortgages or bonds. Rs.

On notes, bills or hundis, Rs.

On other contracts, Rs.

On estimated liabilities, Rs.

The assets of the company on that day were :

Government securities [stating them], Rs.

Bills of exchange, hundis and promissory notes, Rs.

Cash at the Bankers, Rs.

Other securities, Rs.

* If the company has no capital divided into shares, the portion of the statement relating to capital and share must be omitted.

THE FOURTH SCHEDULE.

(*See section 290.*)

ENACTMENTS REPEALED.

1	2	3	4
Year.	No.	Subject or short title.	Extent of repeal
1882 ..	VI	The Indian Companies Act, 1882 ..	So much as has not repealed.
1887 ..	VI	The Indian Companies Act (1882) Amendment Act, 1887 ..	The whole.
1891 ..	XII	The Amending Act, 1891 ..	So much of the Se Schedule as relate the Indian Comp Act, 1882.
1895 ..	XII	The Indian Companies (Memorandum of Association) Act, 1895 ..	The whole.
1899 ..	IX	The Indian Arbitration Act, 1899 ..	The second provi section 3 relating Indian Companie 1882.
1900 ..	IV	The Indian Companies (Branch Registers) Act, 1900 ..	The whole.
1910 ..	IV	The Indian Companies (Amendment) Act, 1910 ..	The whole.

INDIAN CRIMINAL LAW (AMENDMENT) ACT, 1913.

CEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 27TH MARCH 1913.

ACT NO. VIII OF 1913.

An Act further to amend the Indian Penal Code and the Code of Criminal Procedure, 1898.

Whereas it is expedient further to amend the Indian Penal ...e and the Code of Criminal Procedure, 1898; It is hereby ...cted as follows :—

...ort title.

1. This Act may be called the Indian Criminal Law Amendment Act, 1913.

...endment of ...on 40, Indian ...l Code.

2. In section 40 of the Indian Penal Code, after the word and figures "Chapter IV", the word, figure and letter "Chapter VA" shall be inserted.

...ertion of new ...ter in the ...n Penal Code.

3. After Chapter V of the said Code, the following Chapter shall be inserted namely :—

CHAPTER VA.

CRIMINAL CONSPIRACY.

...finition of cri...l conspiracy.

120A. When two or more persons agree to do, or cause to be done,—

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy :

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

Punishment of criminal conspiracy.

120B. (*1*) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, shall, where no express pro-

vision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."

Amendment of section 195, Code of Criminal Procedure 1898.

4. In section 195, sub-section (3), of the Code of Criminal Procedure, 1898, before the words "the abetment", the words "criminal conspiracies to commit such offences and to" shall be inserted.

Insertion of new section 196A in Code of Criminal Procedure 1898.

5. After section 196 of the Code (of Criminal Procedure, 1898), the following section shall be inserted, namely:—

Prosecution for certain classes of criminal conspiracy.

"196A. No Court shall take cognizance of the offence of criminal conspiracy punishable under section 120B of the Indian Penal Code,

(1) in a case where the object of the conspiracy is to commit either an illegal act other than an offence, or a legal act by illegal means, or an offence to which the provisions of section 196 apply, unless upon complaint made by order or under authority from the Governor General in Council, the Local Government or some officer empowered by the Governor General in Council in this behalf, or

(2) in a case where the object of the conspiracy is to commit any non-cognizable offence or a cognizable offence not punishable with death transportation or rigorous imprisonment for a term of two years or upwards unless the Local Government, or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the Local Government has, by order in writing, consented to the initiation of the proceedings :

Provided that where the criminal conspiracy is one to which the provisions of sub-section (3) of section 195 apply no such consent shall be necessary.

Amendment of Schedule II of the Code of Criminal Procedure, 1898.

6. In Schedule II of the Code of Criminal Procedure, 1898, after the entries relating to Chapter V, the entries contained in the Schedule hereto annexed shall be inserted.